V.GOPALA GOWDA, CJ.

M.A. NOS.176, 220 OF 1998 (Decided on 19.08.2011)

M/S. UNITED INDIA INSURANCE CO.LTD. …….Appellant.

.Vrs.

SUNAKAR ROUT & ANR. ……Respondents.

A. MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.173.

Insurance Company preferred appeal – No cogent evidence in support of its case and appeal filed by taking untenable pleas – Appeal is Pending for the last 13 years disentitling the claimant to receive compensation – Held, insurance Company is liable to pay cast of Rs. 5000/- to the claimant. (Para 13)

B. **MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.173**.

Claimants appeal for enhancement of compensation – Tribunal has not awarded compensation in respect of nourishment and conveyance charges and loss of amenities – Held, this Court can enhance compensation under the above heads. (Para 12)

For Appellant - M/s. Saktidhar Das, A.K.Nayak, H.S.Satpathy.
For Respondents- Mr. Khirod Kumar Das (for R.1).

V.GOPALA GOWDA, C.J. M.A. Nos. 176 and 220 of 1998 have been fled by the Insurance Company and the claimant respectively against the judgment and award dated 16th September, 1997 passed by the 2nd Motor Accident Claims Tribunal, Cuttack in Misc. Case No. 1309 of 1989. The Insurance company has assailed the impugned order challenging the correctness of the quantum of compensation determined by the Tribunal at Rs. 25,000/- with interest at 9% per annum from the date of application, i.e. 22.12.1989 and fastening the liability upon it whereas the claimant has prayed for enhancement of the award to the extent of Rs.50,000/- in addition to the amount of Rs. 25,000/- awarded by the Tribunal, urging various facts and legal contentions.

2. The brief facts are stated herein :

The claimant-injured met with an accident on 7.5.1989 at about 7. 30 A.M. while he was going towards Cuttack, near village Bainchua the offending dumper truck bearing registration number ORU 9158 suddenly

coming from the back side dashed against his cycle overtaking another truck causing head injury and compound fracture in his left hand with multiple injuries on his body. He was treated in S.C.B.Medical College and Hospital, Cuttack for which he spent huge money. Hence he filed the claim petition for compensation of Rs. 80,000/- from both the ower and the Insurer claiming his income at about Rs. 40-80/- per day, he was earning from his rice business.

3. The owner was set ex parte. But the Insurance Company-appellant in MA. No. 176 of 1998 filed written statement contesting the claim. It called upon the petitioner to prove the accident, injuries and insurance of the offending vehicle by adducing proper evidence.

4. On behalf of the claimant three witnesses were examined, documents produced were marked as Exts.1 to 4 and the material objects, the X-Ray exposures of the petitoner, were marked as M.Os. I to VII. On behalf of the insurer, no witness was exaimined but the documents produced, were marked as Exts.A to D.

5. The Tribunal has answered the five issues framed by it, in favour of the claimant. The Tribunal while answering issues and taking the income of the claimant at Rs. 40-80/- per per day, determined and fixed the compensation at Rs, 25,000/- with interest at 9% per annum from the date of application, i.e. 22.12.1989 keeping in view the nature and gravity of injuries sustained by the claimant, pain and suffering undergone by him, expenses incurred in connection with his treatment and loss of income suffered during the period of his illness holdinig the offending vehicle had valid insurance at the time of accident observing that the insurer is liable to indemnify the owner to pay the compensation awarded.

6. The claimant has preferred the appeal for enhancement of the compensation awarded, on the ground that the award impugned is illegal and erroneous since the Tribunal has not considered and appreciated the oral and documentary evidence and the objects exhibited on his behalf. It is contended that the evidence of the doctor (P.W.3) who opined 30% deformity of left elbow and for removal of screw plate from the hand of the claimant and that he cannot undertake strenuous work and also cannot lift heavy weight by his hand was not taken into consideration. It is further contended that the Tribunal has failed to compute the total period of treatment and has brushed aside the gravity of injuries sustained. That apart the aspect that due to the accident the claimant sustained loss in business for at least one year in the minimum, has not been taken in to

consideration by the Tribunal. Therefore, he has prayed that this is a fit case to enhance the compensation awarded.

7. On the other hand the insurer has opposed the appeal filed by the claimant on the basis of the evidence of P.W.3-the doctor, on which reliance is placed by the claimant, stating that the doctor has opined that there may not be any disability after the plate is removed. It is contended that the Tribunal has passed the award rejecting the prayer to hear the eleven cases filed relating to the same accident wherein the occupants of the dumper were injured. It is further contended that the contention of the claimant that he has no idea of injury of any other person in the said accident, points out the falsity of the claim. Therefore, it is prayed that the claim of the claimant is liable to be set aside and the award impugned, need not be interfeed with.

8. In response to the notice, the owner did not appear. Pursuant to the direction of this Court, the present correct address of the owner could not be found out despite investigator appointed by the insurer to trace out the owner.

9. After hearing the learned counsel for the parties, the following points would arise for consideration; (i) whether the appeal filed by the claimant is maintainable in law and fastening the liability on the Insurance Company is legal and valid; (ii) whether the claimant is entitled for enhanced compensation, if so, what amount to be awarded in favour of the claimant.

The aforesaid points are to be answered in favour of the claimant and against the insurance company having regard to the finding recorded in favour of the claimant on the issues framed by the Tribunal.

10. So far as the first point is concerned, the learned Member of the Tribunal has rightly answered issue no.1 on the basis of the findings and reasons recorded by him in the impugned judgment in respect of the issue no.1 framed therein holding that the claim is maintainable.

11. In so far as the issue nos. 2 to 5 are concerned, the same are also answered by recording reasons at paragraphs 5 to 8 of the impugned judgment after referring to the evidence, the F.I.R., the discharge certificates, out-door tickets and the receipts showing purchase of medicines, blood purchase and the payment of X-ray charges. The evidence of P.W.2 supporting the accident is relied upon by the Tribunal while answering the issue no.2 in favour of the claimant that due to the rash and negligent driving of the driver of the offending vehicle, the accident occurred and the claimant sustained injuries. The Tribunal has observed

that the claimant was treated as an indoor patient in S.C.B.Medical College and Hospital, Cuttack from 7.5.89 to 10.5.89 after the accident for treatment. Referring to the discharge certificate, it has observed that the claimant was prescribed for taking medicines and he was advised for regular check up. After removal of plaster, non-union is noticed, for which P.W.3 operated his hand, plate was given and grafting was done. It has been further observed that the petitioner was admitted therein second time for treatment. Further plaster was given after operation which was removed after a few months. It reveals that there has been union of bone but the plate and screw are yet to be removed from his hand. Taking into consideration, the nature and gravity of injuries sustained by the claimant, pain and suffering undergone by him, expenses incurred in connection with his treatment and loss of income suffered during the period of his illness holding the offending vehicle had valid insurance at the time of accident, the impugned award is passed, observing that the insurer is liable to indemnify the owner to pay the compensation awarded.

12. The Tribunal has rightly held that due to the rash and negligent driving of the driver of the offending vehicle, the accident occurred and the claimant sustained injuries. The Tribunal taking into consideration the huge money spent by the claimant for his treatment has awarded compensation of Rs.25,000/- with 9% from the date of claim till the date of realisation. The correctness of the finding of the Tribunal on the accident and injury sustained by the claimant is disputed by the Insurance Company in its appeal, without availing the defence by filing application under section 170 of the Motor Vehicles Act, 1988 hence the same is not sustainable in the eye of law as the insurer has no right to file appeal either questioning the accident or the injury sustained by the claimant or on the quantum of compensation awarded by the claimant. It can only challenge the award on statutory grounds. Therefore, the appeal filed by the insurer is liable to be dismissed and the appeal filed by the claimant is liable to be allowed enhancing the compensation. The Tribunal has not awarded compensation in respect of nourishment and conveyance charges and loss of amenities. On this aspect, the compensation awarded is required to be enhanced.

13. Accordingly the claimant's appeal is allowed enhancing the compensation under the following heads :

In respect fracture Rs. 15,000/-, for pain and suffering Rs. 10,000/-, for medical expenses Rs. 10,000/-, towards loss of amenities Rs. 5,000/-, for transport assistance and nourishment charges Rs. 10,000/-, in total RS.

50,000/- is awarded along with 9%, from the date of claim till the date of realisation, as awarded by the Tribunal.

With the aforesaid modification to the impugned judgment, the appeal of the claimant is partly allowed. The appeal of the insurance company is dismissed.

The claim is filed in the year 1989 which was disposed of in 1998. The appeals are pending since thirteen years in this Court thereby disentitling the claimant to receive the compensation. Therefore, this is a fit case to impose exemplary cost to see that the Insurance Company shall not file the appeal taking the untenable plea and contentions as has been urged in its appeal, though it has not discharged its onus before the Tribunal by producing cogent evidence in support of its case. Therefore, cost of 5,000/- is imposed on the Insurance Company to be paid to the claimant. The statutory deposit made before this Court may be returned to the claimant along with interest after showing receipt of payment of the award amount. The remaining enhanced compensation amount with interest from the date of application till the date of payment may be either paid or deposited with the Tribunal within four weeks from the date of receipt of the copy of this judgment.

Appeal by Claimant partly allowed.
Appeal by Insurance Company dismissed.

2011 (II) ILR- CUT- 724

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

W.P. (C) NO.4435 OF 2011 (Decided on 16.09.2011)

SUDARSAN BEHERA & FOUR ORS. ……Petitioners.

.Vrs.

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

ORISSA MUNICIPAL ACT, 1950 (ACT NO. 23 OF 1950) – S.69 (2).

Whether conferment of power upon the President of the meeting to a Municipal Council or Notified Area Council to have a Second or casting Vote in terms of Section 69 (2) in case of equality of votes is arbitrary, un-constitutional and violative of Article 14 of the Constitution of India – Held, provision under Section 69 (2) of O.M. Act is Constitutionally and legally valid and there is no violation of Article 14 of the Constitution. (Para 9,10)

Case laws Referred to:-

1.(2011) 3 SCC 793 : (K.K.Baskaran-V- State Represented by its Secretary, Tamil Nadu & Ors.)
2.AIR 1996 SC 1810 : (Election Commission of India & Anr-V-Dr. Subramanian Swamy & Anr.)
3.(2004) 10 SCC 201 : (State of West Bengal-V- Kesoram Industries Ltd. & Ors.)
4.(2008) 4 SCC 720 : (Govt. of A.P. –V- P.Laxmi Devi).

For Petitioner - M/s. Jyotirmaya Sahoo, T.K.Mishra & B.R.Sahoo.
For Opp.Parties - Mr. R.K.Mahapatra, Government Advocate (for O.P.)

V.GOPALA GOWDA, C.J. The petitioners who are permanent citizens of Purushottampur Notified Area Council have filed this writ petition questioning the legality and propriety of the letter dated 25.1.2011 issued by the Joint Secretary to the Government, Housing and Urban Development Department to the Executive Officer, Purushottampur Notified Area Council, Ganjam, opposite party no.3 giving clarification with regard to Section 69(2) of the Orissa Municipal Act, 1950 (hereinafter called in short 'OM Act').

2. The case of the petitioners is that they are the Councillors of Purushottampur NAC having been elected by the voters from the respective

wards. For transaction of business of the NAC the Councillors ordinarily meet once in every month at their office or at some convenient place within the Municipal area. The Chairperson or in his absence the Vice-Chairperson shall call for a special meeting on requisition. It is stated that under Section 65 of the OM Act, except as otherwise provided in this Act, the Chairperson shall preside at every meeting of the Municipality. In the absence of the Chairperson, the Vice-Chairperson or in the absence of both Chairperson and Vice-Chairperson, a Councillor elected at the meeting shall preside over the meeting. Section 66 of the OM Act provides for the functions of the President of the meeting. If in any meeting there is equality of votes, the President of the meeting shall have a second or casting vote. Further, Section 67(5) of the OM Act provides that the Councillor concerned shall not be entitled to vote on the question referred to in sub-section (3) and the President shall not be entitled to vote on the motion referred to in Sub-section (4). It is stated that in the meeting held by the Notified Area Council on 3.2.2010, no final decision could be taken for which the Executive Officer, Notified Area Council, Purushottampur, Ganjam, opposite party no.3 sought for clarification vide letter no. 118 dated 3.2.2010 from the Joint Secretary to the Government, Housing and Urban Development Department who issued clarification vide letter dated 8.4.2010 categorically stating that the Chairperson can only vote in case of equality of votes(tie). The Chairperson does not have a voting power when an issue is put to vote in the Council. The same is produced as Annexure-1. It is stated that the further clarification given by opposite party no.2 vide letter dated 25.1.2011 with reference to earlier clarification vide Annexure-1 is contrary to Section 69 of the OM Act. It is contended that intention of the Legislature cannot be clarified by adding or subtracting any language or words from the Statute. Statute should be read in the intention of the Legislature. The clarification made under Ananexure-2 is contrary to Section 69(2) of the OM Act. It is further contended that under Article 166 of the Constitution of India, all executive action of the Government of a State shall be expressed to be taken in the name of the Governor and the Joint Secretary to the Government exceeds his jurisdiction in clarifying the provisions of Section 69(2) of the OM Act. Article 162 of the Constitution of India says about the extent of the executive power of the State. Therefore, there is no ambiguity in the language of Section 69(2) of the OM Act. There was no need for issuing second clarification on 25.1.2011. Hence, the same is illegal and contrary to Section 69(2) of the OM Act and is liable to be quashed. It is contended that Chapter VII of OM Act provides for conduct of business of the Notified Area Council. Section 63 of the OM Act deals with ordinary meetings. Under Section 64, the Chairperson, in his absence the Vice-Chairperson shall call a special meeting on a requisition signed by not less

than one-third of the total number of Councillors. In Section 66 of the OM Act, no where it has been stated that the President has a right to vote in the meeting. Section 67 of the OM Act states when a Councillor shall abstain from taking part in the discussion and voting, but here also, the Legislature has not provided that the President has a right to vote. Section 69(2) of the OM Act provides that the President of the meeting shall have a second or casting vote. It clearly reveals that in one hand being a member, the President has a right to vote and on the other he being a President has a right to second vote which is illegal, arbitrary and contrary to the fundamental principles of Representation of People's Act, 1951. The clarificatory order that the President will cast the vote twice is illegal. Therefore, it is submitted that the clarification made under Annexure-2 be declared as unconstitutional and contrary to Section 69 of the OM Act and further Section 69(2) be struck down as unconstitutional and illegal.

3. The writ petition is opposed by opposite party nos. 1 and 2 by filing detailed counter affidavit by one Rabindra Nath Sahu, who is Under Secretary to Government, Housing and Urban Development Department. He has traversed the petition averments and sought to justify the clarificatory order dated 25.1.2011 issued by opposite party no.2 to opposite party no.3 clarifying Section 69 of Orissa Municipal Act. It is contended that the writ petition is a misconceived one. It is stated that on receipt of the notice dated 15.12.2010 of Sri P.C.Patnaik, Advocate, the clarification of Section 69(2) of the OM Act was sought from the Law Department. As per clarification of Law Department, the concerned Advocate and the Executive Officer, Purushottampur NAC, opposite party no.3 were intimated accordingly on 25.1.2011 by the Joint Secretary to the Government, Housing and Urban Development Department. It is stated in the counter that there is no ambiguity in Section 69(2) of the Act. It clearly speaks of a 'second or casting vote'. The use of word 'or' makes the things further clear that both should be read conjunctively to achieve the object. The purpose of conferring such power upon the President is to have a final decision in the meeting on the subject if there is any equality of votes. Where on a particular subject of a meeting or a motion either in the General Body meeting or special meeting there is equality of votes, the privilege has been given to the President to cast one additional vote if he has voted as a councilor on either side on any question or motion. In other words, the President in addition to his vote as a member of body would have right to cast additional vote on either side in the event of any tie on any issue or motion as per literal meaning of the said section. That has been clarified by opposite party no.2 to opposite party no.3 and also the learned Advocate who has issued the notice. Hence, the same shall not be construed as an

executive order under Article 162 of the Constitution of India after obtaining the instruction from the Law Department. Therefore, the writ petition is wholly untenable in law. Further he contends that the presumption of constitutional validity has to be given to the statutory provision keeping the object and intentment of conferring such privilege upon the President only on certain circumstance i.e. when either side of councilors vote and there is no majority. If there is a tie, in such circumstance to take a decision in the matter, the President is required to vote. In support of the said principle, learned Government Advocate has placed reliance upon the decision of the Supreme Court in the case of K.K.Baskaran Vrs. State Represented by its Secretary, Tamil Nadu & Ors., reported in (2011) 3 SCC 793. Further, strong reliance has been placed by the learned Government Advocate upon another decision of the Supreme Court in the case of Election Commission of India & Anr. Vs. Dr. Subramanian Swamy & Anr., reported in AIR 1996 SC 1810 wherein the Apex Court considered the 'doctrine of necessity' and laid down the principle at paragraphs 13,14 and 15. The relevant paragraph will be extracted in the reasoning portion of the judgment.

4. On the basis of rival and legal contentions, the following points would arise for consideration of the Court.

(a) Whether conferment of power upon the President of the meeting to a Municipal Council or Notified Area Council to have a second or casting vote in terms of Section 69(2) in case of equality of votes is arbitrary, unconstitutional and violation of Article 14 of the Constitution of India ?
(b) Whether the clarificatory order dated 25.1.2011 issued by the Joint Secretary to the Government, Housing and Urban Development Department, Bhubaneswar is liable to be quashed?
(c) What order?

5. All the points are taken up together. It is necessary to extract the relevant provisions of Section 69(2) of the OM Act which reads thus:-

> "69. Decision of questions and casting votes –
>
> (1) xxx xxx xxx
>
> (2) In cases of equality of votes the President of the meeting shall have a second or casting vote."

6. Learned Government Advocate has rightly placed reliance upon the said provision contending that the constitutional validity of the said provision has to be preserved unless it is shown that it is unconstitutional and liable to

be struck down. He has rightly placed reliance upon the decision in Baskaran's case referred to supra wherein the Supreme Court with reference to the Constitutional Bench decision of the Supreme Court in the case of State of West Bengal Vrs. Kesoram Industries Ltd. & Ors., reported in (2004) 10 SCC 201, has made the following observation:-

> " …..We have to look at the legislation as a whole and there is a presumption that the legislature does not exceed its constitutional limits."

7. In fact, at paragraph-30 of the said judgment, the Supreme Court has made observation with regard to the duty of the Court which reads thus:-

> "The Court should interpret the constitutional provisions against the social setting of the country and not in the abstract. The Court must take into consideration the economic realities and aspirations of the people and must further the social interest which is the purpose of the legislation, as held by Holmes, Brandeis and Frankfurter, JJ. of the US Supreme Court in a series of decisions. Hence the courts cannot function in a vacuum. It is for this reason that courts presume in favour of constitutionality of the statute because there is always a presumption that the legislature understands and correctly appreciates the needs of its own people vide Govt. of A.P. Vs. P.Laxmi Devi, reported in (2008) 4 SCC 720."

8. The said observation by the Apex Court with all fours applies to the fact situation. Further learned Government Advocate placed strong reliance upon paragraph-14 &16 of the decision in Election Commission of India referred to supra. The relevant portion of the said paragraphs reads thus:-

> "We are quite conscious of the high office the Chief Election Commissioner occupies. Ordinarily we would be loath to uphold the submission of bias but having regard to the wide ramification the opinion of the Election Commissioner would have on the future of Ms. J.Jayalalitha, we think that the opinion, whatever it be, should not be vulnerable. The participation of the Chief Election Commissioner in the backdrop of the findings recorded by the learned Single Judge as well as the Division Bench of the High Court would certainly permit an argument of prejudice, should the opinion be adverse to Ms. J. Jayalalitha. Therefore, apart from the legal aspect, even prudence demands that the Chief Election Commissioner should recuse himself from expressing any opinion in the matter. However, the situation is not so simple, it is indeed

> complex, in that, what would happen if the two Election Commissioners do not agree and there is a conflict of opinion between them ? That would lead to a stalemate situation and the Governor would find it difficult to take a decision based on any such opinion. In such a situation, can the **doctrine of necessity** be invoked in favour of the Chief Election Commissioner?"
>
> xxx xxx
>
> If the two Election Commissioners reach a unanimous opinion, the Chief Election Commissioner will have the opinion communicated to the Governor. If the two Election Commissioners do not reach a unanimous decision in the matter of expressing their opinion on the issue referred to the Election Commission, it would be necessary for the Chief Election Commissioner to express his opinion on the **doctrine of necessity**. We think that in the special circumstances of this case this course of action would be the most appropriate one to follow because if the two Election Commissioners do not agree, we have no doubt that the **doctrine of necessity** would compel the Chief Election Commissioner to express his views so that the majority opinion could be communicated to the Governor to enable him to take a decision in accordance therewith as required by Article 192(1) of the Constitution."
>
> (emphasis laid by this Court)

9. In view of the said observations made by the Supreme Court with reference to interpretation of Article 191 of the Constitution of India, doctrine of necessity theory is invoked in conferring the privilege upon the President of a meeting to exercise second or casting vote in cases where there is equality of votes.

10. In view of the aforesaid reason, the prayer for striking down the provision of Section 69(2) of OM Act cannot be granted. The provision of Section 69(2) is constitutionally and legally valid and there is no violation of Article 14 of the Constitution. Therefore, the first point is answered in favour of the State. As we have already answered the first point in favour of the State, the question of quashing Annexure-2 does not arise. The same is constitutionally valid. Conferment of power upon the President of the meeting is to see that the doctrine of necessity is to be invoked for a clear decision in the matter. Therefore, the second point is also answered against the petitioner and in favour of the State.

11. For the reasons stated above, the writ petition must fail and accordingly, the same is dismissed.

Writ petition dismissed.

2011 (II) ILR- CUT- 730

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

W.A. NO.387 OF 2011 (With Batch) (Decided on 06.09.2011)

D.AV. COLLEGE MANAGING COMMITTEE & ORS. ……Appellants.

.Vrs.

LAXMINARAYAN MISHRA & ORS. …….Respondents.

A. EDUCATION – Establishment of D.A.V. Public Schools – Affiliated to C.B.S.E. Course – Those Institutions get affiliation to C.B.S.E. after obtaining permission and recognition from the State Govt. which is a condition precedent Under Clause 3, 3(i) of Chapter-II of the C.B.S.E. By laws – Admittedly they have obtained permission and NOC from the State Govt. to establish their educational institutions – Held, learned single Judge rightly held that the provisions of the Orissa Education Act, 1969 and the Rules framed there under are applicable to the appellants Educational Institutions in the State of Orissa.

(Para 20)

B. EDUCATION – D.A.V. Public Schools – Fixation of tuition fee – Authorities of the private un-aided educational institutions have fundamental rights to fix their fee structure which would not amount to profiteering and misappropriation or misutilization – Managing Committee Constituted under Clauses 20(2) and (3) of the by laws is not legal which should have been constituted under Rule 25 and 27 of the Rules 1991 – Held, learned single Judge has rightly rejected the fee structure fixed by the Managing Committee constituted by the appellants-Schools in exercise of their power under Clauses 20(1) (2) (3) of the by laws – Held, direction issued by the learned single Judge to the authorities of the concerned D.A.V. Schools to take immediate steps for constitution / re-constitution of the Managing Committee of the appellants-institutions in accordance with the Orissa Education Act and the relevant rules framed there under is legally justifiable.

(Para 21,22)

Case laws Referred to:-

1.AIR 2003 (SC) P.355 : (T.M.A. Pai Foundation & Ors.-V-State of Karnataka & Ors.)
2.(2003) 6 SCC 697 : (Islamic Academy of Education-V-State of Karnataka).

3.1993 (1) SCC 645 : (Unikrishnan J.P. & Ors.-V-State of Andhra Pradesh & Ors.)
4.AIR 1997 SC 3011 : (Vishaka & Ors.-V-State of Rajasthan & Ors.)
5.AIR 1989 SC 1899 : (Asis Hameed-V- State of J & K)
6.AIR 1990 SC 2151 : (Mullikarjuna Rao & Ors.-V-State of Andhra Pradesh & Ors.)
7.(2004) 5 SCC 583 : (School-V- Union of India & Ors.)

For Appellants: M/s. : Jagannath Patnaik, B.Mohanty, T.K.Pattnayak &A.Patnaik (In WA No.387/2001) M/s.: Saurjya K. Padhi, B.Mohanty, S.Patnaik M/s. Sanjit Mohanty, K.S.Patnayak, Ashok K. Parija, M/s. Milan Kanungo, P.P.Panda, Y.Mohanty& S.K. Misra, B.B.Mohanty, B.B.Mohanty

For Respondents : Mr : J. Das M/s/ D.K. Mohapatra, S.Jena,
M/s. : M.K. Sahoo, A.Mishra, P.K.Praharaj,
Mr Bijoy K. Mohanti Mr Shyamananda Mohapatra Mr . J. Das M/s. K.P.Mishra, L.Samantray, C.Mohanty, P.K.Mishra, S.Pattnaik Mr Y.Mohanty, Mr J. Das, A.N. Das, N.Sarkar, E.A. Das & J.J.Das, S.Das

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V. GOPALA GOWDA, C.J. These appeals are filed by the D.A.V. College Management represented through its Regional Director, D.A.V. Institutions, Orissa, West Bengal, Sikkim and Manipur, Markat Nagar, Section -6, Cuttack, Orissa. The correctness of the common judgment dated 27.06.2011 passed in W.P.(C) Nos.5030, 525, 893, 3460, 4713, 4922, 5113, 5147, 5326, 7251 and 11359 of 2009, wherein the learned Single Judge while disposing of the writ petitions has made certain observations and directions, is challenged in these appeals urging various facts and legal contentions.

2. The brief facts of the case are stated below for the purpose of appreciation of rival legal contentions and to answer them.

3. It is stated by the appellants-Institutions that all the DAV Public Schools situated in Cuttack and in the State of Orissa are managed by the DAV College Trust and Management Society, a Charitable Educational Trust established in 1986. All the DAV Public Schools, Colleges and other institutions are managed by the above Trust having charitable purpose and there is no individual/private interest in it. The employees of the DAV Public Schools are the employees of DAV College Managing Committee, a functional wing of the DAV College Trust and Management Society, New

Delhi. DAV Public Schools are imparting education to the students in CBSE pattern and other vernacular patterns. The appellants-Institutions are guided by the rules and regulations of the CBSE which is the affiliating agency. The appellant's schools are the largest Non-Government Educational Institutions which do not receive any grant either from the Central Government or the State Government. The employees of the appellant-Institutions are getting salary as per the guidelines of the C.B.S.E. The track records of the appellants-Institutions are very good over the years than the other educational institutions situated in Orissa. The teaching faculty, infrastructure and the facilities provided by the Schools are better than other Non-Government Schools and the appellants-Institutions always follow the guidelines issued by the CBSE and the State Government. The Managing Committee of the appellants-Schools has published its administrative manual, wherein under Chapter VII at Clause 7.1 the guidelines for determining fee structure for schools has been prescribed, which reads as under:

> "The DAV Public Schools, as is known, are non-profit making, non-commercial institutions. Their sole aim is to provide high quality of school education. As they do not receive any grant-in-aid from the government, and as there is no other source of income, they have to depend largely on fees to meet their expenditure. There are many other things besides the physical facilities provided by a school which form essential elements of expenditure which is turn become the basis for determining the fees"

4. It is stated that the CBSE guidelines provided in clear terms provide for obtaining No Objection Certificate (for short, "NOC") from the State Government to establish DAV institutions affiliated to CBSE Board. There is no law in operation in the State of Orissa for giving NOC to CBSE affiliation institution. Government of Orissa in the Department of School and Mass Education, Orissa on 23.09.1996 has passed Resolution No.30720-VISSME-M-17/96-SME giving NOC to CBSE Institutions including DAV Institutions after fulfilling the conditions prescribed purported to have been issued keeping in mind the requirement prescribed under Sections 5 and 6 of the Orissa Education Act, 1969 (for short, "the Act, 1969"). The executive instructions provide for various establishments including the fees, admission of students, withdrawal of No Objection Certificates issued in favour of DAV institutions affiliated to CBSE/ICSE. The provisions of the Orissa Education Act have no application to Schools, Higher Secondary Schools, Colleges and Junior Colleges in terms of definition of Section 3(j-1), which reads as under:

> "**Section (j-1)** : Junior College means an educational institution imparting instructions in Higher Secondary courses as defined in the Orissa Higher Secondary Act, 1982"

The schools do not come under the private educational institution. Bye-Laws Clause Nos.20 and 21 of the Affiliation Bye-Laws of the CBSE provides for School Managing Committee, its constitution, powers and functions. The term of office of the Managing Committee is three years. The Committee is taking all relevant factors into consideration under the different heads, as has been provided by the State Government in exercise of its power to fix the free structure to the students. The appellants submit that during pendency of the writ applications before this Court, the State Government issued letter dated 27.3.2009 in respect of private English Medium Schools of the State from the academic session 2009-10, wherein the State Government has decided to increase the fee structure of private English Medium Schools in the State provisionally up to 25% over the last year tuition fees only for those schools which are paying 5th Pay Commission scale and are going to pay 6th Pay Commission scale to the staff. Similarly, development fee should not be increased beyond 15%. After the same was issued by the State Government, the Management of DAV Public School, Unit-8, Bhubaneswar, DAV Public School, Chandrasekharpur, Bhubaneswar and DAV Public School, Pokharipout, Bhubaneswar filed three writ petitions bearing W.P.(C) Nos.5113, 5030 and 5147 of 2009. The State Government filed an affidavit in W.P.(C) No.5030 of 2009. In para-3 of the said affidavit, the State Government has stated that the Orissa Education Act, 1969 is relatable to the educational institutions which are required to be affiliated to the Board of Secondary Education and Universities of the State. The English medium schools which are affiliated to CBSE and ICSE are not coming under the Orissa Education Act.

5. Mr J. Patnaik, learned Sr. Counsel Mr Sanjit Mohanty, learned Sr. Counsel, Mr S.K.Padhi, learned Sr. Counsel and Mr M. Kanungo, learned counsel appearing on behalf of the appellants vehemently contended that the impugned common judgment passed by the learned Single Judge is ex-facie illegal, erroneous and contrary to the principles of law in view of the decisions of the Supreme Court in catena of cases. The impugned judgment passed by the learned Single Judge is based on erroneous findings in coming to the conclusion and holding that the Orissa Education Act is applicable to the institutions run by the appellants. Further, applicability of the Orissa Education Act to the institutions of the appellants is a misnomer and misconceived. All the DAV Public Schools, which are affiliated to CBSE Board, have already taken NOC from the Government of Orissa as per the requirement prescribed in the CBSE Guidelines. In the resolution dated

23.9.1996 it is stipulated that for opening of private un-aided English Medium School in the State of Orissa NOC has to be obtained from the State Government with other conditions. The DAV Schools were never granted any kind of NOC under Section 5 and 6 of the Act,1969. The said resolution has taken the spirit of requirements prescribed under Sections 5 and 6 of the Act, 1969. Learned Single Judge has committed an error in arriving at the conclusion that the requirements prescribed under the resolution being similar to the requirements prescribed under Sections 5 and 6 of the Orissa Education Act, 1969 make the Orissa Education Act applicable to DAV Schools in general terms. Therefore, the said findings and conclusion are illegal and erroneous.

6. It is stated that the finding of the learned Single Judge that the executive instruction has merged into the Orissa Education Act has no legal basis or foundation. The resolution of 1996, which prescribes conditions for granting of NOC to the unaided private English Medium Schools, is a distinct executive instruction and has no nexus with the Act, 1969. Learned Single Judge has misconstrued that the resolution of 1996 is a product of the Act, 1969 for which the same is applicable to the DAV Public Schools. Therefore, the impugned judgment passed by the learned Single Judge is liable to be set aside.

7. It is stated that the learned Single Judge has erroneously recorded the finding that the School Managing Committee is illegally continuing being de hors Section 7 of the Act, 1969. The Managing Committee of DAV Public School is constituted as per the guidelines prescribed under the CBSE Board. These guidelines are sacrosanct and applicability of Section 7 of the Orissa Education Act, 1969 and rules pertaining to the constitution of Managing Committee under the Orissa Education (Establishment, Recognition and Management of Private High Schools) Rules, 1991 (for short, “the Rules, 1991”) are not applicable to appellants-Schools in any manner. The DAV Public Schools have taken NOC and the Managing Committee of DAV Public School has been constituted under the CBSE guidelines, which are distinct and independent from Section 7 of the Act, 1969. The stand taken by the State Government in its counter is that the DAV Public Schools have not taken the recognition under the Act, 1969 rather they have taken NOC as per the requirements prescribed under the CBSE guidelines. Therefore, the Act, 1969 is not applicable and thus the impugned judgment passed by the learned Single Judge is liable to be quashed.

8. Further, the learned Single Judge has failed to take into consideration that “Higher Secondary School” means an educational

institution imparting education in Higher Secondary Courses as defined in the Orissa Higher Secondary Education, Act, 1982 (for short, "the Act, 1982") and may have standards or classes VIII, IX and X attached. "Higher Secondary School" has been defined as an educational institution preparing candidates for the examination of the Council and recognized as such by the Council. "Higher Education Course" means the course immediately following the High School Certificate course covering a period of two academic years which is provided for either in a college or a Higher Secondary School and includes Arts, Science, Commerce and Vocational Courses. "Higher Secondary Education" means such general and vocational education forming in itself a complete purposive whole which immediately follows Secondary Education as has been defined in the Orissa Education Act, 1952 (for short, "the Act, 1952") and immediately precedes a stage of education controlled by any University.

9. It is further stated that "Higher Secondary School" means an educational institution preparing candidates for the examination of the Council and recognized as such by the Council but does not include for the purpose of this Act and Regulations made thereunder as the part of that institution which prepares candidates for examination other than Higher Secondary Examination. DAV Public Schools that are imparting Higher Secondary Education up to XII class and not affiliated to the Council of Higher Secondary Education, Orissa, but affiliated to CBSE do not come under the Act, 1969 or the Rules framed thereunder. But, the learned Single Judge in a very mechanical manner has not appreciated the aforesaid contention of the appellants and has come to an erroneous conclusion that DAV Schools being the Higher Secondary Schools come under the ambit of the Orissa Education Act, 1969.

10. Further, it is stated that learned Single Judge has erred in passing the judgment by relying upon the definition clause of the Rules, 1991, which defines "High School" to mean the school preparing candidates for High School Certificate Examination conducted by the Board or an equivalent examination conducted by the CBSE or ICSE and came to an erroneous conclusion that as per these Rules DAV Public Schools are High Schools falling within the ambit. The aforesaid Rules are applicable to DAV Public Schools and consequently the Managing Committee constituted for the schools is illegal for not being established as per these Rules. The definition of "High School" given in the Rules stands contrary to the definition of "High School" provided in the Act, 1969 for which the provisions of the Act will over ride the Rules. Hence, the impugned judgment passed by the learned Single Judge placing reliance upon the Rules arriving at a conclusion that the Schools of the appellants-Management though affiliated to CBSE they are

all subject to regulation of the State Government under the provisions of the Orissa Education Act, 1969 is an erroneous conclusion. The learned Single Judge has failed to notice that for Class +2 Junior College there being separate Rules referred to in ground (1), consideration of the Rules, 1991 is not relevant. Hence, the impugned judgment is liable to be set aside. Therefore, reliance placed on the definition clause where private Higher Secondary School has been defined in Rule 2(k) of the Orissa Education (Establishment, Recognition and Management of Private Junior College/Higher Secondary Schools), Rules, 1991 which defines private Higher Secondary School to mean any Higher Secondary School, which is not established, maintained by Government of Orissa, Union Government or any other State and came to an erroneous conclusion that DAV Schools are imparting education up to Class-X or to Higher Secondary level fall within the definition, for which the aforesaid Rules are also applicable. The aforesaid Rules are not at all applicable to DAV Public Schools. In the premises, the definition of "Higher Secondary School" which is provided in the Orissa Higher Secondary Education Act, 1982, prescribes that "Higher Secondary School" means an educational institution in preparing candidates for examination of the Council. The appellants-Public Schools never prepare such students for the Council Examination, as, admittedly, it prepares the students for CBSE Board Examination. Therefore, the Rules are not applicable to the Schools run by the appellants. Therefore, reliance placed by the learned Single Judge on the aforesaid Rules, 1991 and the conclusion arrived at that the Orissa Education Act, 1969 is applicable, is apparently erroneous and legally not tenable.

11. Further, the learned Single Judge has failed to take into consideration the averments that hike in fees are very much non-profitable but commensurate with the service and facilities that are provided by the DAV Public Schools. But the learned Single Judge in a very mechanical manner has quashed the hike in fees on the ground that no reasons have been assigned in order to hike in fees. Therefore, it is stated that hike in fees is very reasonable as is reflected from the reasons given by the appellants-opp. parties in counter affidavit to the writ petitions, which are quoted hereunder:

> "That the enhancement of fees was determined by the School authorities after consultation with the parents' representatives who are the members of the Local Managing Committee (for short "LMC"). The fees of the deponent schools are enhanced for the following reasons.

A) To meet the CBSE requirement mentioned in the guidelines so far as the school infrastructure is concerned,

B) To appoint the faculties in different disciplines for better academic performance in the school.

C) To pay the salary to the employees of the school after introduction of 6th Pay Commission by the Central Government and subsequently by the State Government.

D) Revised fee structure must take into consideration to need to generate funds to be utilized for betterment and growth of the infrastructure of the deponent schools.

E) That the deponent humbly submits that the deponent schools are governed by the C.B.S.E. guidelines so far as the academics are concerned and also admitting the students in the school as per the C.B.S.E. guidelines and as per the infrastructure and staff of the school. The academic performance of the schools is better than the other schools of Cuttack city. The present infrastructure of all the schools are just and sufficient to meet the requirement of C.B.S.E. guidelines for the sessions 2007-08 leaving room for its betterment.

F) That the parents' allegation that fees for the academic session 2009-10 is exorbitantly high is not correct. As per the decision of the local Managing Committee, the fee structure of the school was revised to meet the heavy financial burden on account of the revision of pay structure following implementation of 6th Pay Commission introduced by the Central and State Government. In the Local Managing Committee the parents' representatives were also present and with their consent the resolution was passed in Local Managing Committee. The fees and Annual charges were revised in order to meet the requirement of C.B.S.E. stipulations and to pay the salary to the employees of the school after introduction of 6th Pay Commission by the Central Government and subsequently by the State Government. The fees structure were revised as the schools are not getting any grant from the State Government and the Central Government and there is no other source of income to meet the additional burden source of income to meet the additional burden of the revised pay. For the above reason the notification dt. 5.1.2009 under Annexure-3 issued by the School authorities is proper.

G) That the deponent humbly submits that the notification/letter dated 05.01.2009 under Annexure-3 was issued by the authority after discussion with the parents' representatives in the Local Managing Committee. Therefore the allegations made by some of the parents are false and hereby denied. So far as the circular dated 09.01.2009 under Annexure-4 series are concerned the deponent respectfully submits that the revised fee structure under Annexure-3 was issued after detailed discussions with the parents' representative and the members of the Local Managing Committee. For the above reason the other allegations of the petitioners (Parents) are not correct.

H) That a bare perusal of the notice dated 09.01.2009 under Annexure-4 series issued by the authority of DAV Public School, Cuttack would go to show that in the notice dated 09.01.2009 it was mentioned that the academic performance of the students of the school are excellent than the other schools situated at Cuttack. It is further stated that the staff working in DAV schools are to be paid salary at the rate prescribed by the Government besides other statutory dues like P.F. Gratuity, Insurance etc. The staff salaries constitute a major expenditure of the school budget. The school also appoints qualified and experienced faculties in the school to impart education to the students. The Central Government revised the pay structure of the employee. In order to give them salary an enhancement of fee is necessary. By giving the above reason in the notice dt e 09.01.2009 the authority revised the fee structure. For the above reason the allegation of the petitioners are not correct.

I) That the Hon'ble apex court have decided a case of T.M.A. Pai Foundation and others-versus-State of Karnataka and other reported in AIR-2003 (SC) Page-355 and observed in Para-56 of the judgment that an educational institution is established for the purpose of imparting education of the type made available by the institution different courses of study are usually taught by the teachers who have to be recruited as per qualification that may be prescribed. It is no secret the better working conditions will attract better teachers. More amenities will ensure that better students week admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the Institution, if it chooses not to seek any aid from the Government to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live

in a competitive world today. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon funds from the Government.

J) It is relevant to state here that it is not the case of the petitioners (some of the parents) that the quality of Education in the deponent school is poor or inferior. It is a fact that the Opp. Party No.6 is not receiving any grant from State Government and Central Government. That Hon'ble Apex Court in the case of T.M.A.Pai Foundation-vrs-State of Karnataka held in para-60 of the judgment that *in the case of un-aided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged*.

K) That the deponent humbly submits that the school is not getting any grant in aid from the Central Government as well as the State Government. The salary of the employees of the schools are to be paid from the fees collected from the students and as such the revision of fees is essential and unavoidable.

L) It is relevant to state here that some students abandon the school without completing their study chiefly due to transfer of their parents to outside Cuttack and Bhubaneswar without clearing the school dues. The fees collected from the students are not sufficient to meet the salary of the employees of the school. After declaration of 6th Pay Commission by the Government the deponent schools have to pay the salary its employees at the higher rate. For the above reason the fee hike is just and proper as the deponent school are not getting any aid from the State Government and also from the Central Government.

M) That deponent further submits that we have no objection to the constitution of any committee by this Hon'ble Court to go into the fee structure charged by the different private schools of the State.

N) It is relevant to state here that the fees collected from the students before implementation of the 6th Pay Commission are not sufficient to pay the salary to the employees of the school. After introduction of 6th Pay Commission, the schools prepared the Budget and revised in fee structure after getting approval from the Local Managing Committee (in short LMC). The fee structure of the deponent school

also not sufficient to pay the salary as per the recommendation of the 6th Pay Commission. The Management of Central School/Kendriya Vidyalaya and the State Government are paying salary to their employees are more than the salary of the Opp. Party Nos.6 and 7. The income out of proposed fees charged by the schools is not sufficient to pay the salary to its employees.

O) For that the appellants humbly submit that the judgment passed by the Hon'ble Single Judge is based on erroneous findings on the ground that the Hon'ble Single Judge has not given any reasoning as to how the hike in price is construed to be profiteering as per the judgment of T.M.A. Pai case. Hence the impugned judgment is liable to be quashed.

P) For that the appellants humbly submits that the judgment passed by the Hon'ble Single Judge is erroneous because the hike in fees is based on rational basis without any motive for profiteering, therefore interference of the Hon'ble Single Judge quashing the hike in fees is unwarranted.

Q) For that the appellants humbly submits that the judgment passed by the Hon'ble Single Judge is based on erroneous findings on the ground that the T.M.A. Pai judgment and other judgments clearly prescribe that hike in fees is the clear cut domain of the management of the schools. In the instant case, the Hon'ble Single Judge has not relied on a single material to establish that hike in fees is made for profiteering. The only findings given by the Hon'ble Single Judge is that the hike in fees needs interference because no reason has been prescribed in the order for hike in fees. Hence the impugned order is otherwise liable to be quashed.

R) For that the appellants humbly submit that the judgment passed by the Hon'ble Single Judge is based on erroneous findings on the ground that for showing non-application of mind by directing for constitution of committee for going into the matter pertaining to hike in fees. This concept of the committee is against the settled principle of law as laid down by T.M.A. Pai judgment and other judgments, hence the judgment passed by the Hon'ble Single Judge is liable to be quashed.

S) For that reliance placed upon the judgment of the apex court reported in is wholly wrong in as much as those cases are governed

by the Delhi Education Act wherein there are provisions relating to tuition fees and the Hon'ble Court has merely interpreted various provisions of the Delhi Act. Admittedly, there is no such statutory provision so far as the Orissa Unaided English Medium Schools are concerned."

12. The reliance placed upon the judgments of the Supreme Court in ***T.M.Pai Foundation and others v. State of Karnataka and others****, AIR 2003 SC 355,* ignoring the law laid down at paragraph-16 of the same judgment and in ***Islamic Academy of Education v. State of Karnataka***, *(2003) 6 SCC 697,* is not applicable to the facts situation of the instant case. Hence, the impugned judgment is liable to be set aside.

13. Mr J. Das, learned Sr. Counsel appearing on behalf of the respondents-petitioners sought to justify the order of the learned Single Judge placing strong reliance upon the definitions of Section 3(f)-*Educational Institution*, 3(i)-*High School*, 3(j)-*Higher Secondary School*, 3(j-1)-*Junior College*, 3(o)-*Private Educational Institution and Section*, 5-*Permission for establishment of Educational Institution* and Sub-Section (2) of Section 6-*Recognition of educational institution*, Section 7-*Managing Committee or Governing Body of the Educational Institution,* Rule 25-*Constitution of Management* and Rule 27-*Procedure for reconstitution* and Rule 2(f-1)-*High School* of the Rules referred to supra and placing strong reliance upon Clause-6 of the Affiliation Bye-laws *School Management Committee*. It speaks that subject to relevant provision in the Education Act of the State/U.T. concerned, since the there is reference in the By-law clause (6) "subject to Education Act" and it is provided for educational institution inter ms of 3(o) of the Act, 1969. It refers to any educational institution not established and managed by the Government of Orissa or Central Government or government of any other state, therefore, the provisions of the Act, 1969 and the Rules, 1991 for constitution of Managing Committee and Governing Body of the educational institution are applicable to the to the Schools, Higher secondary Schools and Junior Colleges run by the appellants-DAV Institutions. Therefore, the learned Single Judge has rightly held that the provisions of the Act, 1969 and Rules 1991 referred to supra are applicable and the constitution of the Managing Committee by the appellants-Institutions is contrary to the Bye-laws clause 6 and the provisions of the Act, 1969 read with Rule 27 of the Rules, 1991. Therefore, the Managing Committee by the appellants-Management is bad in law and fixation of fee by them for the students is also not legal and valid. Hence, the learned Single Judge has rightly directed the State Government to constitute a committee as the same has not been constituted in terms of the provisions of the Act and the Rules for the purpose of fixation of fee structure to the

schools and educational institutions run by the appellants-Institutions in exercise of power under Article 226 of the Constitution and further held that the other reason that the Managing Committee constituted by the appellants-Institutions is more than two terms which is contrary to the byelaws as provided under the Byelaws clause 20.3 as it states that the terms of the members of the Managing Committee shall be three years. A member can be re-nominated for another term but a member cannot remain in office for more than two consecutive terms except ex-officio members and the members of the Trust/Society of the School. In the case on hand, the Committee constituted by the appellants- Institutions is more than four consecutive terms. Therefore, fixation of the fee structure is bad for that reason also. Even accepting for the sake of argument that constitution of the Managing Committee under the Affiliation Byelaws is applicable to the appellant-educational institutions, the fee structure fixed by the said appellants-Institutions is held to be illegal. Further, he has sought to justify the impugned judgment of the learned Single Judge placing reliance upon the decision in ***Unikrishnan J.P. and others v. State of Andhra Pradesh and others***, 1993 (1)SCC 645 and *T.M.A.Pai Foundation's* case (supra) in granting reliefs in favour of petitioners. Further, he placed strong reliance upon the No Objection Certificate obtained by the DAV Public Schools to be established in the Orissa State on 26.8.1994. Therefore, he prays for dismissal of the appeals contending that they are devoid of merit.

14. With reference to the above said legal rival contentions the following points would arise for consideration in these appeals.

(i) Whether the finding of the learned Single Judge holding that provisions of the Orissa Education Act, 1969 and the Rules framed thereunder are applicable to the appellants-Educational Institutions in the Orissa State is either erroneous or error in law?

(ii) Whether the finding in the impugned judgment stating that fixation of the fee structure by the Committee constituted by the appellants-Educational Institutions in exercise of its power under the By-laws clause 21 is legal and valid?

(iii) Whether quashing of the fixation of the fee structure of the Managing Committee approved by the appellants-Society by the learned Single Judge applying the legal principle with regard to fee fixation enunciated by the Apex Court in *T.M.A. Pai's* case (supra) is vitiated in law and answering all the contentious issues in favour of the

petitioners-respondents is erroneous and error in law warranting interference by this Court.

(iv) What order ?

15. The first point is required to be answered in negative for the following reasons. It is an undisputed fact that the High School, Higher Secondary and Junior College are all of private educational institutions in terms of definition 3(o) of the Orissa Education Act, 1969, which read thus:

> "Section 3(o): Private Educational Institution means any educational institution which is not established and managed by Government of Orissa, the Union Government or Government of any other State"

16. All the educational institutions started by the appellants-Society in the State of Orissa are not established and managed either by the State Government of Orissa or the Union Government or any other State. Therefore, the definition of private educational institution under the provision of the Act referred to supra is more comprehensive and is inclusive definition of educational institutions, which institutions in the State are either affiliated to CBSE or ICSE that is evident from byelaws clause no.3, which is applicable to the educational institutions which are being run by the appellants in the Orissa State, which states that any educational institution in India that fulfils the conditions under Sub-clause (i) without which the case of such applicant cannot be processed, who applies to the Board for affiliation, which reads as follows:

> "(i) The school seeking Provisional Affiliation with the Board must have formal prior recognition of the State/U.T. Govt. Its application either should be forwarded by the State Govt. or there should be a No Objection Certificate to the effect that State Government has no objection to the affiliation of the school with the C.B.S.E. Condition of submitting a No Objection Certificate will not be applicable to categories 3.1(i) to (iv)."

17. Therefore, the Bye-law clause 3.3.1 provides for obtaining prior recognition of the State Government by the appellants before seeking affiliation of their Educational Institutions with the CBSE Board. So, prior recognition of the State Government as provided under Sections 5 and 6 of the Education Act, 1969 for establishment of educational institutions is required. The relevant provisions of the said Act are extracted hereunder :

"**Section 5**: *Permission for Establishment of Educational Institution* :-

(1) No private educational institution which requires recognition shall be established except in accordance with the provisions of this Act or the rules made thereunder.

(2) *Any person or body or persons intending to-*

(a) establish a private education institution; or

(b) open higher classes, new streams new optional subjects, additional sections or increase the number of students to be admitted or introduce Honours Courses in new subjects in a recognized private educational institutions; or

(c) upgrade any such institution may make an application to the prescribed authority within such period and in such manner as may be prescribed for grant of permission therefor;

Provided that in respect of applications, which were pending on the date of commencement of the Orissa Education (Amendment) Act, 1994, the applicants shall be allowed a period of thirty days to submit revised applications in accordance with the provisions of this Act.

(3) The applicant along with the application for permission, shall furnish an undertaking that in the event of permission being granted,

(i) adequate financial provision shall be made for continued and efficient maintenance of the institution;
*(**Emphasis laid by the Court**)*

(ii) the institution shall be located on the lands specified in the application and that such lands are located in sanitary and healthy surroundings;

(iii) the building, playground, furniture, fixtures and other facilities shall be provided in accordance with the provisions of this Act and rules prescribed therefor; and

(iv) all the requirement laid down by the Act, the rules and orders, if any, issued thereunder shall be complied.

(4) Every such application shall be supported by an affidavit attesting the fact that all information furnished therein are true and correct to the best of knowledge of the applicant.

(5) The Prescribed Authority shall scrutinize each application, consider the applications which are found complete in all respects and have been made in conformity with the Act and rules made thereunder and thereafter may make such inquiry as he may deem necessary. He shall make a report in respect of each application with his recommendations which shall be placed before the Committee constituted in this behalf by the State Government.

Section 6: *Recognition of Educational Institution*—

(1) An application for recognition of a private educational institution shall be made to the Prescribed Authority on or before the 30th November of the academic year in which the institution starts functioning:

Provided that no application for recognition filed before commencement of the Orissa Education (Amendment) Act, 1994 shall be rejected only on the ground that it has not been filed within the date specified in this Sub-section.

Explanation – Academic year means a period of twelve months beginning with the 1st day of June and ending with the 31st day of May of the next calendar year.

(2) No private educational institution shall be eligible for recognition unless it has been established with prior permission under this Act.
*(**Emphasis laid by the Court**)*

(3) Every application for recognition shall be made in the prescribed form accompanied by such documents and information as may be prescribed. The applicant shall furnish a statement indicating the extent to which conditions specified in the order granting permission and conditions for recognition as specified under Section 6-A have been fulfilled. Every such application shall be supported by an affidavit attesting the fact that all information furnished therewith are true and correct to the best of the knowledge of the deponent.

(4) The Prescribed Authority shall scrutinize the applications. Such of the applications as are found to be complete in all respects and have been submitted in conformity with the provisions of the Act and the rules framed thereunder shall be considered, and thereafter the Prescribed Authority shall inspect or cause to be inspected the educational institution in respect of which recognition has been applied for, and shall make a report with his recommendation which

shall be placed before a Committee constituted by the State Government in this behalf.

(5) The State Government may constitute one or more Committees for consideration of applications for recognition and such Committee may be constituted for the whole State or for any part thereof or for different categories of private educational institution and may make regulations for conduct of business of such Committees."

18. There is definite procedure laid down by the State legislature in the above provisions of the Act for the purpose of obtaining permission and for establishment of educational institution of the appellants-Management and for recognition also the procedure is laid down and its eligibility criteria are clearly enumerated under Sub-Sections (1), (2), (3) and (4) of Section 6 of the Education Act. In the instant case, No Objection Certificate has been obtained by the appellants from the office of the Director of Secondary Education and Schools and Mass Education Department as required for establishment of schools in the Orissa State with certain terms and conditions.

19. That being the position, the interpretation sought for by the learned Sr. Counsel Mr J. Patnaik that either the definition "educational institution" or "private educational institution" is not attracted to the High Schools, Higher Secondary Schools or Junior College run by the appellants-institutions under the Education Act as they are not imparting education for standards VII to X or Higher Secondary Schools, which courses are not defined in the Orissa Higher Secondary Education Act, 1982 and Junior College is also not educational institution imparting Higher Secondary education as defined under the Orissa Higher Secondary Education Act, 1982. The High Schools, Higher Secondary Schools and Junior Colleges being affiliated to the CBSE Board are imparting education and conducting examination as per the syllabi prepared by the CBSE Board. Therefore, in the absence of the said factual aspects as provided in the definition of either "educational institution" or "private educational institution" under the above provisions of the Act the High Schools, Higher Secondary Schools and Junior Colleges of the appellants-Society cannot be brought under definition of "private education institution". The contention urged on behalf of the appellants that merely because No Objection Certificate is obtained by the appellants-Management from the prescribed authority under Section 5 of the Act, 1969 to establish the educational institutions in the State, which is not the legal requirement, but No Objection Certificate is required to be obtained prior to recognition of the State Government or its authorized officer of the Department is only to facilitate the appellants-institution to seek provisional affiliation of their

Educational Institutions from the Board. Therefore, the provisions under Section 5 and 6 cannot be applied to appellants-institutions which are established and run in the Orissa State. Further, the definition of "High School" under Rule 2(f-1) of the Rules, 1991 cannot be explained by the subordinate legislation to be the definition of "educational institutions" and "private educational institutions" stating that preparing candidates for the High School Certificate Examination conducted by the Central Board of Secondary Education or Indian Council for Secondary Education established by the Union Government as defined in the definition of "High School" by the subordinate legislation in the Rules, 1991, cannot be transplanted in the definition of "High School" or "Higher Secondary School" or "Junior College" as defined under the above respective provisions of the Education Act. Even accepting such an argument as advanced on behalf of the respondents that the definition of educational institution and private educational institution which is an inclusive definition of the equivalent examination conducted by the Central Board or I.C.S.E. that has to be inferred and interpreted in that manner to achieve the object of the Act in view of Clause 3.3(i), which clearly states that the school seeking provisional affiliation with the Board must have formal prior recognition of the State/Union Territory. Therefore, the appellants-Management must have formal prior permission and recognition of the State Government as provided under Section of the Act, 1969.

20. In this view of the matter, the legal contention urged on behalf of the appellants that the provisions of the Orissa Education Act, 1969 and the Orissa Higher Secondary Education Act, 1982 and the Rules, 1991 have no application to the case of the appellants-institutions and is not tenable in law and, therefore, the said contention urged in these appeals is liable to be rejected. The learned Single Judge is right in rejecting the legal submissions advanced in this regard on behalf of the appellants in the writ petitions and has rightly held that the provisions of the Act and the Rules referred to supra are applicable to the private educational institutions which are established and run by the appellants-institutions to get affiliation to the CBSE after obtaining the permission and recognition from the State Government is a condition precedent under Clause 3.3(i) of Chapter-II of the CBSE Byelaws. Undisputedly, they have obtained permission and NOC from the State Government to establish their educational institutions referred to supra is the basis for affiliation of their educational institutions to the CBSE in the Orissa State. For the reasons stated supra, the findings and reasons recorded on the contentious issues by the learned Single Judge in the impugned judgment are perfectly legal and valid and the same is neither erroneous nor error in law.

21. Point no.2 is also required to be answered against the appellants-Management by assigning the following reasons. Since we have answered Point no.1 concurring with the conclusion arrived at by the learned Single Judge in holding that the provisions of the Act, 1969 and the Higher Secondary Education Act, 1982 and the Rules, 1991 referred to supra, the other provisions with regard to constitution of the Managing Committee of the Educational Institution also must be applied to the educational institutions run by the appellants-institutions in accordance with the Rules, i.e., the said provision shall be applied in view of Byelaws Clause 6 "School Management Committee" subject to the relevant provisions prescribed in the Education Act of the concerned State. In these appeals, Section 7 of the Act, 1969 read with Rule 25 which states for Constitution of Managing Committee and Rule 27 of the Rules, 1991, which provides for Procedure for Constitution of Managing Committee. Rule 25 of the Rules, 1991 provides that educational agency shall constitute a managing committee to manage and look after the affairs of the school as required under Section 7 of the Education Act. Rule 25(2)(c) provides for seven members other than ex-officio members to be nominated by the educational agency or institution in whose favour the permission is granted. Rule 25 of the Rules, 1991 confers powers upon the Educational Agency to constitute the Managing Committee or Governing Body of educational institution for the purpose of managing the affairs of the school as required under Section 7 of the Act, 1969 including the fixation of fee for the students which is the conclusion required to be drawn in these cases. The combination of members of such Managing Committee, the procedure for re-constitution and nomination of seven members in accordance with Rule 25 from amongst themselves or other persons in the local area interested in the field of education to be members of the Managing Committee to succeed it on completion of its term. The term of either the Secretary or the Member of a Managing Committee shall not be more than two consecutive terms. Therefore, the Managing Committee which is constituted by the appellants-institutions in this case by following the procedure prescribed in Byelaws Clause 20 is not at all legal and valid as the same runs contrary to the procedure prescribed in clause 6 of the Byelaws, which states that subject to relevant provision of the Education Act of the State concerned it should also have school Managing Committee as laid down under Rules 25 and 27 of the Rules, 1991. Therefore, the reliance placed upon Clause 21(xiv) of the Bye-laws contending that the Managing Committee constituted by the appellants-institutions in exercise of power under Bye-laws Clause 20 (2) & (3) have got power to propose the rates of tuition fees to the students of the appellants Educational Institutions and other annual charges and also to review the budget of the school presented by the Principal for forwarding the

same to Society for approval. The interpretation of Clause 6 of the Byelaws sought to be made by the learned Sr. Counsel Mr J. Patnaik that the appellants-institutions can have their own Managing Committees in addition to the School Management Committee as provided under Section 7 of the Act, 1969 read with Rules 25 and 27 of the Rules, 1991 is not tenable in law as it would be contrary to the provisions of the Act, 1969. Rule 25 provides for constitution of a Managing Committee for managing the affairs of the schools. Rule 27 provides for re-constitution of the Managing Committee. The submission made in this regard by the learned Sr. Counsel on behalf of the respondents with reference to the above provisions of the Act and Rules that the Educational Agency alone has got power to constitute or reconstitute the Managing Committee for fixing the fee structure to the students is tenable. Therefore, for constituting the Managing Committee as provided under Rules 25 and re-constituting such Committee under Rule 27 of the Rules, 1991, the Educational Agency shall have the power for the purpose to manage the affairs of the school including the fixation of the fee structure. Undisputedly, as required under Section 7 of the Act, 1969 read with Rule 25 of the Rules 1991, constitution and reconstitution of the Managing Committees are not made by the Educational Agency for the purpose of looking after the affairs of the school and fixing the fee structure of the students studying in various High Schools, Higher Secondary Schools and Junior Colleges of the appellants-institutions. The contention urged on behalf of the appellants that the committee which is constituted under Clauses 20 (2) and (3) of the Byelaws can also have a committee in addition to the School Management Committee as laid down under Sub-Clauses (ii) and (iii) of Clause 21 is not tenable in law. Therefore, such committee is required to be constituted as per Rules 25 and 27 of the Rules, 1991. Therefore, the fee structure fixed by the appellants accepting the proposal of its Managing Committee constituted under Clauses 20 (2) and (3) of the Byelaws is not legal and valid and fixation of fee structure is also not sustainable in law. Therefore, the learned Single Jude has rightly rejected the fee structure fixed by the Managing Committee constituted by the appellants-schools in exercise of their power under Byelaws Clauses 20(1)(2)(3). Learned Single Judge has rightly held that appellants-schools also cannot also exercise that power under Clause 21(xiv) to propose the rates of tuition fee and other annual charges and review the budget of the school presented by the Principal for forwarding the same to the Society for its approval as the same would be contrary to Section 7 of the Act, 1969 read with Rules 25 and 27 of the Rules, 1991. In view of the above finding, the learned Single Judge as an interim measure has constituted a committee in exercise of his powers under Articles 226 and 227 of the Constitution of India placing reliance upon the decisions of the Supreme

Court in ***Vishaka and others v. Stae of Rajasthan and others***, AIR 1997 SC 3011, ***Asis Hameed v. State of J & K***, AIR 1989 SC 1899, and ***Mullikarjuna Rao and others v. State of Andhra Pradesh and others***, AIR 1990 SC 2151, wherein the Apex Court has laid down the law that powers of the High Court under Article 226 of the Constitution are that if the Court finds that the fundamental rights of the persons have been infringed, the Court has jurisdiction to undo such injustice by passing appropriate direction on that behalf.

22. In view of the aforesaid statement of law and following the observations made by the Supreme Court in *T.MA. Pai's case* (supra), wherein it is held that authorities of the private un-aided educational institutions have the fundamental rights to fix their fee structure which would not amount to profiteering and misappropriation or misutilization. Therefore, the direction issued by the learned Single Judge to the authorities of the concerned D.A.V. Public Schools to take immediate steps for constitution/re-constitution of the Managing Committee of the appellants-institutions in accordance with the Orissa Education Act and the relevant rules framed thereunder is legally justifiable.

23. Point no.3 is also required to be answered in favour of the respondents-petitioners for the following reasons. Learned Single Judge has referred to the legal contentions urged on behalf of the appellants-institutions and has taken pains to refer to the Constitution Bench decision rendered in *T.M.A. Pai's* case and certain observations made at paragraphs-53, 54, 56, 61 and 62 of the said judgment by extracting them in the impugned judgment. The learned Single Judge has come to the right conclusion that fixation of the fee structure to the students is without assigning any reason and as to why such enhancement or hike in fees is made and how such hike in fees is to commensurate with the facilities provided to the students are not stated in the fee structure fixed by the Managing Committee appointed by the appellants-institutions under the Byelaws and, therefore, he has held that the same is in violation of Articles 14, 21 and 21-A of the Constitution, i.e., right to equality, right to livelihood and education, which are fundamental rights guaranteed to the students under the Constitution. Learned Single Judge has also held that the private schools cannot do so with a view to make profit and cannot charge capitation fee and he has also rightly placed reliance upon the decision in *Islamic Academy of Education's* case (supra), wherein the doubts and anomalies arose in *T.M.A. Pai's* case have been clarified with regard to the autonomy in admission of students in professional private colleges also with regard to the common fee structure and there shall not be any profiteering.

He further placed reliance upon the observation made by the Apex Court in the said judgment that the fixation of fee directed by the respective State Government to set up committees consisting of retired Judge who shall be nominated by the Chief Justice of that State, and other members to fix the fee structure, which can be charged by the institutions after taking certain relevant aspects into consideration. Since we have answered the Point no.2 holding that the Managing Committee as provided under Section 7 of the Act, 1969 read with Rules 25 and 27 of the Rules, 1991, which provides for re-constitution of such committee to manage and look after the affairs of the school including the fixation of fee structure, those provisions will take care of constituting a committee as we have already held that no such committee is constituted by the Educational Agency and fee fixation made by the Managing Committee constituted by the appellants-institutions under the Bye-laws in the cases on hand is bad in law. Therefore, for the above reason also setting aside the fee structure fixed by the appellants-Managing Committees appointed under Sub-clauses (2) and (3) of Clause 20 of the CBSE Bylaws is legal and valid for the reason that they have no competency to fix fee structure. Further, it is rightly held that the Members nominated by the appellant-Management under the above said Byelaws have got four consecutive terms in the Managing Committee re-constituted by the appellant-institutions is totally impermissible in law. Therefore, the fee fixation made by the appellants-Managing Committees apart from the reasons stated supra is not legal and valid. Further, the learned Single Judge has rightly placed reliance upon the judgment of the Supreme Court in a batch of Civil Appeals in the case of Modern ***School v. Union of India and others***, *etc., etc*. reported in *(2004) 5 SCC 583*, wherein the Apex Court had an occasion to consider the questions framed by it with regard to Delhi Schools Education Act, 1973, which are extracted hereunder:

"(a) Whether the Director of Education has the authority to regulate the quantum of fees charged by unaided Schools under Section 17(3) of the Delhi School Education Act, 1973?

(b) Whether the direction issued on 15.12.1999 by the Director of Education under Section 24(3) of the Delhi School Education Act, 1973 stating inter alia that no fees/funds collected from parents/students shall be transferred from the Recognized Unaided School Fund to the society or trust or any other institution, is in conflict with Rule 177 of the Delhi School Education Rules, 1973?

(c) Whether management of recognized unaided schools is entitled to set up a Development Fund Account under the provisions of the Delhi School Education Act, 1973?"

24. Further, the learned Single Judge has rightly referred to paragraph-17 of the decision rendered in *Islamic Academy's* case (supra) and extracted the same and wherein it is held that the Director of Education has the authority to regulate the quantum of fee charged by the unaided institutions under Section 17(3) of the Delhi Education Act, 1973.

25. In this view of the matter, the impugned judgment of the learned Single Judge cannot be found fault with by the appellants-institutions on the legal contentions urged in these appeals as they are all misconceived, and we have already answered all the questions raised in these appeals in justification of the findings and reasons recorded by the learned Single Judge in holding that the provisions of the Act, 1969, Rules, 1991 and the Act, 1982 are applicable to the educational institutions which are established and run by the appellants-institutions in the Orissa State. Further, not re-constituting the Managing Committee by the appellants-institutions as provided under Section 7 of the Act, 1969 read with Rules 25 and 27, Rules 1991 for the purpose of managing the affairs of the schools including fixation of the fee structure to the students for admission to the various classes in the appellants-institutions is not legally correct.

26. For the foregoing reasons, the substantial questions of law urged on the basis of the legal contentions raised by the learned Sr. Counsel and other counsel on behalf of the appellants-Institutions do not arise for our consideration in these appeals. No case is made out by them for our interference with the finding and reasons recorded by the learned Single Judge in the impugned judgment. The conclusions arrived at and the findings and reasons recorded by the learned Single Judge on the contentious issues are well founded and warrant no interference by this Court.

Hence, all the appeals being devoid of merit are dismissed as such.

Appeals dismissed.

2011 (II) ILR- CUT- 753

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

W.P.(C) NO.22588 OF 2010 (Decided on 20.01.2011)

M/S. PRAKASH STORE ……Petitioner.

.Vrs.

COMMISSIONER OF SALES TAX, ORISSA, & ORS. ……Opp.Parties.

ORISSA V. A.T ACT, 2004 (ACT NO. 4 OF 2005) – S.41 r/w Rule 41 of the Orissa VAT Rules.

Power of Commissioner U/s.41 of the Act to select dealers for tax audit on random basis – The above provision is meant to prevent evasion of tax which is in the interest of the public – Held, it can not be said that the aforesaid provisions of the OVAT Act and Rules are unconstitutional – However in the event of frequent tax audits and harassment to the dealers the same should be brought to the notice of the Commissioner. (Para 7)

For Petitioner - Tusar Kanti Satapathy
For Respondents -

The petitioner who is a registered dealer under the Orissa Value Added Tax Act, 2004 (for short, "the Act") is before this Court seeking issuance of writ of certiorary to declare that Section 4 (1) of the OVACT Act and Rule 41 (1) of the Orissa Value Added Tax Rules, 2004 (for short, "the Rules") are illegal, invalid and ultra vires the Constitution of India.

2. The ground of attack for the said relief sought for by the petitioner is that the Taxing authorities are conducting frequent audits without describing the audit cycle in the Rules. Rule 41 is relevant for the purpose. Repeated conduct of audit amounts to harassment to the petitioner. The arbitrary power conferred on the assessing officer is violative of Article 14 of the Constitution. It is further contended that on the basis of such repeated audits conducted by the Department are in excess of the conferment of the power under Section 41 and Rule 41 of the Act and Rules. There is abuse of power conferred upon the Commissioner and the subordinate officers to whom power is delegated for the purpose of audit to prevent evasion of tax. It is further contended that as per Section 41 read with Rule 41 conducting audit without notice with regard to date place etc. is arbitrary on the part of the Commissioner and the subordinate officers to whom power is delegated to conduct audit in the premises of a dealer. Therefore, the same is arbitrary

and vilative of Articles 14 and 19 of the Constitution and the same is liable to be struck down.

3. Learned Standing Counsel for the Revenue submits that power under section 41 and Rule 41 of the Act and Rules respectively are vested in the Revenue authorities for the purpose of facilitating the Commissioner and his subordinate officers to conduct audit with a view to see that the escapement of tax is brought to assessment in the interest of public. Section 41 of the Act envisages the Commissioner may selects such individual dealers or class of dealer for tax audit on random basis or on the basis of risk analysis or on the basis of any other objective criteria, as such intervals or in such audit cycle, as may be prescribed. Therefore, it is strongly submitted by Mr Kar that the said provisions of the OVAT Act being not violative of Article 14 of the Constitution, the writ petition is not maintainable. On the other hand, if the reliefs as sought for by the petitioner are granted, power of the Commissioner will not be there, which will leave adverse impact on the Revenue. Mr. Kar further submits that if there is any arbitrary action on the part of the Revenue authorities in conducting audit with a view to harass the dealer, the same can be brought to the notice of the Commissioner. Moreover, the Audit Report is the clear subject matter of challenge, which can be scrutinized by the competent authority. Therefore, he submits that writ petition is liable to be dismissed.

4. We have carefully examined the pleadings advanced by the petitioner with a view as to whether it is required to strike down the provisions contained in Section 41 and Rule 41 of the Act and Rules. The said point is answered against the petitioner-dealer for the following reasons. It is worthwhile to extract the provisions prescribed under Section 41 and Rule 41 of the Act and Rules, which read as under :

> "**Section 41**. *Identification of tax payers for tax audit:* (1) The commissioner may select such individual dealers or class of dealers for tax audit on random basis or on the basis or risk analysis or on the basis of any other objective criteria, at such intervals or in such audit cycle, as may be prescribed.
>
> (2) After identification of individual dealers or class of dealers for tax audit under Sub-section (1), the Commissioner shall direct the tax audit in respect of such individual dealers or class of dealers be conducted in accordance with the audit programme approved by him:
>
> Provided that the Commissioner may direct tax audit in respect of any individual dealer or class of dealers on out of turn

basis or for more than once in an audit cycle to prevent evasion of tax and ensure proper tax compliance.

(3) Tax audit shall ordinarily be conducted in the prescribe manner in the business premised or office or godown or warehouse or any other place, where the business in normally carried on by the dealer or stock in trade or books of account of the business are kept or lodged temporarily or otherwise.

(4) After completion of tax audit of any dealer under Sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report to be called "Audit Visit Report", to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sale, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purpose."

Rule 41 : *Selection of dealers for tax audit* –
(1) The commissioner shall, under the provision of Section 41, select by the 31st of January or by any date before the close of every year, commencing from the appointed day, not less than twenty per cent of registered dealers for audit during the following year, by random selection with or without the use of computers :

Provided that for the year coming with the appointed day, the selection of dealer for audit under this sub-rule shall be made by the 30th of September of that year.

(2) The Commissioner, where considers it necessary to safeguard the interest of revenue or where any enquiry is required to be conducted on any specific issue or issues relating to any dealer, or class or classes of dealers, on being referred by an officer appointed under Sub-section (2) of Section 3, may direct audit to be taken up.

(3) The Commissioner may, on the basis of apparent revenue risk of the individual dealers, make selection of dealers for special or investigation audit. The revenue risk may be determined on objective analysis of the risk parameters or on receipt of intelligence or information, regarding evasion of tax.
(4) For the control of large tax payers, the Commissioner may, plan audit checks across the totality of the business of such dealers, within an audit cycle of two years."

5. The aforesaid provisions of the Act and Rules enable the Commissioner to select such individual dealers or class of dealer for tax audit on random basis. If reliable information is received by the Commissioner that there is tax evasion and he feels that he is required to conduct tax audit in respect of the said dealer or class of dealer, he is required to do so. The said provision cannot be said to be a fault with a view to the ongoing events of tax evasion in the country. The aforesaid enactment has brought in with a view to prevent the evasion of tax. The aforesaid Act and Rules have been enacted by the State Legislature in exercise of statutory power.

6. We have carefully read the provision of the Rules which prescribes for audit cycle. Sub-rule (1) of Rule 41 is distinct and different and, in those circumstances, the Commissioner is otherwise at liberty to conduct such audit to plug evasion of sales tax.

7. In view of the reasons stated above, it cannot be said that the aforesaid provisions of the OVAT Act and Rules are unconstitutional. Therefore, the argument advanced by the petitioner fails. The argument advanced by the learned Standing Counsel for Revenue is well founded and the same is accepted. If there are frequent tax audits and arbitrary action by the subordinate officers with a view to harass the individual dealers or class or dealer, the same should be brought to the notice of the Commissioner.

6. In view of the contention raised by the learned Standing Counsel for Revenue, Annexure-1 is liable to be quashed.

7. In the fact and circumstances of the case, we direct to conduct assessment proceeding by issuing fresh notice of hearing. The assessment notice may be issued by the officer who has not conducted the tax audit.

8. All other factual aspects are open for the petitioner-dealer to reflect in the reply to the show cause, which shall be considered by the assessing authority.

Free copy of this order be supplied to the learned Standing Counsel.

Writ petition disposed of.

2011 (II) ILR- CUT- 757

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

W.A. NO. 255 OF 2011 (Decided on 14.09.2011)

DUTIKA MUNDA … …... Appellant.

.Vrs.

STATE OF ORISSA & ORS. ……Respondents.

SERVICE – Anganwadi Worker – Appellant was appointed – Her appointment challenged on the ground that she was not a permanent resident of the area – Collector disengaged her – In writ petition learned single Judge confirmed the order – Hence this appeal.

In course of hearing this Court directed the advocate for the appellant to produce ration Card as well as voter Card at least for a period of ten years which he failed to produce – Held, no infirmity or illegality in the order of the learned single Judge confirming the order of the Collector. (Para 9 & 10)

For Appellant - Mr. Bhojaraj Seth
For Respondents- Government Advocate (For R.1 to R.4)
Miss. Geetanjali Majhi (for R.5)

B.N. MAHAPATRA,J. In the present Writ Appeal, the appellant assails the order dated 07.03.2011 passed by a learned Single Judge of this Court in W.P.(C) No.8976 of 2009 by which the learned Single Judge confirmed the order of the Collector, Sambalpur in cancelling the appointment of the appellant as Anganwadi Worker in village Sahajbahal in the district of Sambalpur.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present Writ Appeal are that the appellant along with three others applied for the post of Anganwadi Worker for village Sahajbahal under Jamankira Block and attended the interview in which the appellant stood first and respondent No.5-Smt. Uttamasini Mahakul stood second. According to the appellant, the said post was reserved for SC and ST candidate and the appellant is the only ST candidate. She possesses the High School pass certificate and is a permanent resident of the said Anganwadi Centre. Pursuant to the order of engagement dated 04.08.2007 issued by the C.D.P.O., Jamankira in favour of the appellant, she joined in the said post on 06.08.2007. While she was continuing as such, respondent No.5 filed writ

petition No.14599 of 2007 before this Court challenging engagement of the appellant as Anganwadi Worker in Sahajbahal village. The said Writ Petition was disposed of with a direction to the Collector, Sambalpur to dispose of the matter on merit. The Collector, after hearing both the parties vide its order dated 08.06.2006 directed disengagement of the appellant as Anganwadi Worker on the ground that the appellant is not a permanent resident of village Sahajbahal and further directed for engagement of respondent No.5 as Anganwadi Worker in the said village. Being dissatisfied by the said order, the appellant approached this Court in W.P.(C) No.8976 of 2009 and the learned Single Judge vide order dated 07.03.2011 confirmed the order passed by the Collector, Sambalpur and dismissed the writ petition. Hence, the present appeal.

3. Mr.Seth, learned counsel appearing for the writ appellant submitted that the order of the learned Single Judge is erroneous, illegal and contrary to the law and facts. The learned Single Judge failed to appreciate the various submissions made before him in their proper perspective. The post of Anganwadi Worker in question is reserved for ST candidate and the appellant being a candidate belonging to ST community was selected by the C.D.P.O. The appellant is a matriculate and came out successful in interview, whereas the respondent No.5 is a plucked matriculate. The appellant is a resident of Sahajbahal. Tahasildar, Kuchinda has issued residential certificate vide Revenue Misc. Case No.856 of 2007 after conducting due enquiry. Respondent No.5 belongs to Other Backward Class category. The selection was made on merit basis and the appellant secured highest mark in the interview. The said residential certificate having not been challenged, the learned Single Judge is not justified to confirm the order of the Collector, Sambalpur wherein he observed that the appellant is temporarily staying at Sahajbahal to take care of her old parents and is not a permanent resident of Sahajbahal and the residential certificate has been obtained from the Tahasildar, Kuchinda for the purpose of engagement as Anganwadi Worker. Mr. Seth alternatively submitted that a fresh selection may be conducted, if his client is found ineligible.

4. Learned Government Advocate supported the orders passed by the Collector, Sambalpur as well as the learned Single Judge and produced photocopies of record for perusal of this Court.

5. Miss. Majhi, learned counsel appearing for respondent No.5 submitted that there is no infirmity and illegality in the order passed by the Collector, Sambalpur as well as in the order of the learned Single Judge, who confirmed the order of the Collector, Sambalpur.

6. On the rival contentions raised by the parties, the only question that arises for consideration by this Court is as to whether the learned Single Judge is justified in affirming the order dated 08.06.2009 passed by the Collector, Sambalpur cancelling the engagement of the appellant as Anganwadi Worker in village Sahajbahal and directing engagement of respondent No.5 as Anganwadi worker in said village.

7. At this juncture, it is necessary to extract the relevant portion of the order of the Collector, Sambalpur passed on 08.06.2009 which runs as under:-

> "Considering the above facts and examining the related documents submitted by the petitioner, the AWW and the villagers including elected representative of Sahajbahal Village the Collector is of the view that the engagement of Smt. Munda as AWW has been not in accordance with the Govt. guidelines for selection of AWW.
>
> It is therefore, ordered that the engagement of Smt. Dutika Munda be cancelled with immediate effect and Smt. Uttamsini Mahakul, W/o- Sri Narasingha Mahakul of village Sahajbahal, PO: Kharsanmal, Sambalpur be engaged as Anganwadi Worker of Sahajbahal AWC."

8. The learned Single Judge confirmed the above order of the Collector, Sambalpur with the following observations:-

> "4.On perusal of the records, it reveals that this Court in a writ petition bearing W.P.(C) No.14599 of 2007 filed by opposite party no.5, directed the Collector to dispose of the matter on merits. Pursuant to the said direction of this Court, both the petitioner and opposite party no.5 were interrogated by the Collector about their residential status. The petitioner submitted a written statement before the Collector stating that she got married to one Dinesh Munda of village Kapribahal, P.O. Jayantpur under Jujumura Block on 10.04.05 and stayed in her inlaw's house for six months. She returned back with her husband to her parental house to look after her old parents as her brothers were serving far away from the home and was not able to take care of the old parents. That apart, the birth certificate issued by the Registrar of Births and Deaths and Health officer, Sambalpur Municipality vide Regd. No.2542/31.5.06 clearly mentioned the address of the petitioner, who is the mother of the newly born baby Babita Munda to be resident of village Jayantpur, Sambalpur. The Collector further observed that the petitioner is

temporarily staying at Sahajbahal to take care of her old parents and is not a permanent resident of Sahajbahal and the residential certificate has been obtained from the Tahasildar, Kuchinda for the purpose of engagement as Anganwadi Worker.

5. In view of the above observation made by the Collector, I find no illegalities or irregularities committed by the Collector while passing the impugned order.

6. In the final analysis, the writ petition fails and is dismissed."

9. In the course of hearing, this Court vide order dated 22.04.2011 directed the learned counsel appearing for the appellant to produce the ration card as well as voter card at least for a period of ten years in support of his contention that the appellant is a permanent resident of village Sahajbahal. The learned Advocate failed to produce the documents as directed by this Court vide order dated 22.04.2011. We have perused the photocopies of the record of selection of Anganwadi Worker of Sahajbahal village under Jamankira Block in the district of Sambalpur. We do not find anything from the record to take a view contrary to the decision taken by the Collector, Sambalpur in his order dated 08.06.2009.

10. The factual finding of the Collector, Sambalpur has been affirmed by the learned Single Judge. We do not find any cogent ground to interfere with the order of the Collector, Sambalpur as well as the order of the learned Single Judge. In our view, there is no infirmity or illegality in the order of the learned Single Judge confirming the order of the Collector, Sambalpur warranting interference by this Court.

11. The writ appeal is devoid of any merit and accordingly the same is dismissed.

Writ appeal dismissed.

2011 (II) ILR- CUT- 761

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

W.A. NO.296 OF 2011 (Decided on 08.09.2011)

JADABA BHUE ……Appellant.

.Vrs.

STATE OF ORISSA & ORS. ……..Respondents.

ORISSA GRAMA PANCHAYAT ACT, 1964 (ACT NO.1 OF 1965) – S.24 (2) (c).

Meeting of no confidence motion against Sarpanch or Naib-Sarpanch – First notice issued giving 15 clear days time but the meeting could not be held – Second notice issued without giving 15 clear days time – Since first notice has lost its life second notice is to be treated as a fresh notice and it is mandatory on the part of the concerned authority to give clear 15 days notice for the purpose of convening the meeting of no confidence against a Sarpanch or Naib Sarpanch.

Held, the Second notice Dt.30.09.2009 fixing the date of no confidence motion meeting to Dt.07.10.2009 is not sustainable in law, hence quashed. (Para 12,13)

Case laws Referred to:-

1.2007(I) OLR 8 : (Sri Balmiki Pradhan-V- State of Orissa & Ors.)
2.99(2005) CLT 402 : (Rushinath Rout-V- State of Orissa & Ors.)
3.1988(I) OLR 80 : (Sarat Padhi-V- State of Orissa & Ors.)

For Appellant - M/s. Goutam Mishra & D.K.Patra.

For Respondents - Mr. Digambar Mishra (for Resp.Nos.3 to 5)
M/s. Anita Nanda & S.Lall (for intervenors)
M/s. S.K.Nanda, N.Maharana & D.Mahakud(forR.6)

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B.N.* MAHAPATRA*, J. This appeal has been directed against an order dated 21.04.2011 passed in W.P.(C) No.14642 of 2009 by a learned Single Judge of this Court dismissing the writ petition of the present appellant.

2. Bereft of unnecessary details the facts and circumstances giving rise to the present writ appeal are that the writ appellant contested the election

for the post of Sarpanch of Bhimtikira Grama Panchayat under Sonepur District held in the year 2007 and he was elected to the said post. While he was continuing as such, some of the ward members of the said Panchayat convened a meeting and passed a resolution for removal of the writ appellant from the post of Sarpanch on the ground that he did not discharge his duty in proper manner. On the basis of such resolution the writ appellant received notice dated 1.9.2009 issued by the Sub-Collector, Sonepur proposing to convene a special meeting on 22.9.2009 for consideration of no-confidence motion against the present writ appellant. No such meeting was held on 22.09.2009. Subsequently, another notice dated 30.9.2009 was sent to the present appellant for holding the meeting on 7.10.2009 for the aforesaid purpose. The said notices were challenged in W.P.(C) No.14642 of 2009 with a prayer to quash the same; but the said writ petition was dismissed by the learned Single Judge by the impugned order dated 21.4.2011.

3. Mr. G. Mishra, learned counsel for the writ appellant submitted that the impugned order is patently illegal and the same is liable to be set aside. Learned Single Judge has failed to appreciate that clause (c) of Sub-section (2) of Section 24 of the Orissa Grama Panchayat Act, 1964 (for short, 'the Act') provides that the date, hour and place of meeting of no-confidence motion shall be fixed at least 15 clear days before the date so fixed. In the instant case, the notice was issued on 30.9.2009 for holding such meeting of no confidence motion on 7.10.2009. Therefore, there is no clear 15 days' notice for holding such meeting as provided u/s 24(2) (c) of the Act. Hence, the notice dated 30.09.2009 fixing the date for holding meeting to move no confidence motion on 07.10.2009 against the writ appellant suffers from procedural irregularity, illegality and is liable to be quashed. Since pursuant to the first notice, the meeting for no confidence motion could not be held, it is the duty of the opposite parties to notify the date of the second meeting by giving 15 days' clear notice to the persons concerned. Learned Single Judge erroneously placed reliance on the two decisions of this Court in the case of *Sri Balmiki Pradhan v. State of Orissa and others*, 2007(I) OLR 8 and in the case of *Rushinath Rout v. State of Orissa and others*, 99 (2005) CLT 402, wherein the factual scenario was that there was a notice prior to the initial date fixed for the meeting adjourning/deferring the meeting to another future date. In the present case, the meeting was initially fixed to 22.9.2009. Subsequently, another notice was issued fixing the date to 7.10.2009. Mr. Mishra further argued that if the interpretation of learned Single Judge is accepted then Section 24 would be rendered nugatory as there can be a notice fixing a particular date and on that date if no meeting is held, then the first notice is to be kept alive and on any subsequent date the meeting can

be convened all of a sudden. Concluding the argument, Mr. Mishra prayed for setting aside the impugned order and to allow the present writ appeal.

4. Per contra, learned Government Advocate submitted that the date fixed for holding meeting to move no confidence motion against the Sarpanch or Naib-Sarpanch cannot be adjourned, but prior to the date fixed it can be deferred to some other date. It was further submitted that 15 days' clear notice is not required in the case of deferment of the date for holding such meeting. While issuing first notice for holding the meeting for no confidence 15 days clear notice was given. Therefore, the second notice cannot be said to be invalid for not giving 15 days' clear notice.

5. Mr. S.K. Nanda, learned counsel for respondent No.6 adopting the stand taken by the learned Government Advocate submitted that there is no illegality or irregularity in issuing the second notice without giving 15 days' clear notice as provided under Section 24(2)(c) of the Act. So far second notice issued for convening meeting for no confidence motion is concerned, provision of Section 24(2)(c) has no application.

6. On the rival contentions raised by learned counsel for the parties, the question that falls for consideration by this Court is as to whether 15 days' clear notice as provided under Section 24(2)(c) of the Act is necessary in respect of a second/subsequent notice issued after expiry of the date initially fixed in the first notice giving clear 15 days' time to move no confidence motion against a Sarapanch or Naib Sarapanch?

7. To deal with the above question, it is necessary to know what is contemplated in Section 24 of the Act which deals with vote for no confidence against a Sarpanch or Naib-Sarpanch. The relevant portion of Section 24 is quoted below:

> "24. **Vote of no confidence against Sarpanch or Naib-Sarpanch** :
>
> (1) Where at a meeting of the Grama Panchayat specially convened by the Sub-divisional Officer in that behalf a resolution is passed, supported by a majority of not less than two-thirds of the total membership of the Grama Panchayat, regarding want of confidence in the Sarpanch or Naib-Sarpanch the resolution shall forthwith be forwarded by the Subdivisional Officer to the Collector, who shall immediately on receipt of the resolution publish the same on his notice board and with effect from the date of such publication, the member holding the office of Sarpanch or Naib-Sarpanch, as the case may be, shall be deemed to have vacated such office.

(2) In convening a meeting under Sub-sec.(1) and in the conduct of business at such meeting the procedure shall be in accordance with such rules, as may be prescribed subject however to the following provisions, namely :

(a) …. ….. …..

(b) … …. ….

(c) the Subdivisional Officer on receipt of such requisition shall fix the date , hour and place of such meeting and give notice of the same to all the members holding office on the date of such notice along with a copy of the requisition and of the proposed resolution, at least fifteen clear days before the date so fixed;

(d) the aforesaid notice shall be sent by post under certificate of posting and a copy thereof shall be published at least seven days prior to the date fixed for the meeting in the notice board of the Samiti;

(e) the proceedings of the meeting shall not be invalidated merely on the ground that the notice has not been received by any member,

(f) to (k) ……"

8. This Court had occasion to interpret the above provision in the case of *Sarat Padhi v. State of Orissa and others*, 1988 (I) OLR 80 wherein this Court held that requirement of giving notice and fixing the margin of time between the date of notice and date of meeting are mandatory, violation of which will make the meeting invalid. Relevant portion of the said judgment is quoted hereunder:

> "The scheme of the notice contemplated under Sec. 24(2)(c) may be divided into three parts – (i) requirement of giving the notice, (ii) fixing the margin of time between the date of the notice and the date of the meeting, and (iii) service of notice on the members I am of the view, which is also conceded by the learned Advocate General, that the first two parts, namely, the date of issue the notice and the margin of clear 15 days between the date of the notice and the date of the meeting, are mandatory. In other words, if there is any breach of these two conditions, then the meeting will be invalid without any question of prejudice. But the third condition, i.e., the mode of service or the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting, will not render the meeting invalid. This requirement is only directory.

> This is also based on a sound public policy as in that event any delinquent Sarpanch or Naib-Sarpanch can frustrate the consideration of the resolution of no confidence against him by tactfully delaying or avoiding the service of the notice on him and thus frustrate the holding of the meeting. The legislature has also accordingly taken care to provide in unequivocal terms a provision to obviate such contingencies by incorporating Clause (c) to Sub-sec. (2) of Sec.24."

9. Now, the question arises for consideration is as to whether such mandatory provision of Sec. 24(2) (c) is applicable in respect of the second/subsequent notice issued for the purpose of holding the meeting of no-confidence motion against the Sarpacnh or Naib-Sarpanch when no meeting could be held pursuant to the first notice and second notice was issued after expiry of the date fixed in the first notice. In the present case, initially the meeting was fixed to move no-confidence motion against the appellant on 22.9.2009 and on the said date no such meeting took place. No further date was fixed prior to or on 22.9.2009. Therefore, for all practical purposes the first notice has lost its life. In that event, if a second /subsequent notice is issued that must be treated as a fresh notice. Once it is treated as a fresh notice, the provisions of Sec. 24(2)(c) of the Act is applicable and it is mandatory on the part of the concerned authority to give clear 15 days' notice for the purpose of convening the meeting of no-confidence against a Sarpanch or Naib-Sarpanch. In the instant case, admittedly, in the second/subsequent notice no clear 15 days' time was given as provided in Sec. 24(2)(c) of the Act for convening the meeting of no-confidence motion against the appellant as the said notice was issued on 30.9.2009 fixing the date to 7.10.2009. Therefore, the second/subsequent notice dated 30.9.2009 fixing the date of no-confidence motion meeting to 7.10.2009 is not sustainable in law.

10. Learned Single Judge relying upon the decisions of this Court in *Rushinath Rout (supra)* and *Sri Balmiki Pradhan (supra)* held that there is no bar for holding the second meeting on a subsequent date if the same has not been held at all on the date when it was scheduled to be held earlier. Fifteen days clear notice was not required for holding the second meeting since in the first notice time for 15 clear days was given.

For the reasons stated in the preceding paragraph, we are unable to accept such view of the learned Single Judge. Moreover, in both the above cases factual scenario was different.

11. In the case of *Rushinath Rout (supra)* before expiry of the initial date fixed for the meeting, subsequent notice was issued adjourning/deferring the

meeting to another future date. In the said case, initially the date of holding no confidence motion meeting was fixed to 12.8.2004 and the Sub-Collector, Keonjhar vide his order dated 3.8.2004 adjourned the date of meeting of the Grama Panchayat from 12.8.2004 to 23.8.2004 whereas, in the instant case, the meeting was initially fixed to 22.9.2009 and on the said date no meeting took place and subsequently another fresh notice was given on 30.9.2009 fixing the date to 7.10.2009.

12. In the case of *Sri Balmiki Pradhan (supra)* the question before this Court was as to whether the meeting held on 2.2.2005 in which the vote of no confidence was passed against the petitioner, is an adjourned meeting as contemplated under Section 24(2) (h) of the Act and as to whether such meeting is barred by the said provision or is contrary to the said provision of the Act. In that case, meeting for vote of no confidence against the petitioner which was originally fixed to 15.1.2005 was not held at all due to exigency beyond control of the Sub-Collector and on account of such event a fresh notice was issued fixing the said meeting to 2.2.2005 on which date the vote of no confidence was moved against the petitioner. In that case, this Court held that meeting held on 2.2.2005 on which vote of no confidence was passed against the petitioner and charge of the post of Sarpanch was taken over by the Naib Sarpanch was neither illegal nor contrary to provision of Section 24(2)(h) of the Act as the meeting was not an adjourned meeting. In that case, the question before the Court was not that no 15 days' clear notice was given in the second notice as provided under Section 24(2)(c) of the Act. Therefore, the judgments of this Court on which the learned Single Judge has placed reliance have no application to the facts of the case at hand.

13. In view of the above, the impugned order passed by the learned Single Judge is set aside and the second notice dated 30.9.2009 fixing the date to 7.10.2009 for holding meeting to move no confidence motion against the appellant is hereby quashed. However, liberty is given to opposite party no.2-Sub-Collector, Sonepur to convene meeting in accordance with law to move the no confidence motion against the appellant.

14. In the result, the writ appeal is allowed with the above observation.

Writ appeal allowed.

2011 (II) ILR- CUT- 767

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

RVWPET NO.25 OF 2010 (With Batch)(Decided on 13.5.2011).

NAKULA CHARAN GOCHHAYAT & ORS. …….Petitioners.

.Vrs.

SECRETARY, JAGATSINGHPUR SUB-DIVISIONAL HOUSE BUILDING COOPERATIVE SOCIETY LTD. & ORS. ……Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 47, RULE 1.

Review – Impugned order was passed exparte in which the property of the review-petitioner has been sold to the auction purchaser without putting it in public auction by adopting unfair and fraudulent means in flagrant violation of Rule 123 and 124 of the Orissa Co-operative Societies Rules 1965 – Opp.Party No.1 society has also not ensure that the property of the defaulter must be sold in such a manner so that it would fetch good money – Collusion of the Secretary of the Society with the purchaser – Held, review petition is allowed – Writ petition filed by the petitioner-loanee is allowed and the Writ petition filed by the third party purchaser is dismissed with cost of Rs.10,000/-.

(Para 58)

Case laws Referred to:-

1.2010 (I) OLR 947 : (Kartika Kissan-V- State of Orissa & Ors.)
2.(2007) 10 SCC 448 : (Lachhman Dass-V- Jagat Ram & Ors.)
3.AIR 1973 SC 2593 : (Gajadhar Prasad & Ors.-V-Babu Bhakta Ratan & Ors.)
4.AIR 1995 SC 1632 : (Chairman & Managing Director,SPICOT.-V-Contromix(P)Ltd.
5.(2004) 7 SCC 151 : (Gajraj Jain-V-State of Bihar & Ors.)
6.AIR 1972 SC 1816 : (State of Orissa& Ors.-V-Harinarayan Jaiswal & Ors.
7.107(2009)CLT 250 : (Swastik Agency & 2 Ors.-V-State Bank of India, Main Branch Bhubaneswar & 3 Ors.)
8.AIR 1973 SC 855 : (Sirsi Municipality by its President, Sirsi-V-Cecelia Kom Francis Tellis.)
9.AIR 1972 SC 1767 : (R.N.Nanjundappa-V-T.Thimmmaiah & Anr.)
10.AIR 2004 SC 1377 : (Sultan Sadik-V- Sanjay Raj Subba & Ors.)
11.AIR 1970 SC 2037 : (Navalkha & Sons-V- Sri Ramnya Das & Ors.)

12.(2008)9 SCC 299 : (Valji Khimji & Co.-V-Official Liquidator of Hindustan Nitro Product (Gujarat)Ltd. & Ors.)
13.2008 AIR SCW 5284 : (FCI Software Solutions Ltd.-V-L.A.Medical Devices Ltd. &Ors.)
14.(2008) 9 SCC 284 : (Dr. Rajbir Singh Dalal-V-Caudhari Devi Lal University, Sirsa & Anr.)
15.AIR 2000 SC 2346 : (Divya Manufacturing Company(P) Ltd. & Anr.-V-Union Bank of India & Ors.)
16.AIR 1036 PC 253 : (Nazir Ahmed-V- King Emperor)
17.AIR 2004 SC 2615 : (Ram Phal Kundu-V-Kamal Sharma & Indian Bank's Association-V-Devkala Consultancy Service).
18.(1992) 1 SCC 534 : (Shrisht Dhawan(Smt.)-V- Shaw Bros.,)
19.(2009) 12 SCC 378 : (State of Orissa & Ors.-V-Harapriya Bisoi)
20.AIR 1970 SC 645 : (Champalal Binani-V-CIT, West Bengal)
21.(2008) 12 SCC 481 : (K.D. Sharma-V-Steel Authority of India Ltd. & Ors.
22.AIR 2004 SC 1815 : (Jamshed Hormusji Wadia-V-Board of Trustees, Port of Mumbai & Anr.)
23.AIR 2005 SC 3434 : (Ashutosh-V-State of Rajasthan & Ors.)
24.AIR 1988 SC 157 : (Haji t.M. Hassan Rawther-V-Kerala Finance Corpn
25.AIR1974 SC 555 : (E.P. Royappa-V-State of Tamil Nadu)
26.AIR 1967 SC 1458 : (State of A.P. & Anr.-V- Nalla Raja Reddy).

For Petitioner - M/s. Biplab Ku.Dash, S.R.Subudhi, J.Sahoo.

For Opp.Parties- M/s. A.K.Mishra, A.K.Sharma, M.K.Dash, P.K.Dash & S.Mishra (for O.P.1 to 3)
M/s. K.R.Mohpatra, S.Ghosh, A.P.Mishra, D.Panigrahi, A.R.Panigrahi (for O.P.No.4)
For Petitioner - M/s. M.K.Mallick, B.K.Mohanty, J.Sahoo, B.K.Dash, S.R.Subudhi, B.M.Mohapatra & S.Lenka.
For Opp.Parties - M/s. A.K.Mishra & A.K.Sharma (for O.P.No.2)
For Petitioner - M/s. S.N.Mohapatra, K.R.Mohapatra, S.Ghosh.
For Opp.Parties - M/s. S.Mantry, A.K.Mishra, A.K.Sahu, M.K.Dash & R.N.Prusty (for O.P.No.1)
M/s. K.C.Lenka, S.Lenka, B.K.Dash, J.Sahoo (for O.P.No.4)

B.N.* MAHAPATRA,*J. The Review petition has been filed with a prayer to review the order dated 04.12.2009 passed in O.J.C. No.872 of 2000 and for *de novo* hearing of O.J.C. No.872 of 2000 along with O.J.C. No.1545 of 1999 filed by the review petitioner.

2. While the Review petition was being heard, learned counsel for the parties appearing in the writ petitions were directed to make submission on merits, as the prima facie case for review of the order passed in O.J.C. No.872 of 2000 was made out by the petitioner.

3. The fact of this case in a nutshell is that the petitioner-Nakula Charan Gochhayat, who belongs to Scheduled Caste community, applied for a loan in the year 1986-87 to Jagatsinghpur House Building Cooperative Society Ltd., Jagatsinghpur (for short, 'Society') and availed a loan of Rs.38,000/- by mortgaging his homestead land and building constructed thereon. In order to avail the loan, he executed a mortgage deed dated 23.05.1986 in favour of the Society. As he defaulted in payment of instalment towards the loan amount, as per the terms of the agreement executed between the petitioner and the Secretary of the Society (O.P. No.1), the latter filed Dispute Case No.1353/87 before O.P. No.3-Assistant Registrar, Cooperative Societies, Jagatsinghpur (for short, 'ARCS') for realization of the defaulted amount and an award was passed against the petitioner. Since the petitioner did not make any payment pursuant to award, Execution Proceeding No.567/88-89 was initiated for realization of Rs.46,254.10. During pendency of the aforesaid Execution Proceeding, the petitioner filed a petition before the Grievance Cell of the Hon'ble Chief Minister of Orissa which was forwarded to O.P. No.3, before whom the said Execution Proceeding was pending. The E.P. Case was disposed of on 20.06.1992 with a direction to the petitioner to pay O.D. loan for Rs.10,560/- in monthly instalment of Rs.300/-. Assailing the said order, the petitioner preferred Revision Case No.26/94 under Section 112 of the Orissa Cooperative Societies Act, 1962 (for short, 'Act') which was also dismissed on 31.12.1996 on the ground of non-maintainability of the same. Being aggrieved, the petitioner again agitated the self-same grievance before the Registrar of the Societies in Revision Case No.3/97, which was also dismissed directing him to approach the appropriate forum. The petitioner thereafter moved the Orissa Cooperative Tribunal (for short, 'Tribunal') in T.A. No.10/97 and the same was dismissed vide order dated 07.01.1999. Due to the default of the petitioner in repayment of loan, the Society published an advertisement on 30.07.1994 in Oriya Daily 'Dharitri" for sale of the property in question in public auction. Since no buyer came forward, the Society itself purchased the property of the petitioner at a valuation of Rs.90,205/- on 19.09.1994. Thereafter, on negotiation, the Secretary of the Society sold the property in question to O.P. No.4-Arendra Jena for a consideration of Rs.93,000/- and executed a registered sale deed in favour of O.P. No.4 on 11.10.1996.

4. Further case of the petitioner is that he has filed O.J.C. No.1545 of

1999 with a prayer to set aside the demand of the Society, auction dated 19.09.1994, confirmation of the said auction dated 01.07.1995 and sale certificate issued on 19.09.1995 and to set aside the order of the Tribunal dated 07.01.1999 passed in T.A. No.10 of 1997. While the said writ petition filed by the petitioner was pending, O.P. No.4-third party purchaser filed O.J.C. No.872 of 2000, with a prayer to direct the Society to handover vacant possession of the property in question in his favour free from all encumbrances within a stipulated period. This Court by an order dated 04.12.2009 directed O.P. No.3- ARCS to issue necessary writ of delivery of possession of the property and also directed the Superintendent of Police, Jagatsinghpur to grant necessary police assistance in order to avoid breach of law and order situation at the time of taking delivery of possession of the property. After knowing about the order dated 04.12.2009, on 28.01.2010, the petitioner requested the O.P.-authorities to wait for a month and also filed Misc. Case No.54 of 2010 on 09.02.2010 along with Misc. Case Nos.57 and 58 of 2010 for condonation of delay in filing Misc. Case No.54 of 2010 and stay of the order dated 04.12.2009 respectively. However, this Court vide order dated 16.02.2010, dismissed the said Misc. Case No.54 of 2010 granting liberty to the petitioner to work out his remedies in accordance with law. Hence, the present Review Petition.

5. Learned counsel for the review petitioner, Mr.Dash vehemently argued that the petitioner being a 'Doma' belongs to Scheduled Caste community. He availed the loan of Rs.38,000/-. The first instalment of the loan amounting to Rs.7,600/- was disbursed to the petitioner on 28.06.1986 and Rs.30,400/- was disbursed on 01.08.1986 towards 2nd and 3rd instalment with 13.5% interest per annum repayable in forty consecutive half-yearly instalments at the rate of Rs.950/-. Thus, twenty years time was allowed to clear up the loan which was to complete in the year 2006. Against the said loan, the petitioner mortgaged his homestead land and building by executing a bond on 23.05.1986. With the loan amount, he has constructed the building over an area of 1000 Sqft. However, due to petitioner's misfortune, he could not repay the installments regularly. His misfortune started with the death of his mother on 14.02.1987. Though he gave marriage of his daughter on 23.06.1988, she was drove out of by her husband and divorced in the year 1989. On 18.04.1989 elder son of the petitioner fell down in the well and expired. On the next day, i.e. 19.04.1989 due to insect bite to the eyes of the petitioner, he became sick and admitted into S.C.B. Medical College and Hospital, Cuttack. Due to the serious illness of his wife she was bedridden from 1987 to 1992. On 10.02.1993, his minor daughter was kidnapped from School at Alana hat. These are all matters of record. Due to set fire to his house on 08.02.1993, the kitchen and store rooms were

completely burnt and other portion of the house was damaged. Further, due to the massive flood occurred on 14.07.1994 the entire area including the residential house of the petitioner was submerged.

6. The petitioner raised his grievance in Dispute Case No.1353 of 1987 in the Court of the ARCS but in that case an *ex parte* award was passed and the Society filed E.P. Case No.567 of 1988-89. Annual income of the petitioner was Rs.4,500/- against the loan of Rs.38,000/-. He has repaid about Rs.90,000/- in 20 years. Filing of Dispute Case No.1353 of 1987 was not maintainable as the petitioner was not a defaulter in the year 1987. When the petitioner approached the Grievance Cell of the Hon'ble Chief Minister, direction was given to the ARCS to reconsider the case of the petitioner and accordingly the ARCS passed an order to pay Rs.10,560/- in 36 monthly installments at the rate of Rs.300/- per month. The petitioner thereafter started to pay the said installments in spite of his misfortunes. After the order dated 20.06.1992, the petitioner arranged a cash of Rs.600/- and when wanted to pay, the Secretary of the Society refused to accept the same. Finding no other alternative, the petitioner sent an amount of Rs.600/- by way of money order vide receipt No.1827 dated 11.07.1994, but the same was not accepted. Similarly, a Demand Draft of Rs.600/- was sent by regd. post which the Secretary of the Society also returned to him by post. Thereafter, the petitioner received a demand notice from the Society on 31.03.1994 for Rs.83,342/- as calculated on 01.01.1994 and the petitioner was intimated that if the said amount would not be paid his house will be auctioned. On receiving said demand notice, petitioner filed Revision Case No.26/94. The said Revision Case was dismissed on 31.12.1996 on the ground of maintainability. Thereafter, the petitioner filed T.A. No.10/97 in the Tribunal on 20.03.1997. On 07.01.99, the Tribunal dismissed the Appeal No.10/97 without appreciating the facts of the case in proper perspective, upheld the order of the Sale Officer as well as sale conducted and confirmed by the Principal Officer, ARCS on 01.07.1995 and the sale certificate issued on 19.09.1995 in favour of the decree-holder Society for Rs.90,805/- as no other bidder came up to participate in the auction to purchase the mortgaged property. Subsequently, the said property was sold to O.P. No.4-Arendra Kumar Jena for Rs.93,000/-.

7. It is further submitted by the petitioner's counsel that no reasonable opportunity of hearing was afforded to the petitioner and the procedures laid down in Rule 123 and Rule 124 of the Orissa Co-operative Societies Rules (hereinafter called as the "Rules" in short) were not followed before selling the property of the petitioner to O.P. No.4. Therefore, it is contented that sale confirmed in favour of O.P. No.4-Arendra Kumar Jena is illegal and void. The

Secretary of the Society has committed an error in refusing to receive the money order and bank draft. While the ARCS being the Principal Officer vide order dated 20.06.1992 allowed the petitioner to pay the balance amount of Rs.10,560/- in 36 installments at the rate of Rs.300/- per month, it is very surprising how the said balance of Rs.10,560/- was inflated to Rs.83,342/- on 01.01.1994 within a period of one and half years. This conduct of the O.P.-Society is enough to show how it has harassed the petitioner.

In support of his contention, learned counsel for petitioner relied upon a judgment of this Court in *Kartika Kissan Vs. State of Orissa & Ors.,* 2010 (I) OLR 947. When a loan of Rs.38,000/- was taken in the year 1986 and repayment time was allowed 20 years with 13.5% interest per annum the O.P.-Society has committed an error in filing the dispute case in the year 1987, though the petitioner was not in default. Though the payments were made, same were not taken into account and the amount of outstanding dues the same was not reduced. With a mala fide intention, the petitioner's land and building was sold to O.P. No.4 without any public auction. The Tribunal's finding in its order that there was proper compliance of all procedure in conducting the public auction for sale of the property is an error of law, as the same relates to movable property. The market value of the property of the petitioner is worth Rs.8 to 9 lakhs as per Annexure-10, which has been illegally given to the said Society at Rs.90,805/-. Sale of the petitioner's property to O.P. No.4 on negotiation by the Society at Rs.93,000/- speaks volumes of illegal activities of the O.P.-Society. The confirmation of sale of the property in favour of opposite party No.4 is the outcome of fraud and collusion and therefore, it being illegal and void is liable to be set aside.

8. Mr.Mishra, learned counsel appearing for O.P.-Society submitted that the petitioner is a chronic defaulter in repaying the loan advanced to him by the Society. Secretary of the Society proceeded with the E.P. Case against the loanee. When the bidder did not turn up due to various reasons, the sale of the mortgaged property was adjourned from time to time and in compliance of the provisions of Rule 108 of the Rules fresh proclamation has been issued and ultimately, when no bidder turn up on 19.09.1994, the mortgaged land and building was sold to the decree-holder Society for Rs.90,805/-. The sale of the property of the petitioner has been confirmed by Principal Officer-ARCS on 01.07.1995. Subsequently, the Society sold the property to one Arendra Kumar Jena-opp. party No.4. It is the case of the Society that in spite of opportunities given to the petitioner, he did not avail the same to settle the loan amount and therefore, the Society was compelled to put the property to sale. Therefore, it cannot be said that no notice was

given to the Review petitioner in E.P. Case. Relying upon Section 103(4) of the Act read with Schedule 'I' attached to the Act, Mr.Mishra vehemently argued that if the petitioner was in any way aggrieved with the action of the Society in selling his immovable property within 30 days of such sale, he could have applied to the Auditor General to set aside the sale of the property on the ground of material irregularity, or mistake or fraud. According to Mr.Mishra, there is no infirmity and illegality in the action of Society in selling the property of the petitioner to the 3rd party, opposite party No.4-Arendra Kumar Jena as well as in the order passed by the Tribunal and therefore, there is no need to quash the same as prayed by the petitioner.

9. Opposite party No.3-Asst. Registrar, Co-operative Societies, Jagatsinghpur Circle, Jagatsinghpur in his affidavit dated 10.11.2000 stated that on 19.09.1994, the auction was held for sale of the property of the loanee-petitioner. Since, no bidder came forward to take part in the auction for the immovable property along with building of the petitioner, opposite party No.3-Asst. Registrar as the Principal Officer issued sale confirmation certificate under Section 114(1) of the Act, 1962 in favour of opposite party No.1-Secretary of the Society for Rs.90,805/-. The third party purchaser purchased the said land and building from opposite party No.1-Secretary on 11.10.1996 for Rs.93,000/- vide Registered Deed No.1367 dated 11.10.1996 in the Sub-Registrar Office, Devidol.

10. Mr. K.R.Mohapatra, learned counsel appearing for the 3rd party purchaser-A.K.Jena supported the stand taken by the Society and vehemently argued that there is no illegality or infirmity in the action taken by the Society in selling the property of the petitioner to opposite party No.4. Pursuant to sale, he has taken delivery of possession of the property. Since the sale has been completed and possession of the property has been taken by the 3rd party purchaser, this Court should not set aside such sale by exercising its discretionary and supervisory power under Articles 226 and 227 of the Constitution of India.

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

(i) Whether in the facts and circumstances, a case for review of order dated 04.12.2009 passed in OJC No. 872 of 2009 is made out?

(ii) Whether before selling the property of the petitioner-loanee to opposite party No.4-3rd party purchaser- Arendra Kumar Jena, the statutory provisions of the Act and Rules were duly complied with?

(iii) Whether the action of opposite party No.1-Secretary, Jagatsinghpur Sub-Divisional House Building Co-operative Society Ltd. in retaining the property in its favour for the reason that no bidder came forward in the public auction and further in entering into an agreement with the 3rd party purchaser on 20.09.1994 to sell the property of the petitioner without putting the property in question to public auction and also before issuance of the sale certificate by opposite party No.3 in favour of opposite party No.1 is collusive and fraudulent?

(iv) Whether noncompliance of statutory provisions and adoption of fraud and collusion by opposite party No.1-Secretary while dealing with the property of the petitioner vitiate the confirmation of the sale made in favour of opposite party No.4-3rd party-purchaser?

(v) What order?

12. Question No.(i) relates to review of order dated 04.12.2009 passed in OJC No. 872 of 2009. Though the scope of review of an order passed by this Court is limited, in the instant case, we find that the impugned order was passed ex parte against the review petitioner in OJC No.872 of 2009 in which various material facts were suppressed. In course hearing, we found that the property of the review-petitioner has been sold in flagrant violation of the statutory provisions and contrary to the settled position of law. It is further noticed that opp. party-authorities have sold the property of the petitioner in collusion with third party purchaser by committing fraud without putting the same in public auction, the details of which will dealt hereinafter.

In view of the above, the Review Petition is allowed as a case for review is clearly made out.

13. Question No.(ii) is as to whether the statutory provisions are complied with before selling of the property of the petitioner to the 3rd party purchaser, Arendra Kumar Jena. In this connection, the relevant provisions of Rules 123 and 124 of the Orissa Co-operative Societies Rules, 1965 (in short, "Rules") are extracted below:-

> "**123. Proclamation before Sale --** Proclamation of sale shall be published by affixing a notice in the office of the Principal Officer of the area at least 30 days before the date fixed for the sale and also by beat of drum or other customary mode in the said village on the date previous to the date of sale and on the date of the sale prior to the commencement of the sale. A copy of the proclamation may also be sent to the nearest Revenue Officer having jurisdiction

over the village for affixing the same in the Notice Board. The proclamation shall state the time and place of sale and specify as fairly and as accurately as possible–

(i) the property to be sold;

(ii) any liability to which the property is subject;

(iii) the amount of the recovery of which the sale is ordered; and

(iv) any other particulars which the Sale Officer considers material for a purchaser to know in order to judge of the nature and value of the property

124. Sale to be by public auction – (1) When any immovable property is sold under the rules the sale shall be subject to the prior encumbrances of the property, if any. The sale shall be by public auction to the highest bidder provided that it shall be upon to the Sale Officer to decline to accept highest bid where the price offered appears to be unduly low or for other reasons to be recorded in writing and provided also that the Principal Officer or the Sale Officer may in his discretion, adjourn the sale to a specified day and hour, recording his reasons for such adjournment. Where a sale is so adjourned for a longer period than 15 days or where there is a service of short adjournments which taken in aggregate, amount to more than 15 days, a fresh proclamation under Rule 123 shall be made unless the defaulter consents to waive it in writing in the presence of two witnesses. The time of sale shall be fixed by the Principal Officer and the sale shall be held after the expiry of not less than 30 days calculated from the date on which notice of the proclamation was affixed in the office of the Principal Officer and the place of sale shall be the village where the property to be sold is situated or such adjoining prominent place of public resort as may be fixed by the Principal Officer of the area.

(2) The Sale Officer shall have the power to divide the property into lots if he thinks it necessary in the interests of the defaulter or the decree-holder. Where the property is divided into lot for purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot. When in the proclamation of sale, the separate lot are mentioned and the order of sale of each lot is mentioned, the Sale Officer shall not vary the lots in the sale and shall not make any departure in the order of the sale in the lots

unless the decree-holder and defaulter give their consent in writing in the presence of two witnesses."

14. Under the Orissa Co-operative Societies Rules, 1965 the interest of the defaulter is well protected. Rule 123 of the said Rules provides wide publication of proclamation of sale. As per the said Rules, proclamation of sale of the property shall be published by affixing a notice in the office of the Principal Officer of the area at least 30 days before the date fixed for sale and also by beat of drums or other customary mode in the said village on the date previous to the date of sale and on the date of sale prior to the commencement of the sale. It also further provides that a copy of the proclamation should be sent to the nearest Revenue Officer having jurisdiction over the village for affixing the same in the notice board to bring to the notice of the public that the property will be sold in public auction. The proclamation shall state the time and place of sale and other particulars about the property decided to be put in public auction. Rule 124 of the said Rules, 1965 provides, that where the price offered by the highest bidder appears to be low, the Principal Officer or the Sale Officer shall adjourn the date of sale to some other date and in case where the sale is adjourned for a period of more than 15 days, a fresh proclamation under Rule 123 shall be made unless the defaulter waives it in writing in the presence of two witnesses. Rule 124(2) empowers the Sale Officer to divide the property in lots in the interest of the defaulter and decree holder.

15. A conjoint reading of Rules 123 and 124 of the Rules make it amply clear that the legislative intent is to protect the interest of the defaulter, whose property is decided to be sold by all possible means. In other words, the Society must see that maximum price, should be fetched to the property which can be achieved only through wide publicity of the intended sale. Needless to say that all possible steps should be taken by the Sale Officer before depriving the defaulter of his right to the property, which is a constitutional right.

16. Needless to say that public money has to be recovered from the defaulters, who do not repay the loan amount to the financial institutions. This does not mean that financial institutions including the Society are at liberty to dispose of the secured asset of the defaulters either in an unreasonable or arbitrary manner and in flagrant violation of the statutory provisions of the Act and Rules and principles of natural justice.

17. In ***Lachhman Dass Vs. Jagat Ram & Ors.,*** *(2007) 10 SCC 448*, the apex Court held that a right to hold property is a constitutional right as well as human right. A person cannot be deprived of his property except in

accordance with provisions of the statute. (Also see *Chairman, Indore Vikas pradhakaran Vs. Pure Industrial Coke and Chemicals Ltd. & Ors, AIR 2007 SC 2458* and *Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood & Ors., (2007) 11 SCC 40)*

18. **In Gajadhar Prasad & Ors., vs. Babu Bhakta Ratan & Ors**., AIR 1973 SC 2593, it had been held that the estimated value of the property to be sold, must not accept merely the *ipse dixit* of one side and a fair valuation has to be made. More so, the judgment debtor is to be given a reasonable opportunity in regard to the valuation of his property sought to be sold, in absence thereof the sale of the mortgaged property would suffer from material irregularity and illegality where the judgment-debtor suffers substantial injury by the sale.

19. The apex Court in **Chairman and Managing Director, SPICOT vs. Contromix (P) Ltd**., AIR 1995 SC 1632 held as under:

> "in the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. But many times it may not be possible to secure the best price by public auction when the bidders join together so as to depress the bid or the nature of the property to be sold is such that suitable bid may not be received at a public auction. In that event, any other suitable mode for selling of property can be by inviting tenders. In order to ensure that such sale by calling tenders does not escape attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price".

Thus, the condition precedent for taking away someone's property or disposing of the secured asset is that the authority must ensure compliance of the statutory provisions of the Act and Rules.

In the present case, nothing has been stated in the affidavit filed by opposite parties that the provisions of Rules 123 and 124 have been strictly complied.

20. In course of hearing of these petitions, we summoned the original records from the Society and ARCS. Order sheet entry dated 16.12.1991 reveals that the date of sale of the property was fixed to that date, but the

sale was adjourned to 31.12.1991 at 11 A.M. at Jagatsinghpur Sub-Division Office of the Society due to want of bidder. There is nothing on record to show that prior to 16.12.1991 any step was taken to publish the proclamation of the sale of the property in terms of Rule 123 of the Orissa Cooperative Societies Rules. Again, the sale was fixed to 20.07.1994. The order sheet entry of 20.07.1994 reveals that several persons made application that they were not able to appear for bidding due to heavy flood and prayed one month's time and on the same date the sale was adjourned to 19.08.1994 and direction was given to issue fresh notice. There is nothing on the record to show that any such fresh auction notice was issued and published as directed on that date. The entry of the order sheet of 19.08.1994 shows that since no bidder appeared the sale was adjourned to 19.09.1994 and direction was given to issue notice. The order sheet entry of 19.09.1994 shows that wide publication as to sale of the immovable property of the judgment-debtor has been made and despite wide publication, no bidder came forward to take part in the auction sale of the property like previous three dates. Therefore, the immovable property of the judgment-debtor was given to the decree holder Society for an amount of Rs.90,805/-.

21. Schedule of property sold to the Society shows that land in question pertains to Khata No.117, Plot No.367, area AC.0.10 decimal having a pucca building of three rooms with RCC roof. There is nothing on record to show that proclamation of sale has been published in the manner prescribed under Rule 123 of the Rules describing the detailed particulars of the property in question. Copy of the auction notice No.44 dated 19.08.1994 shows that copy of the said auction notice was issued and signed by the Sale Officer of the Society, but below the signature of Sale Officer, the copy of the said sale notice had been directed to be forwarded to Asst. Registrar, Jagatsinghpur/ N.Gochhayat/ Tahasildar, Balikuda/ B.D.O., Naugaon/Secretary, Alana Cooperative Society Ltd. G.P. for his information, with request to affix the notice in their notice board for wide publicity under the signature of Secretary of the Jagatsinghpur Divisional House Building Cooperative Society Ltd. The name of N.Gochhyat, as it appears has been inserted in different ink and handwriting. There is nothing to show that the copy of such auction notice issued by the Sale Officer was received by the authorities to whom copies had been directed to be issued and the said authorities in turn published the same as required under Rule 123. There is also no material to show that copy of the said sale notice was issued to and received by the loanee.

22. Therefore, we are of the view that auction notice fixing date of sale to 19.09.1994 has not been published as required under Rule 123 read with Rule 124 of the Rules. Similarly, from auction notice No.2 dated 20.07.1994

by which the date of sale of the property was adjourned to 19.08.1994 it appears that the name of the loanee N.Gochhayat has been inserted. In the advertisement dated 14.07.1994 in Oriya Daily "Dharitri" (at running page 33 of the record produced), the property of the loanee decided to be sold, only the description in respect of Mouza, Khata number, Plot number and area have been given without disclosing about the existence of pucca building having R.C.C. roof with three rooms and other details. Therefore, we are of the view that no publication or proclamation of the sale of the property was made as required under Rule 123 of the Rules.

23. In the instant case, if no bidder participated in the auction process held on 19.09.1994, it is the bounden duty of opposite party No.2-Sale Officer to go for second advertisement and the sale proclamation should have been made in terms of Rule 123 and the property in question should not have been sold to the opposite party No.1-Secretary for Rs.90,805/- as the same is in contravention of the provisions of Rule 124 and opposite party No.1 thereafter should not have sold the said property in favour of third party purchaser without putting the property in public auction which is the legal requirement.

24. Rule 124(2) also empowers the Sale Officer to divide the property in lots in the interest of the defaulter and decree holder. Such a power is vested with the Sale Officer only for the purpose of fetching best price of property. There is nothing on the record produced before us to show that any action has been taken in terms of Rule 124(2) when the land in question is of 0.10 decimals and only on a part of it, a building has been constructed over the plinth area of 1000 sq. ft. There is also nothing stated in the affidavit and also nothing available on the record to show how valuation of the property was made and on what basis the property of the petitioner-defaulter has been sold at Rs.90,800/- to the Society and the Society thereafter sold it for Rs.93,800/- to the 3rd party purchaser.

25. In **Gajraj Jain vs. State of Bihar & others**, (2004) 7 SCC 151, the apex Court held that before putting the assets for sale the Financial Corporation must ascertain the market value of the property, assets should be sold on itemized basis or as a whole, whichever found to be more profitable, and bidders should know the details of the assets or itemized value. Property is to be sold for obtaining the market price and not merely for recovering the dues of the Corporation or any other subsequent charge-holder. In such a case auction of the property has to be held to obtain the best possible price for the mortgaged assets and the best possible price must, in the context, mean the fair market price. The authority, while assessing the fair market price, must act in accordance with the statutory

rules and cannot be permitted to act unreasonably and arbitrarily. The reasonableness is to be tested against in the dominant consideration to secure the best price.

26. It is the bounden duty of opposite party-society to ensure that the property of the defaulter must be sold in such a manner so that it would fetch the best price.

27. In case the property is disposed of to a private party without adopting any other mode provided under the statutory rules, there may be a possibility of collusion/fraud and even if public auction is held, the possibility of collusion amongst the bidders cannot be ruled out. In **State of Orissa & Ors., vs. Harinarayan Jaiswal & Ors.**, AIR 1972 SC 1816, the apex Court held that a highest bidder in auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

28. The legal position remains that every statutory provision requires strict adherence by the Executing Authority for the reason the statue creates rights in favour of the citizens, and, if any order is passed de hors the same, it cannot be held to be a valid order and cannot be enforced. (See ***Swastik Agency & 2 Ors.-v-State Bank of India, Main Branch, Bhubaneswar & 3 Ors.****, 107(2009)CLT 250)*.

29. Thus, law requires that the valuation of the property decided to be put to sale must be done by application of mind for the purpose of fetching the best value of the property and to avoid the possibility of collusion of the bidders as well as with unscrupulous statutory authorities.

30. In view of the above, we are of the considered view that opposite party No.1-Secretary has sold the property of the petitioner to opposite party No.4 without adhering to and in flagrant violation of the provisions of Rules 123 and 124 of the Orissa Co-operative Societies Rules.

31. Question No.(iii) is as to whether the action of opposite party No.1 in selling the property of the petitioner to opposite party No.4 is the result of fraud and collusion.

Opposite Party No.1-Secretary in his affidavit dated 04.12.2009 stated that due to default in payment of loan, the property of the loanee-petitioner was put to public auction in E.P. Case No.567 of 1988-89 on 19.09.1994 by opposite party No.2-Sale Officer, Jagatsinghpur. It is further stated that the purchaser had written an application on 16.09.1994 under Annexure-A/1 to

opposite party No.1-Secretary to purchase the house in question. As no bidder came to participate in the said public auction, opposite party No.1-Secretary purchased the house in question and sale certificate was issued in favour of opposite party No.1-Secretary dated 19.06.1996. On 20.09.1994, the third party purchaser made an agreement under Annexure-B/1 with opposite party no.1-Secretary for purchase of the house in question.

32. The above averments of opp. party No.1-Secretary clearly show how he was interested to sell the property of the petitioner in question in favour of 3rd party purchaser without putting the same in public auction and much prior to issue of sale certificate in his favour on 19.06.1996 and hurriedly entered into agreement with the purchaser on 20.09.1994, who did not participate in the public auction held on previous date, i.e., 19.09.1994.

33. It is unfortunate to note that opposite party No.1-Secretary entered into an agreement with the 3rd party auction purchaser on 20.09.1994 on the basis of his application made on 16.09.1994 under Annexure-A/1 to the affidavit dated 04.12.2009. The said application reveals that the 3rd party purchaser made an application to opposite party No.1-Secretary stating that he had deposited a sum of Rs.93,000/- in Dena Bank, Naya Sarak Branch, Cuttack and he further requested opposite party No.1-Secretary to intimate the Branch Manager, Dena Bank to transfer the money to the account of Secretary, HBCS and only after deposit of the said amount of Rs.93,000/- in their account, opposite party No.1-Secretary would execute a registered sale deed in his favour. It is further shocking that on the basis of the said letter on the same day i.e. 16.09.1994, opposite party No.1-Secretary wrote a letter to the Manager, Dena Bank, Nayasarak, Cuttack to transfer an amount of Rs.93,000/- in favour of the Secretary to enable the Society to transfer the building in favour opposite party no.4-A.K. Jena although the public auction was scheduled to be held on 19.09.1994 in respect of the property in question. In the said letter, the Secretary also solicited an early action by the Bank. We are unable to understand how opposite party No.1-Secretary could write a letter to the bankers of opposite party no.4 on 16.09.1994 to transfer Rs.93,000/- from the account of opposite party No.4-purchaser to the account of the society to enable the society to sell the property of the petitioner to opposite party No.4, particularly when the auction in respect of the property in question had been scheduled to be held on 19.09.1994. Interestingly, only on 19.09.1994, the decree holder Society purchased the mortgaged property and the sale was confirmed by the Principal Officer, ARCS on 01.07.1995, i.e., much after the O.P No.1-Secretary wrote letter to the Banker of purchaser on 16.09.1994 to transfer Rs.93,000/- to the Society to enable the Society to sale the property of the petitioner to O.P. No.4. Th**e** above said facts revealed from the record speak volume of illegality/fraud committed by opposite party No.1

for achieving his vested interest in selling the mortgaged property in favour of opposite party No.4.

34. Admittedly the said applicant i.e. the present 3rd Party Purchaser did not participate in the auction held on 19.09.1994. Nevertheless, opposite party No.1-Secretary entered into an agreement under Annexure-B/1 with the said 3rd party purchaser on 20.09.1994 that on receipt of the auction amount of Rs.89,375/- from the auction purchaser and confirmation from the Principal Officer, Co-operative Department, Jagatsinghpur Circle, the property in question along with the building would be transferred by opposite party No.1-Secretary to the auction purchaser through a registered deed and the possession of the property would be given within two months from the date of receipt of cash, failing which the entire amount would be returned to the auction purchaser.

35. The above sequence of events, the conduct of opposite party No.1-Secretary and the auction purchaser show how the property of the petitioner has been sold to the auction purchaser adopting unfair and fraudulent means without adhering to the statutory provisions. This also shows how opposite party No.1-Secretary was acting hand in glove with the 3rd party purchaser and sold the property of the petitioner without putting the property in public auction before selling it to the 3rd party purchaser. The actions of the Society and Executing Authority are certainly in flagrant violation of the statutory provisions of the Act, Rules and law laid down by the Apex Court in the cases referred to supra. No reply came forward from opposite party No.1-Secretary as to why before selling the property to 3rd party purchaser, it was not put to public auction as statutorily required under Rule 124 of the Rules.

36. We are further shocked to note that the auction purchaser-Arendra Kumar Jena filed O.J.C. No.872 of 2000 suppressing various material facts including filing of O.J.C. No.1545 of 1999 by the petitioner-loanee in which the Asst. Registrar, Co-operative Societies, Jagatsinghpur, the Secretary, Jagatsinghpur House Building Co-operative Societies Ltd. and opposite party No.4-Arendra Kumar Jena, village : Alana , P.S. Nuagaon, Dist: Jagatsinghpur have been arrayed as opposite party Nos.1,2 and 3 respectively. Though on 05.07.1999, O.P. No.3- third party purchaser appeared through Mr. Mishra in O.J.C. No.1545 of 1999, and produced copy of the judgment and order passed by this Court in O.J.C. No.5553 of 1997, the fact of filing and pending of the said O.J.C. No.1545 of 1999 before this Court was not brought by him to the notice of this Court on the date of hearing of O.J.C. No.872 of 2000 on 13.11.2009 and 04.12.2009. Similarly, as per office noting in O.J.C. No.1545 of 1999 M/s. Srinivas Mishra (2), S. Mantri, A.K. Mishra and A.K. Sharma, learned counsel have appeared for

opposite party No.2-Secretary of the Jagatsinghpur House Building Co-operative Societies Ltd. by filing power dated 21.09.1999 and Misc. Case No.11255 of 1999 dated 21.09.1999 for orders. In spite of the same, on the date of hearing of O.J.C. No.872 of 2000 on 13.11.2009 and 04.12.2009 neither the 3rd party purchaser nor the Secretary-Jagatsinghpur Co-operative Society has brought to the notice of this Court that the petitioner-loanee has filed O.J.C. No.1545 of 1999 and the same was pending before this Court. The orders dated 13.11.2009 and 04.12.2009 were passed after hearing learned counsel for the 3rd party purchaser and Mr. A.K. Mishra, learned counsel appearing for Secretary-Jagatsinghpur Co-operative Society but without hearing the petitioner-loanee. By the said order, this Court directed the Secretary to take possession of the house from the petitioner-loanee and handover possession of the same to the 3rd party purchaser. We deprecate such conduct on the part of the learned counsel, who are officers of the Court and required to give proper assistance to Court to pass just order on appreciation of facts and material evidence on record with reference to the law applicable to the case.

37. As stated in paragraph 21, a copy of the auction notice No.44 dated 19.08.1994 had been directed to be forwarded to the Assistant Registrar, Jagatsinghpur/N.Gochhayat/Tahasildar,Balikuda/B.D.O.,Naugaon/Secretary, Alana Cooperative Society Ltd. G.P. for his information with request to fix the said notice in their notice board for wide publicity. But it appears that the name of N. Gochhayat-defaulter has been inserted in different ink and handwriting. Similarly in the auction notice No.2 dated 20.07.1994 by which the date of sale was adjourned to 19.08.1994, it appears that the name of loanee N. Gochhayat has been inserted.

38. The above fact situation shows that the sale of the property to 3rd party purchaser is nothing but out of massive collusion of the Secretary of the Society and Purchaser and the whole transaction is without transparency.

39. Question No. (iv) is as to whether for non-compliance of statutory provisions and adoption of fraud and collusion by opposite party No.1-Secretary while dealing with the property of the petitioner the confirmed sale in favour of the 3rd Party Purchaser vitiates.

40. It is the settled position of law that when the action of the State or its instrumentalities is not in accordance with the provisions of the Act, Rules or Regulations, the Court must exercise its discretionary and supervisory jurisdiction to declare such action to be illegal and invalid and grant consequential relief to a party for which he or she entitled to in law.

41. ***In Sirsi Municipality by its President, Sirsi -v- Cecelia Kom Francis Tellis, AIR 1973 S.C.855***, the Supreme Court observed that the ratio is that the rules or the regulations are binding on the authorities.

Whenever any action of the authority is in violation of the provisions of the statute or Rules the action is constitutionally illegal, it cannot claim any sanctity in law; and there is no obligation on the part of the Court to sanctify such an illegal act. Wherever the statutory provision is ignored, the Court cannot be a silent spectator to such an illegality and it becomes the solemn duty of the Court to deal with the persons violating the law with heavy hands. (See ***R.N.Nanjundappa Vs. T.Thimmaiah & Anr***., *AIR 1972 SC 1767,* ***Sultan Sadik Vs. Sanjay Raj Subba & Ors***., *AIR 2004 S.C.1377*).

42. In **Navalkha & Sons vs. Sri Ramnya Das & Ors**., AIR 1970 SC 2037, the apex Court while dealing with the confirmation of sale by Court held that there must be a proper valuation report, which should be communicated to the judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law and after confirmation of sale and issuance of sale certificate, Court cannot interfere unless it is found that some material irregularity and illegality in the conduct of sale of the property is committed. The Court further held that it should not be a forged sale.

In **Valji Khimji and Company Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Ors., (**2008) 9 SCC 299, the Court held that auction sale of the property should be set aside only if there is a fundamental error in the procedure of auction of the property e.g. not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially higher amount and not only a little over the auction price, that can by itself suggest that any fraud has been done in holding the auction property or involvement of any kind of fraud.

In **FCI Software Solutions Ltd. vs. LA Medical Devices Ltd., & Ors**., 2008 AIR SCW 5284, the Apex Court considered a case where after confirmation of auction sale it was found that valuation of movable and immovable properties, fixation of reserve price, inventory of Plant and Machineries had not been made in the proclamation of sale, nor disclosed at time of sale notice. Therefore, in such a fact-situation, the sale was set aside after its confirmation.

43. The apex Court in the cases of **Dr. Rajbir Singh Dalal vs. Caudhari Devi Lal University, Sirsa & Anr.,** (2008) 9 SCC 284; and **Divya Manufacturing Company (P) Ltd. & Anr., vs. Union of Bank of India &**

Ors., AIR 2000 SC 2346, and **Valji Khimji and Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Ors**., (2008) 9 SCC 299, held that not giving wide publication of the auction notice itself is a good ground for quashing the confirmation of the sale of the property. In such fact situation, the auction purchaser-opposite party No.4 is entitled to refund the amount deposited by him.

44. When the statutory requirement under Rule 124 of the Orissa Co-operative Societies Rules is that the sale shall be by public auction to the highest bidder, opposite party No.1-Secretary cannot ignore such statutory mandate and sell the property to a 3rd Party Purchaser by entering into an agreement contrary to Rule 124 of the said Rules.

45. Law is also well settled that when the statute provides for a particular procedure, the authority has to follow the same and is not permitted to act in contravention of the prescribed provisions. It has been hitherto uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alteris*", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (*See* ***Taylor v. Taylor, (1876)*** *1 Ch.D.426;* ***Nazir Ahmed v. King Emperor****, AIR 1036 PC 253;* ***Ram Phal Kundu v. Kamal Sharma; and Indian Bank's Association v. Devkala Consultancy Service****, AIR 2004 SC 2615*).

If the statute requires that the property of the petitioner-defaulter shall be sold in public auction following the procedure prescribed under Rules 123 and 124 of the Rules, 1965, the same ought not to be sold in any other manner.

46. Thus, before putting the property of a defaulter to auction, the authorities concerned have legal obligation to satisfy that the price fetched is reasonable and the same has been conducted giving strict adherence to the procedure prescribed by the Statute. If there is any material irregularity and illegality in conducting the sale that will vitiate the sale of the property. Therefore, the said sale can be set aside even after confirmation.

47. The apex Court in ***Shrisht Dhawan (Smt) vs. Shaw Bros.,*** (1992) 1 SCC 534), held as under:-

> "Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept

descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or pubic policy forbids as being prejudicial to another. In Black's Legal Dictionary, 'fraud' is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England*, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines 'fraud' as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false."

48. In a recent decision, the apex Court in ***State of Orissa and Others vs. Harapriya Bisoi,*** (2009) 12 SCC 378 scathingly pulled up government officials for their involvement in dealing with government properties in illegal and collusive manner. [also see ***Kartika Kissan*** *(supra)*]

49. The Court cannot be a party to a case founded on massive frauds, illegalities and irregularities as fraud vitiates everything. The Court has a solemn duty to lift the veil to arrive at the truth.

50. In view of the above settled legal proposition laid down by the Apex Court in plethora of cases and that the property of the petitioner has been sold to opposite party No.4-Purchaser without adhering to the statutory provisions of the Rules and law applicable to the facts of the case and practising fraud as stated above on the petitioner, we have to set aside the sale of the property of the petitioner in favour of opposite party No.1-Secretary

and in turn in favour of opposite party No.4 as the same is illegal and void ab initio in law.

51. Question No.(v) is what order?

Law is well settled that the writ jurisdiction is discretionary in nature and must be exercised in furtherance of justice. The Court has to keep in mind that its order should not defeat the interest of justice nor it should permit an order to secure dishonest advantage or perpetuate an unjust gain or approve an order which has been passed in contravention of the statutory provisions. (See ***Champalal Binani Vs. CIT, West Bengal****, AIR 1970 SC 645;* ***K.D. Sharma Vs. Steel Authority of India Ltd. & Ors.****, (2008) 12 SCC 481.*

In ***Jamshed Hormusji Wadia v. Board of Trusteees, Port of Mumbai & Anr.,*** *AIR 2004 S.C.1815*, the apex Court observed that the Court is concerned with substantial justice and prevent to perpetuate grave injustice to parties and whenever the order is one which shocks the conscience of the Court or suffers on account of disregard to the form of legal process or violation of the principles of natural justice provided by the statutory provisions, the Court must interfere. The Court would never do injustice nor allow injustice being perpetuated just for the sake of upholding technicalities.

In ***Ashutosh v. State of Rajasthan & Ors., AIR 2005 SC 3434***, the apex Court held that substantial justice must be given preference over technicalities and Court must do justice at all costs and at the same time the Court should not forget that justice should be tempered with mercy.

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

53. For the reasons stated above, all the proceedings initiated to put the property of the petitioner in public auction are liable to be quashed being in flagrant violation of the statutory provisions and we, accordingly, do so. The sale of petitioner's property by opposite party No.1 in favour of opposite party No.4-3rd party purchaser is hereby set aside.

54. It would be appropriate for the concerned authority of the State to make a detailed inquiry into the matter as to who are those officers involved

in selling the property of the petitioner in question to the third party purchaser without adhering to the statutory provisions and adopting fraud and unfair means and take necessary action against those persons.

55. The petitioner, who was illegally deprived of enjoying his property is entitled for rent and damages from both the Society and opposite party No.4. The rent for the period of deprivation should be calculated on the basis of rate prevailing in the market. We award Rs.50,000/- (rupees fifty thousand) only towards the damages. The amount of rent and damages shall be paid equally by the Society and opposite party No.4. The said amount shall be adjusted towards the loan amount due from the petitioner.

56. In the above premises, we allow the Writ Petition bearing O.J.C. No.1545 of 1999 with the following directions:-

(i) The 3rd party purchaser is entitled to get refund of the amount deposited by him. Opposite party-society shall refund the amount deposited by the 3rd party purchaser with interest @7% per annum within a period of four weeks from today as from the date of deposit of the said amount, it has been enjoying the benefit of amount deposited by the 3rd party purchaser after deducting fifty percent of rent, damage as indicated in paragraph 55 above.

(ii) Opposite party-Society shall recalculate the amount due from the loanee including interest thereon taking into account the order dated 20.06.1992 of the Asst. Registrar, Co-operative Societies, Jagatsinghpur-cum-Principal Officer by which the petitioner was allowed to pay Rs.10,560/- in 36 installments @ Rs.300/- per month by 20.06.1995 and Rs.50,000/- awarded towards damage. The fresh demand notice shall be served upon the petitioner-loanee within a period of four weeks from today.

(iii) It is further directed that as opposite party No.1-Secretary proceeded illegally, the Society is not entitled to raise any claim for legal expenses from the petitioner-loanee.

(iv) On receipt of the recomputed demand notice from the opposite party-Society, the petitioner-loanee shall deposit the same within a period of four weeks from the date of receipt of such fresh demand, failing which the Society shall be at liberty to proceed against the petitioner for full recovery of the outstanding dues on the basis of fresh demand notice in accordance with law. However, if the petitioner-loanee deposits the amount as per the fresh demand, the opposite

party-Secretary, Jagatsinghpur Sub-Divisional House Building Cooperative Society is directed to take over possession of the house in question from opposite party No.4-third party purchaser and hand over the same to the petitioner within four weeks from the date of deposit as per the fresh demand notice. On his failure to do so, suitable action shall be taken against him.

(v) This Court also directs the Superintendent of Police, Jagatsinghpur to provide necessary police assistance in order to avoid law and order situation at the time of taking delivery of possession of the property in question from O.P. No.4

57. The writ petition bearing O.J.C. No.872 of 2000 is dismissed with a cost of Rs.10,000/-. Further a cost of Rs.10,000/- is imposed on the Secretary of the Society, who wrote the letter dated 16.09.1994, to the Manager, Dena Bank, Nayasarak, Cuttack, the banker of opposite party No.4, to transfer Rs.93,000/- to the account of opposite party no.1 to enable him to sell the petitioner's property to opposite party No.4 and entered into an agreement on 20.09.1994 with opposite party No.4 and sold the property of the petitioner to opposite party no.4. The said Secretary is personally liable to pay the cost of Rs.10,000/-. Rs.20,000/- shall be paid to the loanee whose property has been sold to opposite party No.4-3rd party purchaser by the Secretary fraudulently in flagrant violation of law within four weeks from today. Property of the loanee was sold illegally because of connivance of opposite party no.1-Secretary with opposite party No.4-3rd party purchaser at the relevant time. The cost of Rs.10,000/-, so far as 3rd party purchaser is concerned, shall be deducted from the amount refundable to him as directed in paragraph 56(i).

58. In the result, Review Petition No.25 of 2010 is allowed. O.J.C. No.1545 of 1999 filed by the petitioner-loanee succeeds and the same is allowed. O.J.C. No.872 of 2000 filed by the third party purchaser-Arendra Kumar Jena is dismissed with cost of Rs.10,000/- (rupees ten thousand).

Review petition allowed.

2011 (II) ILR- CUT- 790

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

W.P.(C) NO.16172 OF 2008 (Decided on 29. 10. 2011)

DEEPAK FERTILIZERS & PETROCHEMICALS CORPORATION LTD. .....Petitioner.

.Vrs.

PARADIP PORT TRUST. .....Opp.Party

CONSTITUTION OF INDIA, 1950 – ART.226.

Decision taken by an authority contrary to the judgment of a Court, under which the authority is bound, is a nullity in the eye of law.

In this case PPT allotted Ac.39 acres of Port land in favour of the petitioner in a tender process – Subsequently PPT passed a resolution and consequential order cancelling such allotment – Action challenged in writ petition and direction issued to P.P.T. – P.P.T. has not passed the order in pursuance of such direction – Held, impugned resolution and the consequential order are set aside – Direction issued to P.P.T. to take a fresh decision in terms of the direction issued by this Court in the writ petition.

Case law Referred to:-

AIR 1996 SC 2005 : (Delhi Development Authority-V- Skipper Construction Company (P) Ltd.)

For Petitioner - Ms. Soma Patnaik, A.Patnaik & B.S.Rayaguru.
For Opp.Party - M/s. S.K.Padhi, Sr.Advocate, Mrs.Mrinalini Padhi, Goutam Mishra & Anand Das.

B. P. DAS, J. The petitioner, M/s Deepak Fertilizer and Petrochemicals Corporation Ltd. which is a company registered under the Companies Act, 1956 challenges Resolution No. 65/2007 dated 17.10.2007 under Annexure-30 and the consequential order dated 2.11.2007 under Annexure-31, passed by the opposite party-Paradip Port Trust, wherein it has been decided not to allot Ac.39.00 of Port land in its favour, even though the same was originally allotted to it in a tendering process.

2. The brief facts as narrated in the writ application tend to reveal thus:

The Paradip Port Trust, hereinafter to be referred as 'PPT', had allotted 39 acres of land in favour of the petitioner for setting up Fertilizers, Chemicals and Ancillary Products Manufacturing Units after the petitioner emerged as the highest bidder in the tender process and after the petitioner deposited the required premium and other consideration amount. Thereafter the PPT cancelled the said allotment, challenging which the petitioner approached this Court in W.P.(C) No.11946 of 2006. In the counter affidavit filed by the PPT in the said writ application, the reason ascribed for cancellation of the allotment was that the establishment of the factory by the petitioner-company would pose a threat to the environment and water sources and that a dispute was pending between Government of Orissa and the PPT with regard to title of the concerned land. The other reason for such cancellation was that the volume of cargo is low compared to the extent of the land allotted i.e. 39 acres. In the meantime, the Collector, Jagatsinghpur, who had shown concern about pollution hazards with regard to establishment of the industry by the petitioner-company, represented to the Chairman, PPT by making a workable suggestion that preventive measures could be taken by the petitioner-company and in that case there would be no apprehension of environment pollution. In that writ application, the petitioner had argued that the Collector in his letter had made it amply clear that there would neither be any threat to the environment nor there would be any pollution hazard. It was also argued by the petitioner that on 10.10.2006, the Principal Secretary to Government of Orissa, Commerce and Transport Department, being the representative of the State Government in the PPT Trust Board addressed a letter to the Chairman PPT, requesting to re-consider the decision for cancellation of allotment of land and in the said letter it was stated that in the high level meeting of State Government it was also clarified that the dispute pending between the State Government and the PPT would not come on the way of the PPT to allot the land in favour of the petitioner company. As to Cargo Handling Capacity, it was clarified by the petitioner-company that apart from its 3 lakh tonnes of direct cargo, the petitioner company's products would indirectly contribute to increase mining which in turn would help to contribute and generate enormous cargo, which would substantially augment the revenue of the PPT.

Considering the submissions of the respective parties that certain developments had taken place during the pendency of the writ application, this Court disposed of the writ application by order dated 13.12.2006 vide Annexure-24 directing the PPT to take a fresh decision with regard to allotment of Ac.39.00 of land in favour of the petitioner after recalling the order of cancellation of allotment previously made in favour of the petitioner keeping in view the letters under Annexure-15 and 16 and the decision taken by the High Level Committee in its meeting held on 19.6.2006. The letters of

the Collector, Jagatsinghpur and the Principal Secretary, Commerce and Transport Department which were annexed to the aforesaid writ applications as Annexures-15 and 16 are also annexed to the present writ application as Annexures-22 and 23 respectively.

3. After the aforesaid order of this Court, the PPT reconsidered the matter and again rejected the allotment made in favour of the petitioner by its resolution dated 1.5.2007 in Annexure-27 to the effect that "The proposal not to allot 39 Acres of land in favour of Deepak Fertilizers and Petrochemicals Corporation Limited is approved".

4. Being aggrieved by the aforesaid resolution dated 1.5.2007, the petitioner moved this Court in W.P.(C) No. 6274 of 2007 and this Court by its judgment dated 14.9.2007 (Annexure-28) disposed of the writ application with a direction to the PPT to take a decision on the question of allotment of land to the petitioner in the light of the binding directions given by this Court in its order dated 13.12.2006. This Court also directed that the PPT shall take the decision after hearing the petitioner or its representative.

5. Pursuant to the aforesaid order of this Court, the petitioner was granted a personal hearing on 17.10.2007 during which, the petitioner represented by its legal representative put forth its case for allotment of land before the Trust Board. The Trust Board, after hearing the petitioner has passed the resolution dated 17.10.2007 not to allot the land in favour of the petitioner in the greater interest of Paradip Port, vide Annexure-30 and communicated the said decision to the petitioner by letter dated 2.11.2007 under Annexure-31. According to the petitioner, the opposite party has passed the resolution without confining its consideration to the grounds indicated in the order of this Court but on the ground i.e. the land is required for greater interest of the port, which, according to the petitioner has already been nullified by this Court in its judgment dated 14.9.2007.

6. The aforesaid Resolution under Annexure-30 and the communication under Annexure-31 are under challenge in the present writ application.

7. According to Ms. Soma Patnaik, learned counsel for the petitioner, initially on 9.3.2006 a notice inviting tender was issued by the opposite party-PPT for allotment of 39 acres of Port land for setting up Fertilizer, Chemicals and Ancillary Products Manufacturing Units; and the petitioner participated in the said tender and was ultimately selected. On 30.3.2006, the petitioner was informed that the Board decided to allot the land to the petitioner on lease basis for a period of 30 years for construction of Fertilizer, Chemicals

and Ancillary Products Manufacturing Units and the petitioner was asked to deposit Rs.9,75,03,900/- towards premium and other charges, which according to the petitioner had also been deposited by the petitioner. Learned counsel for the petitioner further submitted that the question of pollution and environment hazard had also been dispelled by the subsequent letter of the Collector and his objection to allot the land in favour of the petitioner company was withdrawn and the Collector also endorsed no-objection to the allotment of land in favour of the petitioner vide Annexure-22. According to the learned counsel, the State Government in Commerce & Transport Department had also intimated the PPT that the State Government would not object to the leasing of the land in favour of the petitioner, vide Annexure-23.

8. Learned counsel for the petitioner, further submitted that the first point on which the opposite party harped was no more available to be raised in view of the letter of the Collector to the Commissioner-cum-Secretary to Government, Revenue & Disaster Management Department (Annexure-22). So, according to her, this ground did not survive and there was no reason as to why PPT did not re-consider its case for withdrawing the order of allotment.

According to the petitioner, the order passed by this Court in W.P.(C) No. 11946 of 2006 was very clear for which the PPT had to re-consider the case of the petitioner and to take a fresh decision with regard to the allotment of the land after recalling the order of cancellation of allotment. Such decision had to be taken keeping in view the letters under Annexures-22 and 23 to the present writ application and the decision taken by the High Level Committee in its meeting held on 19.6.2006. These aspects have never been taken into consideration by the opposite party, though a specific direction had been given by this Court in its order dated 13.12.2006 while disposing of W.P.(C) No. 11946 of 2006.

9. As the PPT stuck to its earlier position and advanced another ground of future requirement, the same was challenged by the petitioner in W.P.(C) No.6274 of 2007. The said writ application was disposed of by the judgment dated 14.9.2007 with the following observations/ directions.

> "When a decision is taken by an authority contrary to an operative judgment of a Court, under which the authority is bound, the resultant decision apart from being contumacious is also a nullity in the eye of law. (See the decision in the case of Clarke v. Chadburn, reported in 1985 (1) All England Reports 211). The said decision of the English Court has been approved by the Supreme

Court in the case of Delhi Development Authority v. Skipper Construction Company (P) Ltd., reported in AIR 1996 SC 2005 at page 18, page 2012 of the report.

Following the aforesaid principles, this Court quashes the order dated 1.5.2007 which has been passed by the authorities of PPT. The writ petition, is therefore, allowed and the impugned order dated 1.5.2007 under Annexure-17 is quashed.

The PPT is further directed to take a decision on the question of allotment of land to the petitioner in the light of the binding directions given by this Court in its order dated 13.12.2006. Such decision should be taken by the PPT authorities after hearing the petitioner or its representative within a period two months from the date of service of this order upon the PPT authorities. This direction on the PPT to hear the petitioner is given for the reason that the relevant facts which were considered in Court's order dated 13.12.2006 should be placed before the PPT authorities by the petitioner at the time of hearing which would be given to it by the PPT in terms of this order.

The writ petition is, therefore, allowed to the extent indicated above. No order as to costs."

10. In the impugned Resolution under Annexure-30, the Board expressed its concern that in view of the rapid growth in cargo handling and new projects being taken up, it would pose serious impediment to the Port expansion projects and hence the land should not be allotted to the petitioner.

11. On the aforesaid aspect, learned counsel for the petitioner submitted that the said aspect had also been raised in the earlier writ petition being W.P.(C) No. 6274 of 2007 and this Court in paragraph-15 of its judgment, while dealing with the same had observed that from a perusal of the decision of this Court dated 13.12.2006, it appears that this Court directed the PPT to take a fresh decision in the matter of allotment of land to the petitioner on the basis structured by the order of this Court to which PPT is a party and which had become final and binding on the PPT.

In paragraph-16, this Court had observed that the impugned order had not been passed in consonance with the earlier direction of this Court dated 13.12.2006, rather the order had been passed, keeping in mind the future requirement of the PPT, which had been proposed by the Chairman.

12. According to the petitioner, the decision can only be taken keeping in view Annexures-15 and 16 to the earlier writ petition (Annexures-22 and 23 to the present writ application). But now in the present impugned resolution under Annexure-30 and 31, a new ground has been advanced, i.e. future requirement of land by the PPT.

13. In the counter affidavit filed by the PPT, a stand has been taken that after disposal of W.P.(C) No. 11946 of 2006 on 13.12.2006, the Board decided to seek legal opinion regarding the order dated 13.12.2006 and ultimately the Board decided not to allot the land in favour of the petitioner.

14. According to Mr. S.K. Padhi, learned Senior Advocate for the PPT, the aforesaid decision has been taken by the Board of Trustees, which is a statutory body, after taking all relevant factors into consideration and keeping in view the larger interest of the Port and hence, it cannot be said as arbitrary and illegal. It was further argued that the Court is to examine whether there is any infirmity in the decision making process and not in the decision and further in the case in hand, the petitioner had totally failed to indicate any infirmity in the decision making process.

15. Reliance was placed by the respective parties on a catena of decisions in support of their respective cases.

16. We have gone through the judgment of this Court dated 14.9.2007 passed in W.P.(C) No.6274 of 2007, copy of which has been annexed as Annexure-28, wherein similar questions raised before this Court have been dealt with and reached its finality. In this writ application, we have only to examine whether the impugned resolution and the impugned order have been passed in pursuance of the directions of this Court as have been given in the earlier two writ petitions.

17. In our considered opinion, despite the clear direction of this Court in its order dated 14.9.2007 passed in W.P.(C) No. 6274 of 2007, the PPT has not taken the decision in pursuance of such direction given by this Court in its order dated 13.12.2006 passed in W.P.(C) No. 11946 of 2006, i.e. to take a decision keeping in view the letter under Annexures-15 and 16 (Annexures-22 and 23 to the present writ application).

For the foregoing reasons, we set aside the impugned Resolution dated 17.10.2007 in Annexure-30 as well as the consequential order dated 2.11.2007 in Annexure-31 and direct the opposite party-PPT to comply with the orders of this Court dated 13.12.2006 passed in W.P.(C) No. 11946 of

2006, so also the order dated 14.9.2007 passed in W.P.(C) No. 6274 of 2007 and take a fresh decision in terms of such decisions, which are final and binding on both the parties.

The writ petition is accordingly allowed. No cost.

Writ petition allowed.

2011 (II) ILR- CUT- 797

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

W.P.(C) NO. 19134 OF 2010 (Decided on 16.9.2011)

PRAFULLA KUMAR MISHRA ……Petitioner.

.Vrs.

UNION OF INDIA & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.309, 311.

Promotion – Petitioner was found suitable for promotion to IFS Cadre in the year 2004 – Departmental proceeding initiated against the petitioner in june 2005 - Selection Committee met in the year 2008 – Clause 8.2 (C)of the Guidelines issued by the Government of India Dt.18.11. 2002 – Opp.Parties are justified in keeping the selection of the petitioner to IFS Cadre provisional as on the date selection committee met there was a departmental proceeding pending against him.

Case law Referred to:-

AIR 1991 SC 2010 : (Union of India-V- K.V.Jankiraman)

For Petitioner - M/s. : Rabinarayan Nayak, N.K.Sahoo & G.N.Rout.
For Opp.Parties - Mr. : Saktidhar Das

L.MOHAPATRA,J. The unsuccessful applicant before the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.601 of 2009 has filed this writ application challenging the order dated 23rd September 2010 passed by the Tribunal in the said Original Application.

2. The petitioner, who was applicant before the Tribunal, entered into service as Assistant Conservator of Forests in Group-B cadre on 10.2.1982 after completing two years of training in Forestry and Allied subjects from the State Forest Officers Training College at Coimbatore after being selected through O.P.S.C. during the year 1980-1982. After serving for about 22 years in Group-B cadre, the petitioner was promoted to O.F.S. Class-I rank vide Notification dated 3.6.2004 having been selected by the Departmental Promotion Committee for such promotion. Further case of the petitioner is that the Selection Committee met on 31.12.2008 for preparation of year-wise list of State Forest Service Officers suitable for promotion to the Indian Forest Service under Regulation-3 of the Indian Forest Service (Appointment by promotion) Regulations, 1966. The Selection Committee had not met for

the promotion against the vacancies occurring in 2004, 2005, 2006, 2007 and 2008. When the Selection Committee considered the officers for promotion to I.F.S. in the year 2008, they prepared a year-wise list and in the said select lists, name of the petitioner found place at serial no.4 for the year 2004, serial no.2A for the year 2005 and serial no.0B for the year 2007. The said select lists for the above years were approved by U.P.S.C. on 30th April 2009 but selection of the petitioner was kept as provisional. Selection of the petitioner was kept provisional because of pendency of a disciplinary proceeding against him in the year 2008. According to the petitioner, when the vacancies are considered year-wise, name of the petitioner should have been considered for promotion in the year 2004 his name having been found at serial no.4 in the select list of the year 2004. There was no departmental proceeding pending against the petitioner in the year 2004 and only in June 2005, a proceeding was initiated. Therefore, case of the petitioner in brief is that he having been selected by the Selection Committee for promotion to I.F.S. for the year 2004 when no departmental proceeding was pending against him, he should have been promoted to I.F.S. cadre with effect from the year 2004 and his selection could not have been made provisional because of pendency of a departmental proceeding. It was also contended by the learned counsel for the petitioner that even though the proceeding was initiated in the month of June 2005, the same has not been concluded till today and selection of the petitioner to I.F.S. cadre continues to be provisional. With this background of the case, the petitioner had approached the Tribunal for a direction to the opposite parties to promote him to I.F.S. cadre from the year 2004. The stand of the opposite parties before the Tribunal was that when the Selection Committee considered the case of the petitioner, a departmental proceeding was pending against him and, therefore, even if he was found suitable for promotion in the year 2004, his selection to I.F.S. was kept provisional because of pendency of a departmental proceeding.

3. The Tribunal in the impugned order held that the date on which the Selection Committee convened the meeting and found the petitioner suitable for promotion to I.F.S. cadre, a departmental proceeding was pending against him and, therefore, he cannot claim promotion from the year 2004 merely because in the said year no departmental proceeding was pending against him. With the above finding, the Tribunal having dismissed the Original Application, this writ application has been filed.

4. Shri Nayak, learned counsel appearing for the petitioner submitted that as per the Indian Forest Service ("Appointment by Promotion) Regulations 1966, recruitment has to be made during the year to the

substantive vacancies as on the first day of January of the year in the posts available for the members of the State Forest Service under Rule-9 of the Recruitment Rules. The proviso prescribes that where no meeting of the Committee could be held during a year for any reason other than that provided for in the first proviso, as and when the Committee meets again, the select list shall be prepared separately for each year during which the Committee could not meet, as on the 31st December of each year. In terms of the aforesaid proviso, when the Selection Committee convened the meeting in the year 2008, it prepared a select list for the years 2004, 2005, 2006, 2007 and 2008 as the meeting of the Selection Committee could not be held since 2004 till 2008. The petitioner having been found suitable for promotion to I.F.S. cadre in the year 2004 and his name having been included in the select list at serial no.4, he should have been promoted to I.F.S. cadre in the year 2004 as there was no departmental proceeding pending against him during that year. According to Shri Nayak, learned counsel for the appellant, merely because the committee convened its meeting in the year 2008, the petitioner cannot be deprived of promotion in the year 2004 having been found suitable for such promotion and specifically when no departmental proceeding was pending against him in the year 2004.

The learned counsel for the State submitted that the Selection Committee having considered the case of the petitioner in the year 2008, even though the year-wise list was prepared on the date the committee found him suitable for promotion, a departmental proceeding was pending against him and, accordingly, his selection was kept provisional.

5. Admittedly, the Selection Committee for promotion to I.F.S. cadre did not meet in the years 2004, 2005, 2006 and 2007. Admittedly seven vacancies were also available to be filled up in the year 2004, five in 2005, one in 2006, one in 2007 and one in 2008. According to the petitioner, though the Selection Committee convened its meeting in the year 2008, in the year-wise select list for the year 2004 name of the petitioner was placed at serial no.4 as against seven vacancies available in that year. Therefore, the petitioner should have been given promotion from the year 2004 as no departmental proceeding was pending against him during that year.

6. Learned counsel for the State, on the other hand, submitted that even though vacancies were available in 2004 onwards as stated earlier, the Selection Committee having convened its meeting in the year 2008, even though the year-wise select list was prepared as per the Regulation of the year 1966, a departmental proceeding was pending against the petitioner in the year 2008, and, accordingly his selection was kept provisional. In this

connection, reference may be made to a decision of the Hon'ble Supreme Court in the case of ***Union of India Vrs. K.V. Jankiraman*** reported in AIR 1991 S.C. 2010. The Hon'ble Supreme Court in the said judgment disposed of several Civil Appeals and Special Leave Petitions. In para-21, 22 and 23 of the judgment, the Court dealt with S.L.P.(Civil) No.2344 of 1990. The facts of that case are that at the relevant time the employee was working as Superintending Engineer since July 1986. In respect of an incident, which took place in the year 1984, and because of deficiencies found in the Stores during the period 1982 to 1985, a proceeding was started against the said employee in February 1988 and in August 1988, punishment was imposed on the employee in the said disciplinary proceedings. On 3rd of June 1988, the DPC met for considering promotion to the Selection Grade and by an order dated 28th July 1988, some juniors to the said employee were given the Selection Grade with retrospective effect from 30th July 1986. The name of the said employee was kept in a sealed cover as a departmental proceeding was pending against him. It was contended before the Court that when the departmental proceeding relates to the period from 1982-1985 and in the year 1986, there was no allegation against the said employee and, therefore when the juniors were given promotion from 30th July, 1986, the said employee could have also been given promotion from the said date. Such a contention was not accepted by the Apex Court with an observation that if such a finding rendered by the Tribunal against which Special Leave had been filed is accepted, it would mean that by giving the employee selection grade with effect from 30th July 1986, he would stand rewarded notwithstanding his misconduct for the earlier period for which disciplinary proceedings were pending against him at the time of the meeting of the D.P.C.

Learned counsel for the State also drew attention of the Court to a set of guidelines governing promotion to various grades. The said guidelines have been issued by the Government of India, Ministry of Environment and Forests, New Delhi dated 18th November 2002. Clause-8 of the guideline deals with preparation of year-wise panels where Committee has not met for a number of years. Clause-8.2(c), which is relevant for the purpose of the case, is quoted below.

> "For the purpose of evaluating the merit of the officers while preparing year wise panels, the scrutiny of the record of the service of the officer should be limited to the records that would have been available had the Committee met at the appropriate time. However, if on the date of such meeting, departmental proceedings against an officer are in progress and the sealed cover procedure is to be

followed, such procedure should be observed even if departmental proceedings were not in existence in the year to which the vacancy related. The officer's name should be kept in the sealed cover till the proceedings are finalized."

7. On perusal of the aforesaid clause contained in the guidelines, it is clear that the said guidelines are in consonance with the judgment of the Supreme Court in the aforesaid case. Therefore, the opposite parties were justified in keeping the selection of the petitioner to I.F.S. cadre provisional as the date on which the Selection Committee met a departmental proceeding was pending against the petitioner. We therefore find no infirmity in the judgment of the Tribunal impugned before us and, accordingly, dismiss the writ application.

8. However, before parting with the case, we must make an observation that the petitioner is due to retire very soon and a departmental proceeding is pending against him since 2005. Learned counsel for the State, on instructions, submitted that the departmental proceeding is almost completed and is waiting for final orders to be passed by the disciplinary authority. We, therefore direct that the final order in the departmental proceeding be passed by the disciplinary authority as early as possible preferably within a period of one month from today so that depending on the result of the departmental proceeding, fate of the petitioner could be decided.

Writ petition dismissed.

2011 (II) ILR- CUT- 802

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

W.P.(C) NO.2301 OF 2011 (Decided on 28.07.2011)

DR. MADHUSUDAN BALIARSINGH ……..Petitioner.

.Vrs.

SASMITA BALIARSINGH … …Opp.Party.

FAMILY COURTS, ACT, 1984 (ACT NO.66 OF 1984) – Ss.7,8.

Family Court – Jurisdiction – Civil Court passed a decree dismissing the suit for dissolution of marriage – Such decree was challenged in appeal before the learned District Judge – During pendency of the appeal Family Court established in the area and the learned District Judge transferred the appeal to the Judge, Family Court – Order transferring the appeal is challenged.

Held, Family Court can not exercise the appellate Jurisdiction and the learned District Judge could not have transferred the appeal pending before him to the Judge Family Court for adjudication.

(Para 5)

Case laws Referred to:-

1.AIR 1980 SC 1575 : (Sri Vishnu Awatar etc.etc.-V- Shiv Autar & Ors.)
2.AIR 1999 SC 999 : (Mathew M. Thomas & Ors.-V-Commissioner of Income-tax)
3.AIR 1957 SC 540 : (Garikapati Veeraya-V- N.Subiah Choudhry).

For Petitioner - M/s. Dayananda Mohapatra, M.Mohapatra, G.R.Mohapatra, S.P.Nath & L.K.Nanda.
For Opp.Party - M/s. R.C.Sarangi, S.S.Mohanty, M.K.Pattanaik, S.Jena, A.K.Mohanty.

L.MOHAPATRA, J. In this writ application an important question of law relating to jurisdiction of the Family Courts established under the Family Courts Act, 1984 is raised.

2. The background of the case is that the petitioner had filed Mat. Case No.468 of 2002 before the learned Civil Judge (Senior Division), Bhubaneswar praying for dissolution of marriage and a decree of divorce under Section 13 (1) (ia) of the Hindu Marriage Act. The suit was dismissed by the learned Civil Judge by judgment and decree dated 18.6.2008 and

14.7.2008 respectively. The petitioner thereafter preferred an appeal by Matrimonial Appeal No.5 of 2008 against the said judgment and decree of the learned Civil Judge. The learned District Judge, Khurda at Bhubaneswar allowed the appeal on 21.1.2010. After the said judgment was delivered by the learned District Judge, a petition was filed by the opposite party under Order 41, Rule 21 read with Section 151 of the Code of Civil Procedure to set aside the said judgment and decree passed in appeal and praying for rehearing of the appeal on merit. The learned District Judge by order dated 26.8.2010 allowed the application on payment of cost and posted the case to 30.9.2010. Thereafter by order dated 21.12.2010, the learned District Judge transferred the appeal to the Court of the learned Judge, Family Court, Bhubaneswar which was established during the pendency of the appeal. Challenging the said order of the learned District Judge transferring the case to the Court of the learned Judge, Family Court, Bhubaneswar, this writ application has been filed.

3. Section 7 of the Family Courts Act, 1984 prescribes jurisdiction of the Family Courts. Section 8 deals with exclusion of jurisdiction in relation to suits and proceedings. Section 8 (a) provides that where a Family Court has been established for any area, no district Court or any subordinate civil Court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section. Explanation to sub-section (1) of Section 7 describes the nature of suits and proceedings to be decided by Family Courts. The nature of suits are described in (a) to (g) of the said Explanation attached to sub-section (1) to Section 7. On perusal of the entire provision contained in Section 7, it appears that the same relates to a suit or a proceeding. The word 'proceeding' has not been defined in the Act. With reference to these two sections of the Family Courts Act, 1984, this Court is now called upon to decide as to whether an appeal pending before the learned District Judge against a decree passed by the civil court in a case where prayer for dissolution of marriage has been turned down can be transferred to a Family Court which was established during pendency of the appeal before the District Judge. The learned counsel appearing for the parties, therefore, made two submissions relevant for the purpose of the case.

(1) The term 'proceeding' appearing in Sections 7 and 8, whether shall include an appeal or not ?

(2) In absence of any provision in the Family Courts Act, 1984 whether the Judge, Family Court can exercise appellate jurisdiction ?

A decision of the Supreme Court in the case of ***Sri Vishnu Awatar etc. etc. v. Shiv Autar and others,*** reported in ***AIR 1980 S.C. 1575*** was cited at the bar. While dealing with the case in relation to Section 3 of the Code of Civil Procedure (Uttar Pradesh Amendment) Act, 1978, the Supreme Court observed that the words "or other proceedings" in the phrase " cases arising out of original suits or other proceedings" refer to proceedings of final nature. These words have been added, in order to bring within the purview of the revisional jurisdiction, orders passed in proceedings of an original nature, which are not of the nature of suits, like arbitration proceedings. This phrase cannot include decisions of appeals or revisions, because then the legislature will be deemed to have contradicted itself. The words "or other proceedings" have to be read ejusdem generis with the words "original suits". They will not include appeals or revisions. Another decision of the Supreme Court in the case of ***Mathew M. Thomas and others v. Commissioner of Income-tax***, reported in ***AIR 1999 S.C. 999*** laid down that the word 'proceedings' shall include proceedings at the appellate stage. Reference was made by the Supreme Court to an earlier decision in the case of ***Garikapati Veeraya v. N. Subiah Choudhry***, reported in ***AIR 1957 SC 540***, where the Court held that legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

4. Before we proceed to decide the question, we would like to refer to the objects and reasons behind enacting this law. As it appears from the Family Courts Bill, the immediate background to the need for legislation for setting up of Family Courts is the mounting pressures from several associations of women, other welfare organizations and individuals for establishment of Family Courts with a view to providing quicker settlement to the family disputes where emphasis should be laid on conciliation and achieving socially desirable results. A good deal of time of the civil courts is taken by small family disputes which could be more expeditiously and at much lesser cost can be settled by Family Courts which should adopt an entirely new approach by avoiding rigid rules of procedure and evidence. The Bill also sought to exclusively provide within the jurisdiction of the Family Courts the matters relating to matrimonial relief as indicated in sub-section (1) of Section 7 of the Act. It appears that it not only refers to suits but also other proceedings in relation to the suit but does not provide for inclusion of appeals. Had it been the intention of the legislature to empower the Family Courts to exercise appellate jurisdiction, in cases where such matters have been disposed of by a competent civil court in absence of a Family Court, Section 19 which provides for appeal would have made it very clear. Sub-section (1) of Section 19 clearly provides that save as provided in

sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973, or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law. There is nothing in Section 19 of the Act empowering the Family Court to hear an appeal. We are, therefore, of the view that the term 'proceeding' appearing in Sections 7 and 8 does not include an appeal or revision. It only relates to other proceedings arising out of or in connection with the suit pending before the learned Judge, Family Court. The decision in the case of Mathew M. Thomas and others v. Commissioner of Income-tax relates to a proceeding under the Compulsory Acquisition of Immovable Properties wherein the Court referred to the Income Tax Act, 1961 and C.B.D.T. Circular No.455 dated 16.9.1986. While interpreting the Circular and Section 269-I and 269-C of the Income-tax Act, the Court came to such a conclusion.

5. In view of the discussions made above, we are of the view that the Family Court cannot exercise the appellate jurisdiction and therefore, the learned District Judge, Khurda at Bhubaneswar could not have transferred the appeal pending before him to the learned Judge, Family Court, Bhubaneswar for adjudication taking recourse to Section 8 of the Family Courts Act, 1984. The order dated 21.12.2010 passed by the learned District Judge, Khurda impugned in this writ application is set aside.

6. Since we have held that the Family Court cannot exercise appellate jurisdiction, the learned District Judge, Khurda is directed to find out in how many cases such orders have been passed and all those orders be recalled and the appeals be retransferred to the Court of the District Judge for disposal in accordance with law.

7. With the above observation and direction, this writ application is disposed of.

Writ petition disposed of.

2011 (II) ILR- CUT- 806

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

MATA NO.3 OF 2011 (Decided on 05.08.2011)

SHYAMA PRASAD TRIPATHY & ORS. ……..Appellants.

.Vrs.

AISHWARYA SATPATHY ……Respondent.

HINDU MINORITY & GUARDIANSHIP ACT, 1956 (ACT NO.32 OF 1956) – Ss.6(a)

Custody of Hindu minor child – Ordinarily a child who has not completed the age of 5 years is to remain with the mother but for the betterment and welfare of the child he should remain with his father.

In this case the child is not a suckilng baby -The respondent-mother works in IBM with good salary but she is staying alone and can not devote 24 hours to take care of the child – She had terminated her pregnancy prior to birth of the present child which was not due to medical complicacies – Moreover when she was residing at Chennai alone the child was less than three years but she admitted him to a play school – In the other hand the appellant No.1 father although left his job is presently engaged in business and is staying in the native state with his parents and in the absence of the appellant No.1 the child can be attended 24 hours by the other two appellants who are his parents.

Held, impugned judgment passed by the leared District judge allowing custody of the child with the mother is setaside – Direction issued allowing custody of the child with the father during his school days and he will be in the custody of the mother during long vacations.

(Para 15)

Case laws Referred to:-

1.AIR 1999 SC 1149 : (Ms. Githa Hariharan & Anr.-V-Reserve Bank of India & Anr.)

2.AIR 1985 Orissa 65 : (Smt. Meera Devi -V- Shyamsundar Agarwalla).

For Appellants - M/s. Manas Mohapatra, L.N.Sahoo, S.K.Routray, S.Mohanty.

For Respondent - M/s. Srikanta Kumar Sahoo, M.Mohapatra & B.B.Biswal.

S.K.MISHRA,J. In this appeal, the appellants assail the order dated 18th May, 2010 passed by learned District Judge, Khurda at Bhubaneswar in

Guardian Petition No.208/2008 declaring that the respondent-mother is entitled to have the custody of her son. The facts leading to filling of this appeal may be stated as follows:-

The respondent filed a petition before the learned District Judge, Khurda, inter alia, pleading that she and appellant no.1 got married on 06.12.2000, which was duly registered. The couple led a happy conjugal life in the house of the appellants for some days. The respondent thereafter stayed at her place of posting in Chennai for about more than a year and appellant no.1 went to U.S.A. to his place of posting. Later they came to Bangalore, where they spent happy days together. They stayed in Bangalore for seven years.

2. During this period dissensions grew up between the parties. Appellant no.1 demanded a sum of Rs.10 lakhs from the respondent and when she was not able to comply with the same, she was ill-treated and tortured physically and mentally. It is further pleaded that initially the respondent was getting more salary than appellant no.1. She was meeting most of their expenses and appellant no.1 used to give his entire income to his parents for their maintenance and education of his brothers and sisters. On 11.5.2007 the child Arindam was born. During her pregnancy the respondent had lot of complications for which huge expenses were incurred. It is further pleaded that even though the respondent bore all such expenses, appellant no.1 was annoyed with the same. After birth of the child, the attitude of the appellants became hostile to the respondent and he started ill-treating her more and more. Appellant No.1 and his parents did not take proper care of the child.

3. In the year 2008 appellant no.1 decided to quit the job and take up the business of a builder at Bhubaneswar, which required huge investment. Therefore, appellant no.1 demanded a sum of Rs.20 lakhs from the respondent. When the respondent failed to oblige, appellant no.1 and his parents ill-treated her. Ultimately on 31.5.2008 at about 9.30 P.M., appellant no.1 brutally assaulted the respondent, snatched away the child and drove her away. The child was a breast feeding baby and was thirteen months old at that time. The respondent took shelter in the night in a friend's house and in the next morning she came away to Bhubaneswar to her parents' house. Thereafter, on 17.6.2008 respondent wrote a letter to appellant no.1 requesting him to handover the child to her. Thereafter, on several occasions the respondent requested appellant no.1 to handover the child to her over phone, but appellant no.1, on the other hand, threatened to kill the child if the demand was not fulfilled and did not allow her to see the child.

4. In June, 2008 appellant no.1 came to Bhubaneswar with the child and stayed with his parents. On 14.6.2008 the respondent went to their house and requested them to return the child to her. They did not return the child and behaved her in a rude manner. In the same year the respondent filed a writ petition being W.P.(Crl) No.338 of 2008 before this Court to get back the custody of the child. This Court directed respondent no.1 to pursue her remedy under the Guardians and Wards Act. When the respondent was at Bhubaneswar and demanded the custody of the child, appellant no.1 and his parents forced her for a divorce. Thereafter the respondent filed a case for custody of the child claiming to be the natural guardian and rightful custodian of the boy Arindam.

5. The appellants, who were opposite parties before the court of original jurisdiction, denying all the allegations made by the respondent, inter alia, pleaded that the respondent never liked to bear a child. She was a careerist. She did not like to quit her job under any circumstances. She even did not join her husband when he was in U.S.A. It is further pleaded that she has terminated her pregnancy on two occasions earlier and it was the appellant no.1, who used to comprise on this.

6. Appellant no.1 further pleaded that he had a high salary job and was quite affluent. He had purchased a flat at Bangalore. When the child was born on 11.5.2007 the respondent never took any care of the child. Appellant no.1 had to look after the child and had to hire the service of a nurse. In October, 2007 appellant no.1 had been to U.S.A. for twelve days. During this period the respondent put the child in a child care home. The child was only three months old at that time. The appellants further pleaded that on 31.5.2008 the respondent herself left the marital home deserting the child and lived in a nearby hotel without informing them and in the following morning she left for Bhubaneswar along with all her certificates, jewellery, laptop and keys of the locker of the Bank with full preparation to harass the appellants.

It is further pleaded that in June, 2008 when appellant no.1 came to Bhubaneswar, the respondent had come to their house, where she had clearly stated that she will not stay in their house. It is further alleged by the appellants that the respondent was dominating in nature. Her sisters even did not live in their in-laws house and preferred to live with their parents. Appellant No.1 further claims that due to the attitude of the respondent towards the child he had to resign from his service at Bangalore and come away to Bhubaneswar. The appellants claim that the child is fully comfortable with them and they are the only fit persons to take care of the

child and his future. Hence, they prayed that the petition for custody be rejected.

7. On such pleadings, the parties went to trial and examined witnesses in support of their claims. They also led certain documents into evidence. Having assessed the evidence on record and the law on the point, the court of original jurisdiction come to the conclusion that the respondent should have the custody of the child and therefore it allowed the petition on contest. The appellants however did not comply the orders passed by the learned District Judge, Khurda and, therefore, the respondent filed an application before the Judge, Family Court, Bhubaneswar, which was registered as C.M.Appeal No.134/2010. On 13.1.2011, the Judge, Family Court, Bhubaneswar, directed appellant no.1 to comply with the order passed by the learned District Judge, Bhubaneswar. Against such order a writ petition was filed. At the time of admission an application was filed to convert the writ petition to an appeal under the Family Courts' Act and as such it was registered as MATA No.3 of 2011. Thereafter, since the appeal was not within the period of limitation prescribed, appellant no.1 filed an application for condonation of delay, which was allowed on 30.3.2011(Misc. Case No.30/2011).

8. In assailing the order passed by the learned District Judge, Khurda, Mr. Manas Mohapatra, learned counsel for the appellants, submitted that the learned Judge exercising the original jurisdiction committed gross error on record and without taking into consideration the welfare of the child has passed this particular order. Mr. Mohapatra argued at length to show to the court that the conduct of the respondent is not conducive to the welfare of the child and, therefore, the custody should be given to the appellants.

9. Learned counsel for the respondent, on the other hand, submitted that the learned trial court has not committed any error on record and the conclusion arrived at is just and proper and, therefore, it requires no interference.

10. Admittedly, the parties are Hindus and are guided by Hindu Minority and Guardianship Act, 1956(hereinafter referred to as the "Act" for brevity). Section-6 of the Act is quoted herein below:

> ***"6. Natural guardians of a Hindu minor***- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl, the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
(b) in the case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her, the father;

(c) in the case of a married girl – the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section –

(a) if he has ceased to be a Hindu, or
(b) if he has completely and finally renounced the world becoming a hermit (*vanaprastha*) or an ascetic (*yati or sanyasi*).
Explanation – In this section, the expressions "father" and "mother" do not include a step-father and step-mother.

A bare reading of the aforesaid Section reveals that it is the father, who is the natural guardian of a boy and an unmarried girl, and only after him, the mother is the natural guardian. But it is with a rider. The rider is that the custody of a minor, who has not completed the age of five years, shall ordinarily stay with the mother.

Section 13 of the Act provides that the welfare of the minor is of paramount consideration, it reads as follows:-

"13. Welfare of minor to be paramount consideration–(1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.
(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor".

11. Interpreting these provisions, the Supreme Court, in the case of **Ms. *Githa Hariharan and another vrs. Reserve Bank of India and another*** reported in AIR 1999 SUPREME COURT 1149, has considered the implication of the of Section 6(a) of the Act and ruled that Section 6(a) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6(a), it means "in absence of", the

word "absence" therein referring to the father's absence from the care of the minors property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor or even if he is living with the mother of if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian can act validly on behalf of the minor as the guardian. The Supreme Court held that such an interpretation will be the natural outcome of a harmonious construction of Sections 4 and 6 of the Act.

Moreover, Section 25 of the Guardian and Wards Act,1890 specifically provides that if a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, it will make an order of his restoration. Thus, while deciding the claim under Section 25 of the Act, the welfare of the child has to be looked into and the claim of the custody of wife cannot be ignored or denied only on the ground that husband is natural guardian under Section 6(a) of the Act.

12. Section 17 of the Guardians and Wards Act, 1890 provides for the matter to be considered by the Court in such cases. It reads as follows:-

> **"17. Matters to be considered by the Court in appointing guardian –** (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.
>
> (4) * * * * * * * * * * * * * * * * * * * (5) The Court shall not appoint or declare any person to be a guardian against his will".

Interpreting this provision, this Court in the case of ***Smt. Meera Devi vrs. Shyamsundar Agarwalla*** reported in AIR 1985, ORISSA, 65 has held that it is open to the Court to make any arrangement relating to the minor which he considers to be in the best interest of the minor and in such a case it is the welfare of the minor which alone is the foremost consideration and not the rights of the parents. Neither the father nor the mother has an indefeasible right to have the custody of the minor or to decide his future as he or she likes.

Thus, the law on the point can be summarized as follows:-

In case of a Hindu minor boy or a unmarried girl, the natural guardian is the father. But, if it is found that he is not capable of taking care of the ward then the mother is the natural guardian. However, in cases of children below five years of age, it is the mother, who should have the custody of the child. Such provision has been inserted only because of the reason that in the young age it is the mother, who can cater to the needs of a child better than the father. But the most important consideration while deciding the case of this nature is the welfare of the child, which is of paramount importance. From such provision, it can naturally be derived that in case of a child, who is less than five years, unless there are some exceptional and compelling reasons, the custody should not ordinarily be given to the father. Keeping in view the aforesaid considerations, we have to examine the evidence on record to arrive at a just conclusion.

13. It transpires from the evidence of the respondent that appellant no.1 has left the job and he has no financial stability to take care of the child, whereas the respondent has monthly income of more than Rs.50,000/- from her salary and except the child she has no other dependant. She further explained that she is serving as Advisory System Analyst in IBM Global Services, Bangalore, which has the option of flexible working timings including working from home and from other places in India for women employees. In cross-examination she admitted that prior to birth of Arindam she terminated her pregnancy twice. She further admitted that she was staying alone in Chennai when appellant no.1 had left for U.S.A. She has also admitted that her son Arindam is staying with her husband and parents-in-law at Bhubaneswar. It is further found from her evidence that she had admitted Arindam to a Play School when he was two years and five months old even though she was working from home at that time and since the school hours were only for two hours a day and the child had to learn certain things.

14. Appellant no.1 in his evidence has stated that the child was never under breast-feeding and was disengaged to have gluten sensitive

enteropathy and secondary lactose intolerance. He further stated that respondent always avoided to bear a child and had two abortions against his consent. Appellant no.1 has further stated that the careless attitude of the respondent towards marital life, family and the child forced him to leave his lucrative job only to take care of his family and the child. He stated that at present he was the owner of the franchise of the Cox and Kings for Bhubaneswar and earning Rs.50,000/- per month. Therefore, he claimed that he can take care of the child without any problem.

15. From the undisputed evidence on record, it is clear that the respondent is working in IBM and getting substantial amount as salary and has no other liability on her. It is also clear that she is staying there alone and there is nobody else to look after the child in case of her absence. Though there is flexibility of working from home the same do not appear to be adequate enough to come to a conclusion that she will be in a position to devote 24 hours to take care of her child. On the contrary appellant no.1 is engaged in business and is staying with his parents. Therefore, in the absence of appellant no.1, other two appellants are there to look after the child and the child can be attended to 24 hours a day. Another fact, though not taken into consideration by the learned District Judge is that the respondent has terminated her pregnancy twice prior to birth of Arindam. It is not her case that such termination of pregnancy was caused because of medical complicacies. This past conduct though is not the sole criteria to determine the attitude of the respondent towards her family, but is indicative of her attitude towards rising a family. Further more, when she was residing at Chennai alone, the child was less than three years of age and she admitted him to a Play School, which does not appear to be reasonable to us. Admittedly, we find that the child is with the appellants for the last two years, at Bhubaneswar and, therefore, it can safely be presumed that he has accustomed with the life style of Bhubaneswar with his father and grand parents and at this juncture passing an order to remove him from Bhubaneswar to Bangalore will have an adverse psychological impact on the minor child. Though Section 6(a) of the Act provides that the custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother, we come to the conclusion that in this case for the betterment and welfare of the child, he should remain with his father. It is also noted that since the child is suffering from gluten sensitive enteropathy and secondary lactose intolerance he is not a suckling baby and the mother, who is living alone in a big city, is not in a better position than his father, who is residing in the native State along with his other family members. So this Court comes to the conclusion that the judgment passed by the learned District Judge, Khurda is not sustainable.

16. We, therefore, allow the appeal, set aside the order passed by learned District Judge, Khurda and direct that the child-Arindam shall be in the custody of appellant no.1-father during his school days. It is further directed that he will be in the custody of the mother-respondent during long vacations**.** No costs.

Accordingly, the MATA stands disposed of.

Appeal allowed.

2011 (II) ILR- CUT- 815

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

W.P.(C) NO.12470 OF 2011 (Decided on 28.09.2011)

CHINMAYEE MOHANTY @ KAMILA …….Petitioner.

.Vrs.

KRUSHNA NARAYAN KAMILA ……Opp.Party.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.112.

Paternity of child – Judge, Family Court directed Parties and the child to go for D N A test – Order challenged.

Section 112 of the Evidence Act was enacted at a time when modern scientific advancements with deoxyribonucleic acid (DNA) and ribonucleic acid (RNA) tests were not even in contemplation of the legislature – The result of a genuine DNA test is said to be scientifically accurate but that is not enough to escape from the conclusiveness of Section 112 of the Act i.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable – This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent – But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception – Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access.

DNA test should not have been directed by way of having a roving enquiry – Before ordering for DNA test the Court should have arrived at a finding that the applicant had established a strong prima facie case and the court must have sufficient material before it to enable it to exercise its discretion.

In this case parties have led evidence and it would have been prudent on the part of the learned Judge, family Court not to direct the parties and the child to go for the DNA test for determining the question of paternity without considering the pros and con of such test – Held, the impugned direction is unsustainable in the eye of the law.

(para 13,16)

Case laws Referred to:-

1.AIR 1965 SC 364 : (Mahendra Manilal Nanavati-V- Sushila Mahendra Nanavati)
2.1993 SC 2295 : (Goutam Kundu-V- State of West Bengal & Anr.)
3.AIR 2001 (SC) 2226 : (Smt. Kamti Devi & Anr.-V-Poshi Ram)
4.(2003)4 SCC 493 : (Sharada-V-Dharampal)
5.Vol.100(2005) CLT 73 : (SC) Banarsi Dass-V-Mrs.Tecku Dutta & Anr.)
6.2010(II) OLR(SC) 575 : (Bhabani Prasad Jena-V-Convenor Secretary, Orissa State Commission for Women & Anr.)

For Petitioner - Mr. A.Panda & Associates
For Opp.Party - Mr. S.S.Das & Associates

B.K.MISRA, J The petitioner who was the opposite party in Civil Proceeding No. 166 of 2004 pending in the Court of learned Judge, Family Court, Cuttack challenges the propriety of the order passed by the said Judge, Family Court, Cuttack on 15.2.2011 directing the petitioner as well as the opposite party so also their child to undergo D.N.A. test with regard to the determination of the paternity of the child in question.

2. Before going to examine the propriety or impropriety of the impugned order of the learned Judge, Family Court, Cuttack, it will be worthwhile to mention the cases of the parties in brief. According to the husband-petitioner, he married the opposite party-wife on 24.2.2003. But according to the petitioner, there was no relationship between them and the opposite party behaved differently in maintaining conjugal relationship and ultimately the opposite party-wife was taken by her father to his house on the pretext of some custom. The further case of the petitioner is that he came to know that his wife has given birth to a male child in S.C.B. Medical College Hospital, Cuttack on 9th November, 2003. The apprehension of the petitioner is that the opposite party was impregnated by some other person before marriage and that was the reason as to why she deprived him of his conjugal rights. Under such circumstances the petitioner filed the proceeding for annulling his marriage with the opposite party and to grant a decree of divorce with a further prayer to declare that the child born to the opposite party (wife) is not his child.

3. The opposite party-wife contested the proceeding by way of filing the written statement wherein she denied the allegations of the petitioner and interalia pleaded that the child born to her is out of her wedlock with the petitioner and it is her specific case that she was physically and mentally tortured by the petitioner and his mother on demand of dowry and after the birth of the child the petitioner did not take care of her as well as the child nor did pay anything towards their maintenance for which she is residing

with her parents especially when the petitioner refused to take them back to his house.

4. In the proceeding before the Family Court, both parties have led evidence. During the pendency of the said proceeding a petition was filed by the petitioner-husband for a direction to the parties including the child to undergo the prescribed D.N.A. test to ascertain the paternity of the child which was born to opposite party on 9.11.2003. Such petition filed by the husband was stoutly resisted by the wife.

5. The Judge, Family Court, Cuttack upon hearing the learned counsel for the petitioner-husband as well as the opposite party-wife passed the impugned order directing the parties as well as the child to go for D.N.A. test which would help the Court in arriving at the just decision of the case.

6. Learned counsel appearing for the petitioner challenged the impugned order contending that when the marriage between the parties is an admitted fact and after marriage the spouses lived under one room and when sufficient materials are there before the Court that Opposite Party has access to her, the Court should not have ordered a roving enquiry in directing the parties and the child to go for the D.N.A. test. It was also contended that there has been abuse of the discretionary power so exercised by the learned Judge, Family Court, Cuttack. It was also contended that right to personal liberty is very important and compelling a person to undergo for medical examination of his or her blood test or the like without his or her consent and wish tantamount to interference with his or her fundamental right of life or liberty when there is no provision either in the Family Court's Act, the Code of Civil Procedure or the Evidence Act. It was also contended that the D.N.A. test is not to be directed as a matter of routine since Court's of Law always are inclined towards holding legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from rendering a verdict lightly or hastily which will have the effect of branding a child as a bastard and its mother as unchaste woman. Law always presumes both that a marriage ceremony is valid and that every person is legitimate.

7. Learned counsel appearing on behalf of the husband while admitting the marriage of the opposite party with the petitioner submitted that from the medical history of the petitioner it can not be said that the child born to the petitioner on 9.11.2003 is a legitimate child as the medical history of the petitioner shows that she had conceived prior to her marriage as her period

was missing as per the Bed Head ticket since 18.2.2003 i.e. seven days prior to the marriage and when the child was born to the petitioner on 9.11.2003 and was a "term baby", the same shows that the child was born when the gestation had attained 37 complete weeks but less than 42 weeks in other words between 259 and 294 days since the last menstrual period. It was also contended by the learned counsel for the opposite party that when a child is born before completion of 37 weeks (259 days) the child is considered preterm. It was also contended that at the time of admission of the petitioner to S.C.B. Medical College & Hospital, Cuttack for delivery it was reported to the doctor that the petitioner had married for the last one year. Thus, according to learned counsel for the opposite party-husband pregnancy begins from the first date of the last menstrual period (L.M.P.) and starting from that date the expected date of delivery is calculated and therefore when the bed head ticket shows that the period of the petitioner was missing since 18.2.2003 and her expected date of delivery was 25.11.2003 the child born to the petitioner is not born through him as he had no access to his wife namely, the petitioner during her stay in his house. In other words, the opposite party disputing the paternity of the child prayed for the DNA test. It was very vociferously contended by the learned counsel for the Opposite Party that the only way to disprove the paternity of the child is by blood group test. Having regard to the development of the medical jurisprudence to deny such request of him would be unreasonable.

8. In support of their respective contentions, the learned counsel for the parties placed reliance in several decisions of the Apex Court, namely **AIR 1965 S.C. 364, Mahendra Manilal Nanavati –v- Sushila Mahendra Nanavati, AIR 1993 S.C. 2295, Goutam Kundu –v- State of West Bengal & another, AIR 2001 (S.C.) 2226, Smt. Kamti Devi & another –v- Poshi Ram, (2003) 4 SCC 493, Sharada –v- Dharampal, Vol.100 (2005) CLT 73, (S.C.) Banarsi Dass –v- Mrs. Teeku Dutta & another and 2010 (II) OLR (S.C.) 575 Bhabani Prasad Jena –v- Convenor Secretary, Orissa State Commission for Women & another**.

9. In the instant case, we are called upon to decide as to whether the impugned order of the learned Judge, Family Court, Cuttack dated 15.02.2011 in C.P.No.166 of 2004 could be sustainable in the eye of law in the given facts and circumstances of this case.

10. We may point out at the outset that challenging the order of the Judge, Family Court, Cuttack regarding payment of monthly maintenance to the wife and child the present Opposite Party had preferred MAT Appeal No. 34 of 2008 before this Court. At that time the learned counsel for the present Opposite Party raised the dispute about the paternity of the child and prayed

for a direction for D.N.A. test to find out as to whether he (Opposite Party) is the father of the child or not. But the said suggestion was rejected by the Court while dismissing the appeal.

11. Since in this case the parties have led evidence and the matter is sub-judice before the learned Judge, Family Court, Cutttack, we refrain ourselves from expressing any opinion as to the pregnancy of the petitioner as well as the period of gestation as any finding or expressing opinion on that would definitely weigh in the minds of the trial Judge and may pre-judge the issue in question. Therefore, without delving into the technicalities of pregnancy, period of gestation and when fertilization occurs, which have been advanced in course of argument by the learned counsel for the opposite party, we would be confining ourselves with regard to the DNA test which has been ordered by the learned Judge, Family Court, Cuttack.

12. In matters of this kind and when dispute arises with regard to parentage, resort is being made to Section 112 of the Indian Evidence Act. There is a presumption and very strong one, though at the same time a rebuttal one. Section 112 of the Evidence Act is based on the well-known maxim “pater is est quem nuptiae demonstrant” (he is the father whom the marriage indicates.) The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate. It throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed. The law is general presuming against vice and immorality.

13. It is to be mentioned here that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant

by access or non-access. (**Kamti Devi Vrs. Poshi Ram, 4 (2001) 5 SCC 311: 2001 SCC (Cri) 892)**.

14. In **Bhabani Prasad Jena's** case (supra), the Apex Court by analyzing the position of law in the case of **Sharada** and **Banarasi** (supra) have concluded as follows:-

> "(1) That Courts in India cannot order blood test as a matter of course;
>
> (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
>
> (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
>
> (4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> (5) No one can be compelled to give sample of blood for analysis."
>
> It has also been held that:-
>
> "In a matter where paternity of a child is in issue before the Court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in a routine manner, whenever such a request is made. The Court has

> to consider diverse aspects including presumption under Section 112 of the Evidence Act, pros and cons of such order and the test of 'eminent need' whether it is not possible for the Court to reach the truth without use of such test."

15. In the instant case, the opposite party-husband had earlier prayed for DNA test on 18.8.2007 and the Court rejected such prayer of the present opposite party-husband on 19.5.2010 but again the husband renewed his prayer for DNA test of the parties including the child which was disposed of by the impugned order. On going through the impugned order, it has come to our notice that the learned court below was swayed away with the notion that the oral evidence and documentary evidence and medical Texts which were produced by the petitioner-husband and holding that the opposite party-wife might have conceived prior to her marriage ordered for a DNA test to arrive at a just decision of the case. It would be appropriate to quote the reasoning of the court below hereunder:-

> "xx xx xx Learned counsel of O.P. argued that if she was pregnant before her marriage petitioner's female relatives could notice it after her marriage seeing her swelled abdomen and since no such physical development was noticed in her, a conclusion is not available that she was impregnated by somebody else before her marriage. He also argued that petitioner did not suggest to O.P. during her cross-examination that as she was already pregnant before her marriage her father gave her in marriage hastily. He also argued that a hasty marriage would not necessarily always denote pregnancy prior to marriage. These contentions of learned counsel of O.P. would not succeed. Merely because petitioner's female family members found no feature of pregnancy in O.P. soon after the marriage, a conclusion cannot be reached that whatever petitioner is saying now about the pregnancy of O.P. has to be rejected. Petitioner by various items of materials i.e. oral evidence, documentary evidence and medical texts have filed to show that O.P. might have been pregnant prior to her marriage. Under these circumstances D.N.A. test of all the parties including the child would help the court in arriving at the just decision of the case."

16. Thus on analyzing the impugned order, we have no hesitation to hold that the DNA test should not have been directed by way of having a roving enquiry. Before ordering for DNA test the Court should have arrived at a finding that the applicant had established a strong prima facie case and the Court must have sufficient material before it to enable it to exercise its

discretion. Abuse of the discretionary power at the hands of a Court cannot be expected when parties have led evidence before the Court. The Court has to examine the materials before it regarding the degree of proof of non-access for rebutting conclusiveness in the light of the judgment of the Apex Court in **Kamti Devi's Case** (supra). When parties have led evidence before the Court, it would have been prudent on the part of the learned Judge, Family Court not to direct the parties and the child to go for the D.N.A. test with regard to determining the question of paternity raised by the Opposite Party and the pros and con of such D.N.A. test should have been considered.

17. The contention of the learned counsel for the opposite party-husband that the petitioner (wife) when had earlier prayed for time for collection of blood sample she cannot thereafter have a volte-face and question the propriety of the impugned order, appears fallacious and not tenable.

18. The above being the position, the direction for DNA test as has been given by the learned Judge, Family Court, Cuttack is unsustainable in the eye of law.

19. In the ultimate analysis, the impugned order is set aside and the writ petition stands allowed.

Writ petition allowed.

2011 (II) ILR- CUT- 823

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

O.J.C. NO.10082 OF 1996 (Decided on 25.08.2011)

GANESWAR BISWAL …....Petitioner.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

SERVICE – Petitioner an N.M.R. worker in Orissa Power Generation Corporation (O.P.G.C) – Voluntary retirement scheme (VRS) floated by O.P.G.C. for N.M.R. workmen – Petitioner opted VRS and received all financial benefits – Subsequent application for regularization of his service.

Held, once an employee opts to retire voluntarily he can not raise a claim for regularization of service.

(Para 15)

Case laws Referred to:-

1.AIR 1986 SC 1571 : (Central Inland Water Transport Corporation Ltd. & Anr.-V- Brojo Nath Ganguly & Anr.)
2.AIR 2003 SC 858 : (Bank of India & Ors.-V-O.P.Swaranakar etc.)
3.AIR 2008 SC 2449 : (National Textile Corporation (M.P.) Ltd.-V- M.R. Jhadav)
4.AIR 2006 SC 1420 : (HEC Voluntary Retd. Emps. Welfare Soc. & Anr.-V-Heavy Engineering Corporation Ltd. & Ors.)

For Petitioner - M/s. Rangadhar Behera, S.K.Swain & D.R.Rath.
For Opp.Parties - Govt. Advocate (for O.P.1)
M/s. P.N.Mohapatra & K.C.Mohanty (for O.P.2)

C.R. DASH, J. The petitioner was working as an N.M.R. in the establishment of Orissa Power Generation Corporation ('O.P.G.C.' for short), a public sector undertaking under the Govt. of Orissa in Energy Department. The O.P.G.C. floated a Voluntary Retirement Scheme ('V.R.S.' for short) for the N.M.R. workmen working under it. The bone of contention between the petitioner and the O.P.G.C. relates to the V.R.S. The stand of the O.P.G.C. is that the petitioner having opted for voluntary retirement under the V.R.S. and having taken all the financial benefits admissible under the V.R.S., the writ petition is not maintainable. The petitioner's stand is that he had no interest to take voluntary retirement, but he having been coerced to accept the offer of voluntary retirement under the V.R.S. and after he was relieved

from service under the V.R.S., service of some of the N.M.Rs. similarly circumstanced with him having been regularized, action against him vide Annexure-3, the Notice offering V.R.S. to him and Annexure-4 the relieve order under the V.R.S. are violative of Articles 14 and 21 of the Constitution of India and the same are liable to be quashed.

2. It is not disputed that the V.R.S. was floated by the O.P.G.C. and Notice was issued to the petitioner on 31.10.1995 vide Annexure-3 to give option under the V.R.S. The petitioner does not dispute the fact that he had opted for voluntary retirement and took all the financial benefits admissible to him under the V.R.S. Contention of the petitioner is to the effect that under normal circumstance he would not have taken voluntary retirement, as he was not interested for the same. The tone and tenor of the Notice vide Annexure-3 however was coercive, in as much as if the petitioner would not have opted for voluntary retirement, action under the provisions of Industrial Disputes Act as contemplated in the Notice vide Annexure-3 would have been taken against him. It is further contended that after the petitioner had opted for voluntary retirement under the V.R.S., Service of some of the N.M.Rs. similarly circumstanced with the petitioner was regularised and in that view of the matter, the petitioner has got a just claim for regularisation of his service despite his voluntary retirement.

3. Whether the petitioner had any interest to take voluntary retirement under the V.R.S. or not is a question which cannot be gone into or addressed in a writ petition, because his action of taking voluntary retirement is presumed to be voluntary in nature unless the contrary is proved. The facts, which run contrary to the act of voluntariness of the petitioner is alleged to be the last paragraph of the Notice, vide Annexure-3, legality and validity of which the petitioner has challenged. For better appreciation and ready reference, Annexure-3 is quoted as hereunder :-

"N O T I C E

Notice No. 761 Date : 31.10.95

> You, the N.M.R. Employees are well aware that a large number of N.M.R. Employees were recruited during the construction stage of the project. On reduction of construction activity and workload, the Management now do not require such a large labour force. However the Board of Management has now decided that to reduce the strength of N.M.R. Employees, a Voluntary Retirement Scheme may be offered to the N.M.R. Employees so that the surplus employees can be reduced. The terms and contents of the said Scheme is enclosed.

The Scheme shall come into force with effect from 31.10.95 and shall remain open for the N.M.R. Employees to make application till 30.11.95.

The N.M.R. Employees who are interested to Retire Voluntarily under the Voluntary Retirement Scheme are hereby intimated to make applications in the prescribed form available with the Sr. Asst. Manager (Administration) of Corporate Office, General Manager, Mini/Micro, Berhampur and Sr. Manager (Power), Mini Hydel Division, Cuttack.

In case N.M.R. Workmen shall not come forward and opt for the Voluntary Retirement Scheme, the Management shall be constrained to retrench the N.M.R. personnels as per provisions of the Industrial Disputes Act and they shall not be entitled to the ex gratia payment as mentioned in the Voluntary Retirement Scheme.

Sd/-
Copy to : Notice Board Sr. Manager (Power),
Person concerned Mini Hydel Project Division,
Cuttack."

4. Some of the employees similarly circumstanced with the present petitioner had moved this Court in O.J.C. No.3476 of 1997 challenging legality of the selfsame Notice vide Annexure-3 (as quoted supra). The ground of challenge in the aforesaid writ petition was same as in the present writ petition. This Court vide order dated 04.09.1998 dismissed the said writ petition by holding that the petitioners therein having opted to take voluntary retirement and they having accepted the benefits thereunder, it is too late in the day to visit the Writ Court asking the Court to lift the veil and grant them the relief as prayed for.

5. The prayer, grounds of challenge and contentions of the petitioners in the aforesaid writ petition (O.J.C. No. 3476 of 1997) being the same with the present writ petition and the petitioners therein being similarly circumstanced with the present petitioner, we would normally be inclined not to differ from the view expressed by an earlier co-ordinate Bench in similar writ petition. Learned counsel for the petitioner however wants us to address the questions raised by him in the light of the law settled by Hon'ble the Supreme Court in the case of **Central Inland Water Transport Corporation Ltd. and another *vs.* Brojo Nath Ganguly and another,** A.I.R. 1986 S.C. 1571 and other such reported decisions.

Learned counsel for the opposite parties with all vehemence submits that none of the decisions cited by the learned counsel for the petitioner is applicable to the facts of the present case and the petitioner having opted for voluntary retirement and having received the benefits under the V.R.S., cannot now agitate the issue and claim for regularization in service.

6. According to the V.R.S. (part of Annexure-3), the scheme shall be applicable to all the N.M.R. workmen, those who have completed minimum three years of service in corporate office and mini micro organization. According to Clause-2 of the said scheme, in order to avail the benefit under the scheme, an N.M.R. employee is to make application to the Management in the prescribed form. According to Clause-3 of the scheme, the employee who applied for voluntary retirement under the scheme and the applications thereof are accepted by the Management will be eligible for the financial benefits as enumerated. Clause-4 of the scheme stipulates that the Management shall have the power to reject the application of an employee for voluntary retirement without assigning any reason thereto.

7. A proposal is made when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence (Section 2(a) of the Contract Act). Herein the O.P.G.C., by reason of the scheme, has not expressed its willingness to do or abstain from doing anything with a view to obtaining assent of the employee to such act. Further the power of the O.P.G.C., as found from the scheme to accept or reject any application for voluntary retirement is absolutely discretionary. The scheme, therefore, cannot be said to be an offer, which, on the acceptance by the employee, would fructify in a concluded contract. The scheme having regard to its provisions merely constitutes an invitation to treat and not an offer. The proposal of the employee when accepted by the O.P.G.C. would constitute a promise within the meaning of Section 2 (b) of the Contract Act. Only then the promise becomes an enforceable contract. (See **Bank of India and others *vs.* O.P. Swaranakar etc.,** A.I.R. 2003 S.C. 858).

Hon'ble Supreme Court in **National Textile Corporation (M.P.) Ltd. *vs.* M.R. Jhadav,** A.I.R. 2008 S.C. 2449, has further explained the aforesaid aspect of V.R.S. constituting a contract by holding thus :-

> "17. When a scheme is floated for voluntary retirement, it constitutes an offer to treat. It is not an offer stricto sensu. Only when pursuant to the said invitation to treat, an employee opts for such a scheme, it

constitutes an offer. When such an offer is made, it is required to be accepted.

The matter relating to implementation of the said offer would indisputably be governed by the terms and conditions of the scheme……."

Further the Hon'ble Supreme Court in the aforesaid case of **National Textile Corporation**, has held thus :-

"20. Subject, of course, to the terms of 'invitation to treat' as also those of the offer as envisaged under the Indian Contract Act, an offer has to be accepted. Unless an offer is accepted, a binding contract does not come into being. A Voluntary Retirement Scheme contemplates cessation of the relationship of master and servant. The rights and obligations of the parties thereto shall become enforceable only on completion of the contract. Unless such a stage is reached, no valid contract can be said to have come into force. Acceptance of an offer must, therefore, be communicated."

8. It is an admitted that in the present case that the offer has been communicated to the petitioner and he has already received all the financial benefits admissible under the V.R.S. Hon'ble Supreme Court in the case of **HEC Voluntary Retd. Emps. Welfare Soc. & Anr. vs. Heavy Engineering Corporation Ltd. & Ors. ,** A.I.R. 2006 S.C. 1420, has held thus :-

"The voluntary retirement scheme speaks of a package. One either takes it or rejects it. While offering to opt for the same, presumably the employee takes into consideration the future implications also."

Proceeding further, it has further been held by Hon'ble the Supreme Court that :-

"It is not in dispute that the effect of such voluntary retirement scheme is cessation of jural relationship between the employer and the employee. Once an employee opts to retire voluntarily, in terms of the contract he cannot raise a claim ……."

9. In view of the settled law on the point, the offer of voluntary retirement by the petitioner having been accepted by the O.P.G.C. (opp. party) and the petitioner having received all the financial benefits under the V.R.S., this Court cannot go into the question as to whether the petitioner had any interest to take voluntary retirement or not. It is to be only seen

whether the last paragraph of the notice vide Annexure-3 constitutes a coercion as contended by the petitioner.

10. The last paragraph of the Notice vide Annexure-3 is to the effect that in case an N.M.R. workman does not come forward and opt for V.R.S., the Management shall be constrained to retrench the N.M.R. personnel as per the provisions of the Industrial Dispute Act and they shall not be entitled to the ex gratia payment as mentioned in the V.R.S. This Clause in the Notice, vide Annexure-3, is contended to be coercive.

11. We must read the Notice in conjunction with the objectives for which the V.R.S. was floated. According to the assertions in the counter affidavit, and the notice (Annexure-3) the V.R.S. was floated with the objective to downsize the staff, as the organization had become over-staffed after cessation of construction works in different places. To achieve such an objective, the Management thought of two methods, i.e. voluntary retirement under V.R.S. and retrenchment of surplus employees in accordance with the provisions of the Industrial Disputes Act. The former is facilitative by floating of the V.R.S. and the latter is statutory. In the notice vide Annexure-3, the authorities have made their objective and the methods to achieve the objective clear. Paragraph-3 of the notice vide Annexure-3 simply makes it clear that if the sought objective is not achieved by the first method then the management shall be constrained to resort to the second method and in that event the financial benefits admissible under the facilitative method under the V.R.S. cannot be claimed. The tone and tenor of the notice vide Annexure-3 does not in any way amount to pressurizing the N.M.R. workmen and putting them under coercion to respond to the V.R.S., which, according to settled law is only an “invitation to treat” and an employee has the right either to take it or reject it. On the contrary, by making their mind and intention clear in Annexure-3 the authorities have helped the employees to take a just decision before opting for V.R.S. by taking into considerations the future implications also, which includes possibility of retrenchment with no facilitative financial benefits. We are, therefore, not inclined to accept the contention of learned counsel for the petitioner on this score.

12. It is asserted by the petitioner that Manguli Charan Behera and Susanta Bahinipati are the two N.M.R. workmen, who are similarly circumstanced with him (petitioner); they were retrenched from service under the V.R.S. but subsequently their services have been regularized. Such an assertion by the petitioner has been refuted in the counter affidavit. In the counter affidavit, it is averred that aforesaid two N.M.R. workmen had never opted for voluntary retirement and services of both of them were regularized

depending on vacancies according to their suitability. The petitioner has filed rejoinder. In the rejoinder, the aforesaid averment in the counter affidavit is not at all challenged on facts. The petitioner in the rejoinder has taken a stand that, aforesaid two N.M.R. workmen being junior to the petitioner, should have been retrenched from service in accordance with the aforementioned second method (action under the Industrial Disputes Act) if they did not opt for voluntary retirement under the V.R.S.

13. The stand and contention raised by the petitioner and learned counsel appearing for him is too spacious to be accepted. The objective of the V.R.S. was to downsize the staff. If the staff could not have been down sized under the V.R.S. according to the requirement and expectation, the authorities of O.P.G.C. would have resorted to action under the Industrial Disputes Act for retrenchment as contemplated. The Court in exercise of its jurisdiction of judicial review cannot ask the O.P.G.C. to adopt one of the methods or act according to the wish of the petitioner, who is no more having any jural relationship with the O.P.G.C. after his retirement under V.R.S. Further the claim of the petitioner to be senior to Manguli Charan Behera and Susanta Bahinipati is misconceived and ridiculous inasmuch as after his retirement under the V.R.S. his (petitioner's) seniority is irrelevant so far as regularization of left-over staff (after the exercise of downsizing) is concerned. We are, therefore, not inclined to accept the contention of learned counsel for the petitioner on this score.

14. Learned counsel for the petitioner wants us to address the petitioner's grievance in the light of the decision of Hon'ble the Supreme Court in the case of **Central Inland Water Transport Corporation Ltd.** (supra). The aforesaid case is a landmark case relating to service contracts. On interpretation of the relevant service rule, Hon'ble Supreme Court held that the rule empowering the Government Corporation to terminate service of its permanent employees by giving notice or pay in lieu of notice period is opposed to public policy and violative of Article 14 and Directive Principles contained in Articles 39 (a) and 41 of the Constitution of India. Analyzing the provisions of the Contract Act and the Constitution of India, Hon'ble Supreme Court struck down the clause in the relevant Service Rule providing for termination of services of the officers by giving them three months' notice observing that, considering the inequality in the bargaining power of the parties, the clause in the contract of employment was void under Section 23 of the Contract Act as opposed to public policy besides being ultra varies Article 14. The aforesaid decision and all other decisions relied on by the learned counsel for the petitioner relates to contract of employment with certain power with the employer to terminate the service of

a permanent employee by giving three months' notice or following similar methods. The ratio of those decisions does not apply to the facts of the present case, which is concerned with rights and claim of the petitioner after his voluntary retirement under a scheme floated by the O.P.G.C.

15. Having gone through the decision cited by the parties diligently and having considered the fact of the case meticulously in the light of those decisions, we are of the view that the petitioner, after a concluded contract culminating in cessation of jural relationship of the employee and the employer between him and the O.P.G.C., cannot now claim for regularization of service.

16. Learned counsel for the petitioner submits that in obedience to the interim order of this Court dated 10.12.2009 the petitioner having deposited in Court all the amounts he had taken under the V.R.S., the case for regularization of service of the petitioner is to be considered taking a lenient view of the matter.

The contention raised by learned counsel for the petitioner is too spacious to be accepted. No doubt, the conduct of the petitioner in depositing the amount in Court shows his earnestness and bona fides to return to the service under the O.P.G.C; but the petitioner being ceased of such a right, the Court under the writ jurisdiction cannot revive the right any more and grant relief to the petitioner.

17. In view of the above, the writ petition is dismissed.

18. The amount already deposited by the petitioner in Court be returned to him (petitioner) along with accrued interest thereon within fifteen days, on proper identification.

Writ petition dismissed.

2011 (II) ILR- CUT- 831

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

JCRA NO.08 OF 2002 (Decided on 22.06.2011)

DANDADHARA SAHOO …….. Appellant.

.Vrs.

STATE OF ORISSA …Respondent.

CRIMANAL TRI AL – Soon after the occurrence, the appellant surrendered at the police station and admitted to have killed his wife by giving farsa blows – Doctor conducting post mortem established that the death of the deceased was homicidal in nature and the injuries found on the body of the deceased were possible by the weapon like farsa produced before him – Chemical examination report reveals that human blood of 'B' group was detected from the full pant of the appellant and to that effect no explanation has been given by him – Held, impugned judgment of conviction and sentence is confirmed.

(Para 9)

For Appellant - Mr. Gouri Sankar Pani
For Respondent - Mr. Soubhagya Ketan Nayak
(Addl. Govt. Advocate)

PRADIP MOHANTY, J. This appeal has been preferred by the appellant challenging the judgment dated 07.12.2001 passed by the learned Additional Sessions Judge, Nayagarh in S.T. Case No.11/87 of 2000.

2. The case of the prosecution, in short, is that the appellant had married the deceased, who was the daughter of the informant (P.W.4), three and half years prior to the incident. At the time of marriage, P.W.4 had given a cash of Rs.15,000/-, gold and silver ornaments and household articles as dowry. Four months after the marriage, due to some difference in the family, the appellant and the deceased left their house and lived in a separate house in the same village. The appellant addicted to liquor and sold all the ornaments, utensils and also the cabin in which he was running his betel shop. Then the appellant started assaulting his wife (deceased) to fetch money from her father. In the evening of the previous day of the occurrence, the appellant assaulted his wife and asked her to bring Rs.1,000/- from her father. On 05.12.1999 at about 9.00 AM, the father of the deceased went to the house of the appellant and pacified the matter. But, on that day (05.12.1999) at about 2.00 PM, the appellant dealt a farsa blow on the neck of the deceased-Rajalaxmi. Getting such information from Santosh Kumar

Sahoo (P.W.3), deceased's father (informant) went to the house of the appellant and found his daughter lying dead with cut injury on her neck and throat. At about 300 PM, the informant (P.W.4) lodged the report at Dasapalla Police Station pursuant to which the case was registered. The investigation was taken up by P.W.10 during the course of which he held inquest over the dead body and sent the same for post mortem examination, prepared the spot map and seized the blood stained earth and the sample earth as well as the weapon of offence. Getting V.H.F. message that the appellant surrendered at the police station, the I.O. came there and arrested the appellant. He then sent the appellant for medical examination and collection of nail clippings and blood group. He also seized the full pant of the appellant and ultimately on completion of the investigation filed charge sheet against the appellant.

3. The plea of the appellant is one of complete denial of the allegation. His further plea is that Santosh Kumar Sahoo (P.W.3) had illicit relationship with the deceased. On the date of occurrence, when the appellant returned home, he found his wife and P.W.3 sleeping together on a cot. When the appellant shouted, P.W.3 whirled a farsa and when the deceased got up, the farsa struck on her neck and P.W.3 fled away from the spot.

4. In order to prove its case, prosecution examined as many as ten witnesses including the doctor & the I.O. and exhibited twenty documents. The defence examined the appellant himself as D.W.1.

5. Learned Additional Sessions judge, who tried the case, relying on the evidence of the eye witness (P.W.3), the parents of the deceased (P.Ws.4 and 5), the mediator of the marriage (P.W.7), the postmortem doctor (P.W.8) and other incriminating circumstances available on record convicted the appellant for commission of offence under Section 302, IPC as well as Section 498-A, IPC and Section 4 of the Dowry Prohibition Act and sentenced him to undergo imprisonment for life for the offence under Section 302, IPC, rigorous imprisonment for two years for the offence under Section 498-A, IPC and rigorous imprisonment for six months for the offence under Section 4 of the Dowry Prohibition Act, which are to run concurrently.

6. Mr.Pani, learned counsel for the appellant submits that the trial court should not have believed the evidence of the eye witness (P.W.3) in absence of any corroboration and should have acquitted the appellant accepting the version of the defence which is more probable. He further submits that P.Ws.4 and 5 having not reported to the police or to any

Bhadralog about the earlier torture meted out to their daughter (deceased), no reliance can be placed on their evidence.

7. Mr. Nayak, learned Additional Government Advocate, on the other hand, vehemently contended that the evidence of the ocular witness (P.W.3) is very clear, cogent and trustworthy. He vividly described the role played by the appellant. P.W.4, the father-in-law, and P.W.5, the mother-in-law of the appellant, have specifically stated about the torture meted out to the deceased for non-fulfilment of demand of dowry. P.W.8, the doctor who conducted autopsy has clearly corroborated the evidence of the ocular witness. The chemical examination report (Ext.19) also reveals that human blood stains were found from the seized full pant of the appellant. Therefore, there is no infirmity or illegality committed by the court below in convicting the appellant.

8. Perused the L.C.R., more particularly the evidence of P.Ws.3 to 5, 7 and 8 as well as the chemical examination report (Ext.19) on which reliance has been placed by the trial court for recording the judgment of conviction. P.W.3 is a neighbour of the appellant. In his examination-in-chief, he stated that the appellant had a betel shop and he was addicted to liquor. On the day of the occurrence at about 12.00 to 12.30 PM, while he was in his bari side he heard shout of Mami (deceased). Hearing the shout, immediately he rushed to the house of the appellant and saw the appellant sitting over the deceased, who was lying on the ground, and giving blows on her neck by means of a farsa. Being frightened he came out of the house, went to the father-in-law's house of the appellant and informing the incident to the father of the deceased he lost his sense. Nothing has been elicited from him in cross-examination to demolish his evidence. Rather, in cross-examination he admitted that at the time of occurrence, he and his mother were in the bari side and that the distance between the house of the appellant and the place where they were standing was 20 cubits and that seeing the incident he raised hullah.

P.W.4 is the father of the deceased and the informant in this case. He stated that he had given a cash of Rs.15,000/-, gold and silver ornaments and other household articles to the appellant as dowry at the time of marriage of the deceased with the appellant. Four months after the marriage, appellant and the deceased left the house of the appellant's father. While they were living separately, they used to quarrel at times and he (P.W.4) used to go there to settle the matter. Once appellant demanded a fan through the deceased and he complied the same. Again he demanded a cash of Rs.1,000/- to start a business, but as he had no money with him

he gave Rs.500/-. Fifteen days prior to the death of the deceased, appellant had sent her to collect Rs.3000/- from him, but he took the deceased to the house of the appellant and told him that he was unable to comply such demand as he was a daily labourer. He further stated that on the previous day of the occurrence, the appellant asked the deceased to bring Rs.1,000/- from him and as she refused to ask him, the appellant assaulted her. On 05.12.1999 morning, P.W.4 went to the house of the appellant and requested him not to quarrel with his daughter. On that day at about 2.00 PM, he got information from P.W.3 that the appellant dealt farsa blow to his daughter and immediately rushed to the house of the appellant along with his wife. He saw the dead body of the deceased lying near the door of the room of the house of the appellant with cut injury on her neck and throat. He proved the F.I.R. (Ext.2) lodged by him at Daspalla P.S. In cross-examination, nothing has been elicited in favour of the defence.

P.W.5 is the mother of the deceased who corroborated the evidence of P.W.4 with regard to demand of dowry and intimation given by P.W.3. She went to the spot and saw the dead body of the deceased lying inside the room of the house of the appellant with cut injury on her neck and throat. Nothing substantial has been elicited from her in cross-examination.

P.W.7 is the mediator in the marriage between the appellant and the deceased. His evidence is that a cash of Rs.15,000/- was given by P.W.4 towards dowry to the appellant.

P.W.8 is the doctor who conducted autopsy over the dead body of the deceased and found the following external injuries.

"(i) Two incised wounds on front side of neck ½" length and ½' x 1" depth.

(ii) Incised wound of size 7" x 3½" and skin in apposition ½" above the sterniclido mastoid origin.

(iii) Incised wound 7" x 1½" on the left side of the neck."

On dissection he found as follows:

"(i) Right plural cavity contained coagulated blood coating the right lungs.

(ii) All the chambers of the heart were empty.

(iii) All internal organs like lever, spleen and kidney were pale.

(iv) Large vessels were empty.

(v) Stomach contained 500 grams of partially digested food materials."

He opined that all the injuries were ante mortem in nature. The external injury nos.(ii) and (iii) were sufficient to cause death in ordinary course of nature. To the query made by the I.O., he opined that the injuries found on the body of the deceased could be possible by the farsa produced before him.

9. The analysis of evidence made above leads to the conclusion that the prosecution through P.Ws.4, 5 and 7 has amply proved that the deceased had married the appellant one year prior to the occurrence. At the time of marriage, there was demand for dowry by the appellant which was complied with by P.W.4. After the marriage was solemnized the appellant demanded further dowry in shape of money from the parents of the deceased and subjected her to cruelty and harassment, as P.W.4 expressed his inability to fulfil the same. The evidence of P.W.3, the sole eye witness, appears to be clear, cogent and trust worthy. He has categorically narrated how appellant committed murder of his own bed partner in a barbaric manner. Soon after the occurrence, the appellant surrendered at the police station and admitted to have killed his wife by giving farsa blow, as is evident from Ext.20 as well as the evidence of the I.O. (P.W.10). From the evidence of the postmortem doctor (P.W.8), it is clearly established that the death of the deceased was homicidal in nature and the injuries found on the body of the deceased were possible by the weapon like farsa produced before him. The chemical examination report (Ext.19) reveals that human blood of 'B' group was detected from the full pant of the appellant and to that effect no explanation has been given by the appellant. Under the circumstances, there is hardly any scope for this Court to interfere with the impugned judgment of conviction and sentence passed by the trial court.

10. In view of the aforesaid, the JCRA is dismissed and the impugned judgment of conviction and sentence passed by the trial court is upheld.

Appeal dismissed.

2011 (II) ILR- CUT- 836

M.M.DAS, J.

W.P.(C) NO.11915 OF 2011 (Decided on 05.08.2011)

RAJ GOPAL RAMANUJA DAS ……Petitioner.

Vrs.

COMMISSIONER OF ENDOWMENTS ORISSA & ORS. ……...Opp.Parties.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 (ACT NO.11 OF 1952) – S. 7 & 35(2).

Jurisdiction of the Commissioner – Whether Commissioner can suspend a Mahanta U/s.7 of the Act – Held, No.

In this case Police seized silver slabs from the premises of the Emar Math, Puri – Mahanta of the said Math was implicated in a theft case – Commissioner of Endowments suspended the petitioner - Mahanta and appointed the Opp.Parties 2 to 6 as members of an interim trust Board – Held, No provision under the Act to suspend a hereditary trustee – Petitioner has not earned any disqualification as provided U/s.35 of the Act.

The Commissioner can take steps U/s.7 of the Act to ensure that the religious institution is properly administered and its income is duly appropriated for the purposes which they were founded or exist – Held, impugned order suspending the petitioner from the Mahantaship and constitution of the interim trust board is quashed and the matter remanded back to the Commissioner to constitute another interim trust board by taking members from well known Hindu Public of the locality and Government officials to manage the affairs of the Emar Math – However the petitioner shall continue as Mahanta of the said Math but he shall not deal with the properties of the Math until completion of the proceeding initiated against him U/s.35 of the Act.

(Para 11,12)

Case law Referred to:-

108(2009) CLT 508 : (Sri Siddha Math, represented by Mohanta Satya Narayan Ramanuj Das & two Ors.-V-Sri Jagannath Temple Managing Committee & Anr.)

For Petitioner - M/s. Bikram Pratap Das, S.Rath & S.K.Mishra.

For Opp.Parties - Dr. A.K.Rath (for O.P.1)
M/s. M.K.Mishra, P.K.Das & S.Senapati (for O.P.6)

M. M. DAS, J. Exercise of jurisdiction under Section 7 of the Orissa Hindu Religious & Endowments Act, 1954 (hereinafter referred to as 'the Act') by the Commissioner of Endowments in suspending the petitioner from his Mahantaship of Emar Math, Puri is the subject matter of dispute in the present writ application.

2. The brief facts leading to the present case are that the police seized a silver slab from a person at Dhenkanal sometime in February, 2011 and basing on the disclosure made by the said person that it was stolen from the premises of the Emar Math, Singhadwar P.S. Case No.16 of 2011 was registered on 26.02.2011 on an F.I.R. being lodged by the I.I.C. of the said Police Station alleging theft of silver slabs by some labourers, who were doing repair works in the Emar Math premises under a contractor engaged by Archaeological Survey of India. The labourer from whom the silver slab was seized led to discovery of a large number of such silver slabs from inside a completely closed room in the Math premises having no entry to the said room. As per the investigation made, it is disclosed that the theft was committed by entering into the closed room through a hole in the roof of the said room. The petitioner, who is the Mahanta of the said Math, has been implicated in the case basing on the statements of co-accused persons. He was arrested on 24.03.3011 and has been released on bail on 27.04.2011, pursuant to the orders passed by this Court on 22.04.2011 in BLAPL No.7091 of 2011. The Commissioner of Endowments issued the impugned order dated 25.03.2011 suspending the petitioner from the Mahantaship of the Math and appointed the opposite parties as members of an interim trust board for management of the Math and to safeguard its properties. The said order was passed soon-after the petitioner was arrested and was in custody.

3. It is stated by the petitioner that the hidden treasure to a huge magnitude found in the Math premises, received widest media attention and has been sensitized. The silver slabs numbering more than five hundred were initially kept in the Math premises guarded by the police and thereafter pursuant to the order passed by this Court in a writ application, have been shifted to the police armory for its safe custody. The petitioner feigned innocence with regard to his involvement with the theft and claims that he had no knowledge of existence of such large cache of silver slabs inside the Math premises. The silver slabs seized indicate that they are century old slabs and according to the petitioner, it might have been kept in the closed room without any opening therein by some of his predecessors' Mahantas.

4. Learned counsel for the petitioner urged that in a "Math" the Mahanta is the head and under no circumstances, the Commissioner of Endowments can suspend him from Mahantaship of the Math by exercising power under Section 7 of the Act, as the petitioner has not earned any disqualification as provided under Section 35 of the Act.

5. Before delving into the legal question, it would be apt to state that as already vividly discussed by this Court in the decision rendered in the case of ***Sri Siddha Math, represented by Mohanta Satya Narayan Ramanuj Das and two others v. Sri Jagannath Temple Managing Committee and another***, 108 (2009) CLT 508, the Hindu Mathas for the first time were established by Adi Shankara (Shankaracharya), who founded four Mathas at four corners of India and made them institutions for his vendantic teachings. Such Math founded by Adi Shankaracharya at Puri is known as "Gobardhan Math". The galaxy of Vaishnaba teachers and philosophers, have founded different sects of Vaishnavism. The first amongst them was Ramanujacharya, whose followers were known as Sri Vaishnabas. Thereafter, various other Mathas, like Ramanandi Matha etc., were established, which admits Sudras in their brotherhood and obey no caste rules. According to 1929 Edition of the Puri Gazettor, Mathas are Monastic houses originally founded with the object of giving religious instructions to "Chellas or disciples" and generally to encourage a religious life. At that time, as many as seventy Mathas existed in Puri. The Maths surrounding the Lord Jagannath Temple, Puri, sprouted and flourished under the religious rulers of Puri. The various Mathas in course of time, have become involvement with the ritual worship in the Jagannath Temple. The Mathas are affiliated with and espoused the teaching of different sects. The Emar Math was established by Sri Ramanujacharya, who was one of the first Vaishnabas and whose followers are known as Sri Vaishnabas. The Emar Math provides "Chandrika" and "Chausara" fashioned from flowers for Lord Jagannath's "Bada Singhara Besa" and "Chula" for the Nabanka ritual. The Emar Matha offers "Pana Bhoga" during the time of "Anasara" and "Bala Bhoga" during the month of "Kartika".

6. In this background and considering the history of the Mathas established in and around Sri Lord Jagannath Temple, Puri, it would be evident that the Mahanta, who is considered to be the leader of the Math is to propagate the philosophy of its founder by holding religious discourses and in the instant case, the petitioner, who is the Mahanta, is to propagate the teachings and philosophy of Ramanujacharya, whose followers are known as Sri Vaishnabas.

7. Admittedly the petitioner was the managing hereditary trustee of the Emar Math. Section 35(1) of the Act deals with disqualification of hereditary trustees in a Math, which is as follows :-

> "35. ***Disqualification of hereditary trustees*** – (1) A hereditary trustee of a math shall be declared disqualified and shall consequently cease to hold his office if he –
>
> (a) is of unsound mind ; or
>
> (b) is suffering from any physical or mental disease or defect or infirmity which renders him unfit to be a trustee; or
>
> (c) has ceased to profess and practice Hindu religion or tenets of the math; or
>
> (d) is convicted for any offence involving moral turpitude [x x x]; or
>
> (e) has committed breach of trust in respect of any of the properties of the religious institution; or
>
> (f) persistently and willfully defaults in discharging his duties or functions under this Act or any other law for the time being in force or in payment of contribution or other dues payable to Endowment Fund."

Sub-section (2) thereof provides that the Commissioner shall, after enquiry in accordance with the provisions of the Act and so far as may be, of the Code of Civil Procedure, 1908 (V of 1908) relating to trial of suits and with the prior approval of the State Government, declare by an order in writing whether a trustee is disqualified either temporarily or for the life-time under this section. ***(emphasis supplied)***

8. There is no provision under the Act to suspend a hereditary trustee. The power of the Commissioner under Section 35 (2) of the Act to temporarily disqualify a hereditary trustee can only be exercised after due enquiry is conducted in accordance with the said provision. Section 35 (1) of the Act, as quoted above, prescribes amongst other grounds, that only if a person is convicted for any offence involving moral turpitude or has committed breach of trust in respect of any of the properties of the religious institution, shall be declared disqualified and consequently cease to hold his office. On 25.03.2011, the Commissioner of Endowments registered O.A. No.1 of 2011 under Section 35 of the Act basing on a report submitted on the same day by the Inspector of Endowments, Part – I suo motu, and

issued a notice to the petitioner framing the charges against him, which are as follows :-

> "1. Whereas the above named Mahant (Hereditary Trustee) of Emar Math, Puri concealed valuable properties of the Math by not giving information to the office of the Commissioner of Endowments or entering the same in the property Register and thereby willfully defaulted in discharging his duties and functions under the provisions of the Act.
>
> 2. Whereas the above named Mahant has committed criminal breach of Trust in respect of the valuables like silver bricks for which he has been booked for the offences U/Ss. 120-B, 457, 380, 381, 406, 411 & 34 I.P.C. in Singhadwar P.S. Case No.16/2011."

9. By the said notice, the petitioner was called upon to file a show cause by 28.04.2011. At the time of issuance of said notice, the petitioner was in custody. It appears from the impugned order under Annexure – 2 that the Commissioner again referring to the report of the Inspector of Endowments dated 25.03.2011 immediately passed an order before receipt of the show cause notice by the petitioner holding that the charge against the petitioner is serious and to safeguard the interest of the institution and smooth administration, in exercise of his power under Section 7 of the Act, the Mahanta is put under suspension pending disposal of the charges framed against him and during the period of suspension, the Mahanta is allowed to reside in the Math and he is to get maintenance as per the provisions of the OHRE Act, 1951. In view of suspension of the Mahanta (petitioner), the Commissioner by the said order also appointed the opposite parties 2 to 6 as members of the interim trust board and directed that they shall assume the charges of the institution immediately. On 04.06.2011, the Deputy Commissioner again referring to the report of the S.I. of Endowments, Bhubaneswar dated 25.04.2011, directed the petitioner to hand over the complete charge of the institution to the newly appointed interim trustees of the institution and report compliance. It appears that except the Superintending Inspector of Endowments, all the other persons included in the interim trust board, are Mahantas of various Mathas situated at Puri. The said Mahantas propagated the philosophy of the founders of their respective Mathas and, by no stretch of imagination, can be considered to be competent to discharge the duties of the petitioner – Mahanta. It further appears that before the charges levelled against the petitioner have been proved and the proceeding has been completed as per Section 35 of the Act, the Commissioner of Endowments in a hasty manner has exercised power under Section 7 of the Act, which provides that subject to the

provisions of the Act, the general superintendence of all religious institutions and endowments shall vest in the Commissioner and the Commissioner may do all things, which are reasonable and necessary to ensure that the religious institutions and endowments are properly administered and that their income is duly appropriated for the purposes, which they were founded or exist. The Commissioner is also authorized under the said section to pass such interim orders as he deems necessary for the proper maintenance of the religious institution or proper administration of a religions endowment. Taking a holistic approach of the case, it is amply clear that the Commissioner without due application of mind has constituted the interim trust board by including Mahantas of various other Maths, who belong to different sects other than the sect of the founder of Emar Math and such trustees can never discharge the duties of the petitioner as the Mahanta of the Emar Math. Further, the rider to exercise power under section 7 of the Act is that such power can be exercised subject to the provisions of the Act and when section 35 (2) of the Act clearly stipulates that the Commissioner is duty bound to conduct an enquiry following the provisions of the Act and that of the Code of Civil Procedure and, thereafter, take approval of the State Government to declare by an order disqualifying a trustee either temporarily or for life time, the Commissioner could not have exercised jurisdiction under section 7 of the Act by constituting the interim trust board and suspending the petitioner from the Mahantaship of Emar Math.

(emphasis supplied)

10. Dr. A.K. Rath, learned counsel for the Commissioner of Endowments, however, submitted that for smooth management of the Emar Math, the Commissioner can exercise power under section 7 of the Act to see that the Math and its properties are properly administered.

11. This Court, therefore, finds that the Commissioner can take steps under section 7 of the Act to ensure that the religious institution is properly administered and its income is duly appropriated for the purposes which they were founded or exist. However, inclusion of the Mahantas of various Maths in the interim trust board discloses non-application of mind on the part of the Commissioner in constituting the said interim trust board, as the said Mahantas do not belong to the denomination of the founder of Emar Math.

12. As this Court has already held above that the order of suspension of the petitioner is not legally sustainable and the constitution of the interim trust board is a result of non-application of mind, this Court quashes the order suspending the petitioner from the Mahantaship of the Emar Math as well as the constitution of the interim trust board. However, the matter is

remanded back to the learned Commissioner to constitute another interim trust board by taking members from well known Hindu public of the locality and Government officials in the said interim trust board to manage the affairs of the Emar Math , i.e., to manage its properties and income. However, the petitioner shall continue to function as the Mahanta of the said Math and discharge his duties as such, which he is required to do including the Seva Puja of the deity/deities existing in the Math premises as well as the functions to be performed in relation to Lord Shri Jagannath Temple. The Mahanta, however, shall not deal with the properties of the math in any manner until the proceeding initiated against him under section 35 of the Act is completed by the Commissioner. It is further directed that as the Mahanta was in custody when the notice to file show cause was issued, the Commissioner shall afford an opportunity to the petitioner – Mahanta by giving him reasonable time to file show cause to the charges and proceed with the said enquiry strictly in accordance with law. The Commissioner, if ultimately in the said proceeding, finds that the Mahanta – petitioner, who is the hereditary trustee, is to be disqualified either temporarily or for life – time, he shall appoint the 'Chella' or the next person in line of succession, as per the Act, as the hereditary trustee for the interim period of disqualification on permanently, as the case may be, and dissolve the interim trust board constituted by him in the meantime.

13. With the aforesaid observation and direction, the writ application is allowed.

Writ petition allowed.

2011 (II) ILR- CUT- 843

R.N.BISWAL, J.

W.P.(C) NO.5017 OF 2011 (Decided on 13.09.2011)

MANAGEMENT OF SYNERGY INSTITUTE OF ENGINEERING & TECHNOLOGY DHENKANAL .. …….Petitioner.

.Vrs.

PRESIDING OFFICER & ANR. .. …….Opp.Parties.

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF1947) – S. 25-F.33.

Termination of workman – Industrial dispute raised – Conciliation being failed reference made to the Tribunal – Workman filed petition for payment of subsistence allowance till disposal of the I.D. Case – Management raised objection that workman was never been suspended prior to the order of termination – Tribunal allowed subsistence allowance – Hence the writ petition.

The moment the order of dismissal was passed the relationship of master and servant between the parties has been ceased – Held, order allowing subsistence allowance is quashed.

(Para 7 & 8)

Case law Referred to:-

1959 STPL (LE) 1309 SC : (Hotel Imperial, New Delhi, & Ors.-V-Hotel workers' Union)

For Petitioner - M/s. Narendra K. Mishra, D.K.Pani, A.K.Ray & A.Mishra

For Opp.Parties - M/s. Sanjay Ku. Mishra, S.Dash & T.Lenka

R.N.BISWAL,J. The 1st party is the management of a Technical Educational Institution having been established by Shivani Educational and Charitable Trust, Cuttack in the year 1999 at Dhenkanal. It offers B. Tech. Course in different Engineering disciplines. The 2nd party-workman was engaged as a driver under the said institution.It is alleged that he along with one Hiran Lenka took away two bags of cement stealthily from the cement stock-yard of the institution in a red Maruti Van. The Security Officer of the institution was instructed by the Administrative Officer to conduct a fact finding enquiry of the matter and to submit report. It is alleged by the management of the institution that the 2nd party-workman admitted his guilt

before the Security Officer in course of enquiry and accordingly on 16.2.2008 the latter submitted his report to the Administrative Officer for taking suitable action in the matter. As per the case of management charge sheet being prepared it was sent to the 2nd party-workman to show cause who submitted his reply clearly admitting to have taken the college vehicle without permission and by maintaining silence as regards the other specific charges. So on 20.2.2008 his services were terminated with immediate effect.

2. The 2nd party-workman raised an industrial dispute before the District Labour Officer, Dhenkanal challenging the order of termination of his service. It having been admitted for conciliation, the management were noticed and they filed reply to it. As the conciliation could not be materialized, the Labour Officer submitted a failure report to the State Government. In turn the State Government in their Labour and Employment Department, in exercise of power conferred under Section 12(5) read with Section 10(1)(c) of the Industrial Disputes Act,1947 (hereinafter referred as 'I.D.Act') made the following reference to the Industrial Tribunal, Bhubaneswar.

> "Whether the termination of services of Shri Sumanta Kumar Mohapatra, driver w.e.f. 20.2.2008 by the management of Synergy Institute of Engineering & Technology, Dhenkanal is legal and/ or justified ? If not to what relief the workman is entitled to?

3. The 2nd party-workman in his written statement, filed before the Industrial Tribunal, inter-alia denied to have admitted his guilt and took the plea that since there was no enquiry after charge was framed, order of termination of his services was illegal. On the other hand, the management contended that since the 2nd party workman admitted his guilt, there was no need of conducting a regular enquiry.

4. The Presiding Officer, Industrial Tribunal directed the management to prove the charge by adducing positive evidence. However, instead of adducing evidence they filed a petition for taking up the issue relating to fairness and propriety of the domestic enquiry at the first instance which was granted by the Tribunal on 17.8.2010. While the matter stood thus, on 29.11.2010 the 2nd party- workman filed an application praying for payment of subsistence allowance till disposal of the I.D.case. The management filed objection thereto stating that since the 2nd party-workman had never been suspended prior to termination of his service, the prayer for subsistence allowance could not be granted.

5. After hearing learned counsel for the parties, the Tribunal vide order dated 27.1.2011 has held that there is a prima facie case in favour of the 2nd party-workman, balance of convenience leans in his favour and he would face much hardship if the petition for payment of subsistence allowance is not allowed, since it would take a long time for disposal of the I.D. Case and accordingly relying on the decision, in the case of ***Hotel Imperial, New Delhi, and others –v- Hotel workers' Union***, 1959 STPL (LE) 1309 SC allowed the petition and directed the management to pay him Rs.700/- per month with effect from December 2010 till final disposal of the I.D. Case.

Being aggrieved with the said order, the management have preferred the present writ petition.

6. Learned counsel appearing for the petitioner mainly contends that the learned Industrial Tribunal has given undue weightage to the decision in the case of Management Hotel Imprerial (supra), which has least relevance to the facts and circumstances of the present case. The ratio in the said case at best be applicable to a case seeking permission for dismissal under Section 33 of the I.D. Act ,where the workman was put under suspension and no subsistence allowance has been paid to him. Learned counsel appearing for the opp.party-management on the other hand, submits that the aforesaid decision would be squarely applicable to the present case.

7. In the case of Management Hotel Imperial (supra) since the workmen therein were concerned workmen in terms of Section 33 of the I.D. Act, after suspending them the management sought for permission under Section 33 of the I.D. Act from the Industrial Tribunal for their dismissal, wherein the apex Court held that the Industrial Tribunal can grant interim relief till permission is granted or refused. In the present case, as it appears the 2nd party workman is not a concerned workman as such there is no question of seeking permission for his dismissal or approval of the dismissal order. The moment the order of dismissal was passed against him, the relationship of master and servant between the parties ceased, whereas in the case of suspension, as in the case cited above, such relationship ceased for the time being. As it appears when it was argued on behalf of the management before the Tribunal that interim relief should not be granted to the 2nd party-workman, relying on the aforesaid decision, the Tribunal refuted the argument advanced. Interim relief, where it is permissible can be granted as a matter incidental to the main question referred to the Tribunal, but, where it is not permissible it cannot be granted.

8. In the case at hand, in the considered opinion of this Court the interim relief granted in favour of opp. party-workman is not permissible,

since from the date of his dismissal, i.e,20.2.2008, his relationship with the petitioner as master and servant ceased. If the impugned order is allowed to stand, it would lead to miscarriage of justice. However, if the reference is answered in favour of the opp. party-workman, he will get back his wages from the date of his dismissal.

Accordingly, the writ petition is allowed and the order dated 27.01.2011 passed by the Industrial Tribunal in I.D. Case No.09 of 2009 is hereby quashed. No cost.

Writ petition allowed.

2011 (II) ILR- CUT- 847

INDRAJIT MAHANTY, J.

CRLMC. NO.3080 OF 2010 (Decided on 19.10.2011)

SUBHASHREE DAS @ MILI PANDA & ORS. ……...Petitioners.

.Vrs.

STATE OF ORISSA ……Opp.Party.

UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 (ACT NO.37 OF 1967) – S.45.

Sanction for prosecution – Offence under chapter IV and VI of the U.A.P. Act – Sanction obtained – Validity – Magistrate took cognizance against the petitioners –Order of cognizance challenged.

In this case the State Government has not appointed an officer to act as an authority for conducting an independent review of the evidence gathered in course of investigation and has not recommended whether this case is a fit case for sanction or not as provided U/s.45 (2) of the U.A.P. Act which was inserted with a view to avoid frivolous prosecution.

Held, the very foundation for obtaining sanction being not in consonance with law the impugned order of cognizance against the petitioners, in the absence of valid sanction is liable to be quashed.

(Para 9 & 10)

Case laws Referred to:-

1.AIR 1997 SC 3475 : (Rambhai Nathabhai Gadhvi & Ors.-V-State of Gujarat)

2.(2005)30 OCR (SC) 370 : (Manoranjan Prasad Choudhary-V-State of Bihar)

For Petitioner - M/s. Manoj Kumar Mishra, P.K.Jena, S.B.Pradhan & D.P.Mohapatra

For Opp.Party - Mr. Debasis Panda Addl. Govt. Advocate

I. MAHANTY, J. The present petition under Section 482 Cr.P.C. has been filed by the petitioners, namely, Subhashree Das @ Milli Panda, Kishore Kumar Jena and Sangram Kumar Bhoi @ Sangram Bhola with a prayer to quash the proceeding in G.R. Case No.16 of 2010 pending before the learned J.M.F.C., Banpur and S.T. No. 12/116 of 2010 in the court of

learned Ad hoc Addl. Sessions Judge (F.T.C.), Khurda arising out of Balugaon P.S. Case No.8 of 2010 corresponding to CID (CB) P.S. Case No.1 of 2010.

2. Learned counsel for the petitioners sought to quash the criminal proceeding initiated against the petitioners inter alia, on the following grounds:

(A) Investigation not done by DSP, the competent officer empowered to investigate the case under the UAP Act.

(B) Sanction is not valid sanction.

(C) Documents relied on by prosecution has not formed part of the record.

(D) Proper court has not taken cognizance.

(E) Court trying the case is not competent.

3. Learned Addl. Government Advocate, on the other hand, opposed the prayer made on behalf of the petitioners and made response to each of the contentions noted hereinabove.

4. Although various contentions were advanced in course of the argument, this Court is of the view that contention 'B' as noted hereinabove, ought to be dealt with at the outset, since the determination thereof would be vital for the purpose of ultimate outcome of the case and the other contentions may not be required to be determined.

5. Mr.M.K.Mishra, learned counsel for the petitioners submitted that, the petitioners have been charged with the offences under Sections 16, 17, 18, 20, 21, 38 and 40 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the U.A.P. Act') and for an offence under Chapters-IV and VI of the Act the previous sanction of the Central Government or, as the case may be, the State Government is required in term of Section 45 of the U.A.P. Act.

6. For better appreciation, Section 45 of the U.A.P. Act is quoted hereinbelow:

"45. Cognizance of offences.- (1) No Court shall take cognizance of any offence –

(i) Under Chapter III without the previous sanction of the Central Government or any officer authorized by the Central Government in this behalf;

(ii) Under Chapters IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.

(2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation within such time as may be prescribed to the Central Government or, as the case may be, the State Government."

On a conjoint reading of both the Sub-Sections (1) and (2) of Section 45 of the U.A.P. Act, it is clear therefrom that the State Government is required to "appoint an officer" to act as an "authority" for conducting an "independent review of the evidence gathered" in course of the investigation and such officer appointed to carry out independent review, shall make a "recommendation" within the time as may be prescribed "to the appropriate Government".

7. Learned counsel for the petitioners asserted that incorporation of the requirement for appointment of an officer to conduct an "independent review", as incorporated to Sub-Section (2) of Section 45 of the Act, serves a very important purpose. The prosecution under the Unlawful Activities (Prevention) Act, is an extremely stringent law, Parliament provided a safeguard to avoid frivolous prosecution.

It is asserted that in the present case, the State of Orissa has not made "appointment" of any officer to carry out the "independent review" and further, there has been "no prescription of any time limit" for making the necessary "recommendation". In the absence of the appointment of an officer to conduct the independent review or prescription of any time limit for making recommendation, it is contended that the sanction in the present case, is not a valid sanction in law.

In this aspect, learned counsel for the petitioners placed reliance upon the speech of Hon'ble Home Minister while moving the draft bills in the Rajya Sabha and in his speech, the Hon'ble Home Minister, clearly stated that the legislative intent behind Section 45(2) of the Act was for "creating an independent executive to review the entire evidence gathered in course of

investigation and then to make a recommendation whether the case was a fit for prosecution or not". This was prescribed by the Hon'ble Home Minister in order to filter and buffer and such independent authority who was required to review the entire evidence would provide the very **salutary safeguard**. Such an authority independent from the investigators was the **"biggest buffer against arbitrariness."**

8. Sri Debasis Panda, learned Additional Government Advocate on behalf of the State produced a letter dated 24.2.2011, containing an extract taken from File No.PIC/1 (Pro) 93/2011 which contains the "review notes" of one Sri A.M.Prasad, the Special Secretary/Additional Secretary of Home Department. It is claimed that the said Sri Prasad had reviewed the evidence as required under Sub-Section (2) of Section 45 of the Act and had "recommended approval of the prosecution". He further submitted that since the Special Secretary/Additional Secretary of Home Department had considered and reviewed the evidence collected in the course of investigation and had recommended sanction for prosecution of the petitioners, no error or grievance on this score ought to be entertained.

9. In the light of the aforesaid submissions, in course of hearing, learned Additional Government Advocate for the State was asked to produce any document/order of appointment of Sri A.M.Prasad, Special Secretary, issued by the appropriate authority, appointing him as the "review authority" under Section 45(2) of the Act, 1967. To this query, learned Additional Government Advocate, fairly responded that, no such formal appointment order appointing the Special Secretary for the purpose of reviewing cases under Section 45 of the Act is available on record. To a further query of the Court as to whether the State have prescribed any time limit for the purpose of producing such report by the reviewing authority, learned Addl. Government Advocate for the State also responded in the negative.

In view of the aforesaid response of the State, it is clear therefrom that the State have failed to produce before this Court any documentary evidence in order to establish the appointment of the Special Secretary A.M.Prasad as the authority for the purpose of carrying out an independent review as required under Section 45(2) of the Act. I am also constrained to note that the State have also failed to produce any document or order prescribing any "time limit" for furnishing of such recommendation, by the independent review authority. Apart from the aforesaid fact, this is relevant herein to take note of Speech of the Hon'ble Home Minister, copy of which has been furnished by the learned counsel appearing for the petitioner and the same is quoted herein below:

> "Finally, Sir, we have incorporated a very salutary provision. To the best of our knowledge- I don't know, I may be corrected by the Law Minister or the Law Secretary later – it is the first time we are introducing this. In a prosecution under the UAPA, now, it is the executive Government which registers the case through a police officer. It is the executive Government which investigates the case through an investigating agency, namely, the police department. It is the executive Govt. which sanctions U/s.45. Therefore, there is a fear that a vindictive or a wrong executive Govt. could register a case, investigate and sanction prosecution. There is a fear. May be, it is not a fear that is entirely justified but you cannot say that it is entirely unjustified. So what are we doing? The executive Govt. can register the case because no one else can register a case. The executive Govt., through its agency, can investigate the case. **But,** before sanction is granted under 45(1) we are interposing an independent authority which will review the entire evidence, gathered in the investigation, and then make a recommendation whether this is a fit case of prosecution. So, here, we are bringing **a filter, a buffer, an independent authority** who has to review the entire evidence that is gathered and, **then**, make a recommendation to the State Govt. or the Central Govt. as the case may be, a fit case for sanction. I think, this is a very **salutary safeguard.** All sections of the House should welcome it. This is a biggest buffer against arbitrariness which many Members spoke about. Sir, these are the features in the Bill."

In this respect, reference needs to be made to the case of **Rambhai Nathabhai Gadhvi and others v. State of Gujarat,** AIR 1997 Supreme Court 3475, wherein it is held as follows:

> "As the provisions of TADA are more rigorous and the penalty provided is more stringent and the procedure for trial prescribed is summery and compendious, the sanctioning process mentioned in Section 20-A (2) must have been adopted more seriously and exhaustively than the sanction contemplated in other penal statutes. If there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

In the case of **Manoranjan Prasad Choudhary v. State of Bihar,** (2005) 30 OCR (SC)-370, it is held that "it is also well settled proposition of law that where there is no sanction by the competent authority, the proceeding itself stands vitiated".

10. In view of the conclusions/finding reached hereinabove, this Court is of the considered view that, no cognizance could have been taken against the petitioners in the absence of any valid sanction of the prosecution and in this regard, although sanction for prosecution had been obtained, yet the same was not based upon a review by a validly appointed authority to carry out "independent review of evidence" obtained in course of investigation. Therefore, the very foundation for obtaining such sanction being not in consonance with law, the order of cognizance dated 16.7.2010 passed by the learned J.M.F.C., Banpur in G.R. Case No.16 of 2010 ought to be quashed and this Court directs accordingly.

Insofar as the other contentions as noted hereinabove are concerned, this Court is of the view that the same need not be dealt with in the present case, since the order of cognizance has been quashed and the same are left open for adjudication in any appropriate proceeding, if the same is raised.

11. With the aforesaid observations and directions, the CRLMC is allowed.

Application allowed.

2011 (II) ILR- CUT- 853

H.S.BHALLA, J.

W.P.(C) NO.1723 OF 2010 (Decided on 07.07.2011)

CHAMPA MALLICK ……..Petitioner.

.*Vrs.*

MANAGING DIRECTOR, NESCO & ORS. …….Opp.Parties**.**

Electricity – Petitioner's husband expired due to electrocution - Writ Petition for compensation – Opp.Parties filed counter saying there was no negligence on their part but the deceased and a cow got electrocuted due to illegal and unauthorized hooking arrangements made by the deceased himself – Disputed question of fact – Not possible to ascertain the real cause of death in the writ petition – Proper forum is Civil Court.

Held, direction issued to the Opp.Parties for payment of Rs.50,000/- to the petitioner by way of interim relief within a period of one month failing which the petitioner is entitled to interest at the rate of 9% per annum from the date of passing of this order till realization. The amount of Rs.50,000/- shall be adjusted by the Opp.Parties incase of any further compensation is granted by the Civil Court.

(Para 8)

Case laws Referred to:-

1.(1999)8 Supreme 57 : (Chairman, Grid Corporation of Orissa Ltd.(GRIDCO) & Ors. -V- Sukamani Das (Smt.) & Anr.)
2.(2000) 4 SCC 543 : (Tamil Nadu Electricity Board-V- Sumathi & Ors.)

For Petitioner - Subhranshu B.Mohanty
For Opp.Parties - H.M.Dhal

H.S.BHALLA,J. The lights of the house of the present petitioner was switched off on 26.05.2009, when she lost her husband and the petitioner opted to knock the door of this Court for claiming compensation.

2. The other facts required to be noticed for disposal of this writ petition are that the husband of the petitioner, namely, Srushtidhar Mallick, who is a vegetable seller, while coming back to his village after selling the vegetables through a paddy field on 26.5.2009 at about 8.00 A.M., saw a cow was thrilling coming in contact with the live electric wire being snapped from the

main 11 K.V. electric wire and was lying scattered nearby the Lift Irrigation point. The husband of the petitioner in order to rescue the cow from sudden death, ran away to her and came in contact with the live electric wire and fell down being senseless and later on succumbed to the injuries. On the same day F.I.R. was lodged before Soro Police Station and U.D.Case No. 25 dated 26.5.2009 was registered. The O.I.C., Soro Police Station made inquest over the dead body and sent the dead body to C.H.C., Soro for post mortem. The Medical Officer of C.H.C., Soro, who conducted post mortem opined that the cause of death of Srushtidhar Mallick was due to high voltage electrocution. The Xerox copy of the post mortem report of the doctor is filed as Annexure-4 series to this writ petition. The O.I.C., Soro Police Station after due investigation submitted final form stating that the cause of death of Srushtidhar Mallick was due to electrocution. The petitioner alleges that since NESCO authorities were liable for the cause of the unprecedented death of her husband and as the husband of the petitioner was the only earning member of her family, she has prayed for compensation of Rs.4 lakhs from the opposite parties.

3. Pursuant to the notice issued by this Court, opposite parties 1 and 2 filed their counter affidavit stating that there is no negligence on their part for the death of the husband of the petitioner, rather it is a negligence on the part of the husband of the petitioner. In paragraph 5 of the counter it is stated that the husband of the petitioner had availed power supply unauthorisedly by way of hooking through bare conductors from the OLIC point by connecting the electrical jumper for the purpose of cultivation. On the date of incident, i.e., on 26.5.2009 on getting the information, the Junior Technician rushed to the spot and found that the bare hooking conductor being hit by heavy rain and cyclone had fallen on the iron poles and as a result of which the electric pole was charged. It is further stated that the cow came in contact with the said iron pole and got electrocuted. The deceased rushed to the spot and while he was trying to disconnect the hooking arrangements made by him, got electrocuted. Therefore, the deceased and the cow got electrocuted due to the illegal and unauthorized hooking arrangements made by the deceased himself. The opposite parties have also denied the other averments made in the writ petition.

4. Learned counsel appearing for the opposite parties fairly submitted that because of unauthorized hooking through bare conductors from the OLIC point by the deceased, the cow as well as he himself got electrocuted and no negligence can be attributed to the opposite parties and they are not liable to pay any compensation to the petitioner.

5. On perusal of the averments made in the writ petition, no clinching material is available to show that actually because of hooking through bare conductors by the husband of the petitioner, he received the shock and ultimately died. It is also required to be examined whether the wire had snapped as a result of any negligence of the opposite parties and under which circumstances the deceased had come into contact with the wire. In view of the specific denial of the opposite parties regarding their negligence, they deserve an opportunity to prove that proper care and precautions were taken in maintaining the electric line and the live wire snapped because of circumstances beyond their control or unauthorized intervention of third parties or that the deceased had not died in the manner stated by the petitioner. These questions could not have been denied properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved, a petition under Article 226 of the Constitution is not a proper remedy.

6. The Supreme Court in **Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others v. Sukamani Das (Smt.) and another (1999) 8 Supreme 57** examined the jurisdiction of the High Court under Article 226 of the Constitution. The fact of the said case is akin to the present case. In that case the deceased Pratap Kumar Das was moving on road, while he came in contact with a live electric wire, which was lying across the road after getting snapped from the over-head electric line. It was alleged that such electric wire had snapped because of negligence of the GRIDCO and its officers, as they were not maintaining the electric transmission line and therefore, they are liable to pay damages for this negligent act. In the said case this Court had awarded compensation. The GRIDCO preferred an appeal before the Supreme Court against the judgment passed by this Court. In the aforesaid case, the Supreme Court has held as follows :

> "In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contract with snapped live wires of the electric transmission lines of the appellants, that "admittedly/ prima facie amounted to negligence on the part of the appellants". The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to appellant had snapped and the deceased had

> come in contract with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the appellants and under which circumstances, the deceased had come in contract with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wire had snapped because of circumstances beyond their control or unauthorized intervention of third parties or that the deceased had not died in the manner stated by the petitioners. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ petitioners to approach the civil court as it was done in O.J.C.No. 5229 of 1995." (para-6)

Similar view has been taken in **Tamil Nadu Electricity Board v. Sumathi and others**, (2000)4 SCC 543, wherein the Supreme Court held that where disputed questions of fact arises, the proper remedy is filing suits in the Civil Courts.

7. Thus, it is clear from the above that whenever there is any disputed fact in issue for adjudication, the writ jurisdiction is not the proper forum. The petitioner should have approached the Civil Court for redressal of her grievance. It cannot be said that in this case, denial of liability by the opposite parties is only for the sake of the same. Real disputed question of fact like negligence of the opposite parties, act of nature, contributory negligence and what should be the amount of compensation, which can be termed as just are to be decided in this case. This can be only done by a regular trial not on the basis of the affidavits.

8. Since in the present case, it is not possible to ascertain the cause of death and in what manner the accident took place and on account of whose negligence, the deceased met his edge of doom, some compensation by way of interim relief is required to be granted and in the final analysis, the opposite parties are directed to pay a sum of Rs.50,000/- (fifty thousand) to the petitioner within a period of one month from the date of passing of this order. It is further made clear that in case the amount is not paid to the

petitioner within the period mentioned above, then in that event, the petitioner is entitled to interest at the rate of 9% per annum from the date of passing of this order till its realization. The petitioner would be at liberty to approach the Civil Court for obtaining compensation in accordance with law and if such an approach is made by the petitioner, the Civil Court shall dispose of the suit preferably within a period of six months from the date of appearance of the parties. The amount of Rs.50,000/- shall be adjusted by the opposite parties in case any further compensation is granted by the Civil Court.

9. The writ petition is disposed of accordingly. Parties are left to bear their own costs.

Writ petition disposed of.

2011 (II) ILR- CUT- 858

SANJU PANDA, J.

W.P.(C) NO.2077 OF 2009 (Decided on 10.08.2011)

DR. SUDHANSU SEKHAR RATH ……...Petitioner.

.Vrs.

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

ORISSA LAND REFORMS ACT, 1960 (ACT NO.16 OF1960) – Ss. 40-A, 42, 43.

Petitioner purchased disputed land on 12.7.1982 from the landholder which is after the cutoff date i.e. 26.09.1970 – Ceiling proceeding initiated in 1999 – Landholder neither participated in the proceeding nor exercised his option as provided U/s.40-A of the Act – Revenue authorities suo motu carved out the ceiling surplus area but have not taken physical possession of the land – Petitioner appeared suo motu and filed application to include the disputed land within the ceiling limits of the land holder – Prayer refused by the Revenue authorities – Hence the writ petition.

A person who has not filed his return U/s.40-A of the Act, can claim to have a right of option and choose the land to be retained by him after determination of the ceiling by the Revenue Officer in exercise of power U/s.43 of the Act – The option can be exercised not only in suo motu proceeding but also at any stage of appeal and revision in view of the circular of the State Government bearing No.46458-Re-256/76-R- Dt.17.6.1976.

Even after the land is vested in Government the land holder is entitled to exercise his option on condition of substituting the lands – Held, decision of the Revenue authorities excluding the land from the retention area of the ceiling surplus landholder is bad and liable to be set aside. (para 8,9,13)

Case laws Referred to:-

1.1990(Ii) OLR 199 (F.B) : (Sahadev Nayak & after him Gundicha Nayak-V-State of Orissa & Ors.)

2.Vol.XLIV(1977) CLT 449 : (Nares Chandra Tripathy-V-Revenue Officer-cum-Addl. Tahasildar, Angul & Ors.)

For Petitioner - M/s. Pramod Ku. Routray, B.G.Mishra, N.K.Deo, A.Routray & J.Bhuyan.

For Opp.Parties - Addl. Govt. Advocate (for O.P.1 to 5)

S. PANDA, J. The petitioner has filed this writ petition challenging the orders of the Revenue authorities.

2. The brief facts of the case are that the petitioner is the purchaser of the disputed land appertaining to Khata No.289, Plot No.192, H3.200 out of H3.255 in Mouza-Nuagaon, District-Phulbani, Hal District- Kandhamal. He purchased the said land from opposite party no.6 by registered sale deed dated 12.7.1982 and is in possession of the same till date.

2.1 Admittedly, opposite party no.6 was the owner of the property referred to above along with other properties. The Tahasildar-cum-Revenue Officer, Baliguda initiated OLR (Ceiling) Case No.100 of 1999 in the name of opposite party no.6 basing on the report of the Revenue Inspector, Nuagaon. It was found that he was the owner of an area of H24.280R of land including house site of H0.370 R. On conversion to standard acres, it comes to A16.39 acres as per the Orissa Land Reforms Act (in short, "the Act"). Accordingly, Ac.6.39 standard acres of lands were declared as ceiling surplus. Admittedly, the possession of the ceiling surplus land had not been taken by the authorities as required under Section 45-A of the Act. The said surplus land was not in possession of opposite party no.6.

2.2. After coming to know about the initiation of the ceiling proceeding, the petitioner appeared before the Revenue Officer praying for exclusion of the land from the ceiling surplus area and keeping the said area in the retention area of the land- holder as the land-holder had taken the benefit of the said land and appropriated the consideration amount. The petitioner being a bona fide purchaser should not be deprived of the said land as the land-holder did not disclose anything at the time of sale as required under the Transfer of Property Act. The Tahasildar rejected the claim of the petitioner by order dated 23.12.2000 in OLR (Ceiling) Case No.100 of 1999 on the ground that the draft statement was issued to the ceiling surplus land-holder and the copy of the same was also published through beat of drum inviting objections from the parties/public involved, affected or interested within the stipulated period. As no objection was filed by ceiling surplus holder or anybody/public, the draft statement so issued had been confirmed on 18.3.2000 declaring the lands measuring H.10.330 (S.A.6.39 or Ac.25.82) including the objected plot No.192 as ceiling surplus land. The confirmed draft statement was published keeping a period of fifteen days for inspection of the confirmed draft statement free of charge by any person interested,

involved or affected. After completion of publication period, the ceiling surplus land had been vested with the Government on 15.5.2000. The ceiling surplus land-holder was asked to hand over the possession of the ceiling surplus land. As ceiling surplus land-holder failed to comply with the court's order, the possession of the ceiling surplus land had been taken over through Revenue Inspector, Nuagaon. As per the order dated 28.6.2000, the ceiling surplus land was taken to the Government Khata and the record-of-rights was corrected accordingly. Now a separate lease proceeding, i.e., OLR Lease Case No.4 of 2000 had been opened for distribution of the ceiling surplus land among the landless beneficiaries. The Tahasildar rejected the objection filed by the objector on the ground that there was no sufficient ground or reason to accept or appreciate the prayer of the objector regarding deletion of Plot No.192 measuring H.3.2000R from the ceiling surplus land at this belated stage. Being aggrieved by the said order of the Tahasildar, the petitioner preferred OLR Appeal No.1 of 2001 before the Sub-Collector, Baliguda. However, the appellate authority on 27.2.2001 dismissed the appeal holding that the responsibility lies on the ceiling surplus land-holder for option on condition of substitution of lands. Since the appellant failed to produce the ceiling surplus holder, it was not possible to identify encumbrance free land in the absence of ceiling surplus holder who had failed to turn up despite three chances given to him. Against the order of the appellate authority, the petitioner filed OLR (Ceiling) Revision No.5 of 2001 before the Addl. District Magistrate, Kandhamal. The revisional authority by order dated 25.4.2003 held that since the ceiling surplus land-holder had transferred the land after the cut off date i.e. 26.9.1970, the transfer is void. Against the said order, the petitioner preferred revision bearing OLR (RC) No.1 of 2004 before the Revenue Divisional Commissioner (Southern Division), Berhampur. As the revision was not maintainable, the same was withdrawn. Thereafter, OLR Revision No.8 of 2006 was filed before the Commissioner, Land Reforms, Orissa, Cuttack praying to refer the matter to the Board of Revenue. The Commissioner, Land Reforms held that the petitioners being a well to do person no reference was possible to be made either in the eye of law or in the interest of natural justice. Hence this writ petition.

3. Learned counsel for the petitioner submitted that the disputed land is in possession of the petitioner from the date of purchase till date and no attempt has yet been taken by the Revenue authority to take possession of the same from him as per law. From the facts narrated above, it would be clear that the ceiling surplus land-holder has not given his option to retain the land of his choice. Since the proceeding was initiated by the Revenue authority after the petitioner purchased the land, the Revenue officer should

have included the disputed land within the ceiling limits area of the land-holder. In support of his contention, he cited an unreported decision of this Court in OJC No.542 of 1979 (Samanta Narayan Srichandan Mohapatra vrs. Tahasildar, Banki and others disposed of on 4.7.1985) wherein it is held that while calculating the ceiling surplus land, the transferred land by the ceiling surplus land-holder after 26.9.1970 i.e. the cut off date, is to be retained in his retention area and for balance land he is to exercise his choice. In view of the said decision, the orders of the Revenue authorities are liable to be set aside.

4. Learned Standing Counsel for opposite parties 1 to5 submitted that since the land was transferred after the cut off date, the Revenue authorities rightly rejected the plea of the petitioner. Therefore, the impugned orders need not be interfered with.

5. Notice was issued to the ceiling surplus land-holder, opposite party no.6. The service return has been received after valid service as it appears from the office note dated 3.11.2009. But the said opposite party no.6 has chosen not to appear in the present writ petition.

6. From the above description of facts, it appears that the ceiling proceeding was initiated by the Revenue authority in the year 1999. The land-holder did not exercise his option as provided under Section 40-A of the Act Further, the ceiling surplus land, as directed by the Revenue authorities, was also not taken into possession physically though the order was passed to that effect. The land-holder also did not participate in the ceiling proceeding. Therefore, the Revenue authorities suo motu carved out the area as ceiling surplus area. It is to be considered, in the present case, whether the petitioner was a bona fide purchaser and whether the decision of the Revenue authorities was justified in the facts and circumstances of the case when the petitioner suo motu appeared before the Revenue authorities and filed his application to include the disputed land within the ceiling limits of the land-holder.

7. No doubt, the Act came into force on 26.9.1970 i.e. the cut off date, and by that date, the land-holder was in possession of more than the ceiling area. Therefore, the excess area is to be vested with the Government after initiation of the ceiling proceeding.

8. The land-holder was debarred from alienating/transferring the land after the said cut off date and his ceiling area is to be determined taking into consideration the cut off date. The Act also provides that the land-holder has

to exercise his option to retain the land of his choice. Therefore, the land-holder is duty bound to appear before the Revenue authorities in the ceiling proceeding for exercising his option to retain the land of his choice. Simultaneously, the Revenue authorities have to consider that the land-holder has not taken any benefit out of the transferred land even after the cut off date, if he has alienated or transferred the land. In case the transferred land is not included within the retention area of the land-holder, the land-holder will take benefit of his own wrong and the land-holder should not be entitled to double benefits.

9. In the case of Sahadev Nayak and after him Gundicha Nayak v. State of Orissa and others reported in **1990(II) OLR 199 (F.B)**, the Full Bench of this Court has held that a person who has not filed his return under Section 40-A of the Orissa Land Reforms Act, 1960 can claim to have a right of option and choose the land to be retained by him after determination of the ceiling by Revenue Officer in exercise of power conferred under Section 43 of the Act. Thus, the option can be exercised not only in suo motu proceeding but also at any stage in view of the Circular of the State Government bearing No.46458-Re. 256/76-R dated 17.6.1976. In the said circular, it is also clarified on the subject of review of cases in which selection of land to be retained within the ceiling has not been made by the surplus land owner. Paragraph-3 of the said Circular reads as follows:

> "According to the first Proviso to Sec.40-A(1) of the Act, the right to indicate the parcels of land to be retained within the ceiling is denied to a land-owner **only** if he has transferred or partitioned any land in violation of provisions of Sub-sec.(1) of Sec.40. In the other cases, the option of selecting the lands to be retained within the ceiling rests with him."
>
> (Emphasis supplied)

10. In the case of Nares Chandra Tripathy v. Revenue Officer-cum-Additional Tahasildar, Angul and others reported in **Vol. XLIV (1977) CLT 449**, this Court has held that the jurisdiction of a revisional authority is not fettered by any limitation. In fact, as has been universally accepted, a revision as provided under the Statute is wide in its amplitude and the revisional authority has full power to pass appropriate order for ends of justice. The State Government itself in realization of the fact that the administration of the Land Reforms Act was not being done properly has issued a Circular, reference to which has already been made, that at any stage and even after the land is vested in Government, the land-holder is entitled to exercise his option on condition of substituting lands.

11. In view of the aforesaid decisions, it can be summed up that even after the land is vested in Government, the land-holder is entitled to exercise his option on condition of substituting the lands. Therefore, the land-holder is entitled to exercise the said option regarding exchange of land as the Government circular has stated that in case land-holder transferred the land after the cut off date, he is not entitled to retain the land of his choice/option excluding the said transferred land from the ceiling area.

12. The aforesaid view has been fortified by a Division Bench of this Court in OJC No.542 of 1979 disposed of on 4.7.1985 (Samanta Narayan Srichandan Mahapatra v. Tahasildar, Banki and others). In paragraph-4 thereof, it is indicated as follows:

> "4……..Section 40-A clearly provides that the land-holder has got a right to indicate the parcels of land which he wishes to retain and the parcels of land in excess of the ceiling and furnish the same in the return. We find that the rejection of the claim of the petitioner that he has got the right of selection of the lands within the ceiling limit apart from the lands he has sold away after the appointed date is not justified and is contrary to the provision of law."

13. Therefore, in the present case, the decision of the Revenue authorities, excluding the land from the retention area of the ceiling surplus land-holder, is bad and liable to be set aside.

14. Hence, this Court sets aside the impugned orders of the Revenue authorities and remits the matter back to the Tahasildar, Baliguda to consider the case of the petitioner afresh in the light of the decision made in the above paragraphs.

The writ petition is accordingly allowed.

Writ petition allowed.

2011 (II) ILR- CUT- 864

B.N.MAHAPATRA, J.

MACA NOS.413 & 414 OF 2008 (Decided on 25.04.2011)

D.M.,NEW INDIA ASSURANCE CO.LTD., BALASORE …….Appellant.

.Vrs.

MANJULATA JENA & ORS. ..……..Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO. 59 OF 1988) – S.168.

Just compensation – Determination of – Insurance Company filed appeal challenging the award passed by the Tribunal – Held, even in the absence of an appeal by the claimant, in an appropriate case this Court can enhance the quantum of compensation payable.

(Para 13)

Case laws Referred to:-

1.2008(2) TAC.394(SC) : (Laxmi Devi & Ors.-V-Mohammad Tabbar & Anr.)
2.2011(1) ILR CUT 115 : (Kunibala Sahoo & Ors.-V-Jagmohan Majhi & Anr. & M/s. Oriental Insurance Company Ltd.-V-Kunibala Sahoo & Ors.)
3.AIR 2003 SC 674 : (Nagappa-V-Gurudayal Singh & Ors.)
4.76(1993) CLT 605 : (Mulla Md. Abdul Wahid -V- Abdul Rahim & Anr.)
5.AIR 1989 SC 1834 : (Pravash Chandra Dalui & Anr.-V-Viswanath Banerjee & Anr.)

For Appellant - M/s. M.Sinha & P.R.Sinha.
For Respondents - Mr. D.Samal

B.N.MAHAPATRA, J. Both the appeals have been directed by the Divisional Manager, New India Assurance Company, Balasore against the judgment dated 19.01.2008 passed by the Motor Accident Claims Tribunal-IV, Bhadrak in M.A.C. No.97 of 2003 and M.A.C. No.120 of 2003. M.A.C. No.97 of 2003 was filed by the mother of the deceased whereas M.A.C. No.120 of 2003 was filed by the wife and the minor children of the deceased Narendra Jena, who died in a vehicular accident which took place on 19.11.2003 for grant of compensation under the provisions of MV Act, 1988.

2. The case of the claimants in both the cases is that on 19.11.2003 at about 8 PM while the deceased was standing on the left side of Bhadrak-

Basudevpur road near Andrei Bazar, the offending bus bearing registration No.OR-O1-7383, namely, "Jaga-Kalia" being driven by the driver Ranjan Kumar Das in a rash and negligent manner came in high speed and dashed against the deceased, as a result of which the deceased sustained injuries on his leg, head and penis. Immediately, the injured was taken to District Headquarters Hospital, Bhadrak where he succumbed to the injuries. According to claimants, the deceased was earning Rs.3,000/- per month by engaging himself as a mason and contributing Rs.2,000/- towards family maintenance. In this connection, Bhadrak (R) Police registered Bhadrak (R) PS Case No.253 (13)/03 corresponding to G.R. Case No.1218/03 pending in the Court of S.D.J.M., Bhadrak. After completion of the investigation, the Police submitted charge sheet under Sections 279, 304(A), IPC against the driver of the offending vehicle. With these averments, the claimants filed the claim petitions before the Tribunal claiming compensation under the M.V. Act.

3. The opp. Parties have appeared and filed their written statements. O.P. No.2-Insurance Company denied the averments made in the claim petition. Opp. Party No.1 stated in the written statement that the accident took place due to contributory negligence and there was no fault of the driver. The vehicle had valid insurance policy and the driver had valid driving licence and also he tested his driving licence. They had no knowledge about fake driving licence, if any. They have seen the driving licence issued by the Licensing Authority, Chandikhol and tested the driver's, driving and on finding him fit he was allowed to drive the vehicle. He was engaged as driver one year before the date of accident. In such situation, respondent-owner is not liable to pay the compensation.

4. On the rival pleadings of the parties, the Tribunal framed the following three issues:-

(i) Is there any cause of action and is the case maintainable?

(ii) Whether Chagulu @ Narendra Jena died in a vehicular accident due to rash and negligent driving of the offending vehicle bearing No.OR-01-7383 on 19.11.2003 at Andrei bazar?

(iii) Whether the petitioners are entitled to get compensation, and if so, from whom and to what extent?

5. After taking into consideration the oral and documentary evidence adduced by the parties, learned Tribunal held that the accident took place

due to the rash and negligent driving of the driver Ranjan Kumar Das of the offending vehicle causing injuries and death of the deceased. Due to the death of the deceased, the claimants have lost the contribution of income of the deceased to the family, his love and affection, and future dependency. The offending vehicle was validly insured with O.P. No.2 and at the time of the accident, the age of the deceased was 33 years. The income of the deceased was assessed at Rs.50/- per day. Deducting 1/3rd of the income towards personal expenditure and applying multiplier of 17, the amount of compensation was assessed at Rs.2,04,000/-. Further, adding Rs.9,500/- towards loss of consortium, loss of estate and funeral expenses, the total compensation was determined at Rs.2,13,500/-.

6. With regard to the validity of the driving licence the learned Tribunal held that the seizure list reveals that D.L.No.283/94-95 stood in the name of Ranjan Kumar Das and was issued by the Licensing Authority, Chandikhol which was valid till 01.06.2006 and the driver's badge number was 185. Considering the evidence of PW-1 and taking note of various judicial pronouncements, the Tribunal recorded that no material was adduced from the side of the Insurance Company to show that the insured was guilt of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding driving of the vehicle by a duly licensed driver and held that the Insurance Company cannot be absolved of its liability and shift the burden on the owner of the vehicle. On these findings, learned Tribunal directed the Insurance Company-appellant to pay Rs.2,13,500/- with interest at the rate of 6% from the date of claim, i.e., 23.12.2003 till recovery to the claimants in MAC No.120/03 within one month from the date of order. Out of the said award, Rs.1.60 lakhs was directed to be kept in a fixed deposit for five years jointly in the names of the claimants in any nationalized Bank and the balance amount was directed to be paid to them. Opp. Party No.2 was also directed to pay Rs.13,500/- with interest at the rate of 6% per annum from the date of claim, i.e., 16.12.2003 to the petitioner Dutika Jena within one month till recovery in M.A.C. No.97/03.

7. Mr.M.Sinha, learned counsel appearing for the Insurance Company-appellant referring to its grounds of appeal vehemently argued that the amount of compensation awarded by the learned Tribunal is on higher side. The Tribunal erred in holding that the owner of the vehicle having engaged an experienced driver, who had possessed a valid driving licence, the said owner is not guilty of violation of the policy condition. Such finding is erroneous inasmuch as it is an admitted case that the original driving licence is a false one which was issued by the Licensing Authority, Bhubaneswar not

in the name of the accused driver Ranjan Kumar Das but in the name of another person, namely, Dilip Kumar Mohanty. Mr. Sinha further submitted that the owner of the vehicle had not verified the genuineness of the original driving licence. It is also not the stand of the owner that he had no knowledge about the original driving license number of his driver. In the renewal DL, the original DL number and its place of issue are clearly noted. In the present case, the DL was issued by the Licensing Authority, Bhubaneswar which is not far away from Chandikhol (renewal office). There is no impediment on the part of the said owner to verify the validity of the original DL of the driver from the office of the Licensing Authority, Bhubaneswar. The owner of the vehicle having not verified the original DL of his driver as required under the law, the learned Tribunal ought to have concluded that the owner of the vehicle is guilty of breach of the Insurance policy. When admittedly the original DL is fake, at least the right of recovery ought to have been given in favour of the Insurance Company-appellant. The Insurance Company has every right to recover the entire award amount from the owner of the vehicle and the said opportunity having not been afforded to the appellant, the award is vitiated in law and liable to be set aside.

8. Mr.Samal, learned counsel appearing for respondent No.1 submits that the amount of compensation awarded by the Tribunal is extremely on the lower side. The deceased left behind him two unmarried daughters and the widow. The accident took place in 2003 when the income of a daily wage earner was minimum Rs.100/-. The deceased was a mason. Therefore, the amount of compensation computed taking Rs.50/- as daily income of the deceased is extremely low. The Tribunal has rightly held the Insurance Company liable to pay the compensation awarded.

9. On the rival contentions, following three questions fall for consideration by this Court:-

(i) Whether the amount of compensation awarded by the Tribunal is just and proper?

(ii) Whether the Tribunal is justified in holding that there is no breach of policy condition by the insured with regard to driving licence of the driver of the offending vehicle and therefore the Insurance Company is liable to pay the amount of compensation?

(iii) Whether the appellant-Insurance Company is entitled to be granted with the right of recovery of the entire awarded amount from the owner of the vehicle for breach of policy condition?

10. So far as first question is concerned, both the appellant-Insurance Company and the claimants submitted that the compensation awarded by the learned Tribunal is not just and proper. According to the Insurance Company, the amount of compensation awarded is on higher side and is liable to be substantially reduced. Per contra, the claimant-respondent's grievance is that the amount of compensation awarded to the dependants of the deceased, who left behind him two unmarried daughters and widow, is extremely low. In view of the above rival contentions of the parties, it is felt necessary to decide what should be the just compensation in the instant case. In support of their claim, Manjulata Jena, the wife of the deceased, examined herself as PW-1 in M.A.C. No.120/03. In her evidence, she stated that the deceased at the time of accident was about 33 years old and earning Rs.3,000/- per month as mason and was contributing Rs.2,000/- towards family maintenance. Learned Tribunal in its order held that in the absence of any document the deceased was treated to be a daily wage earner and at the time of accident he was earning Rs.50/- per day. Needless to say that a mason/labourer/daily wage earner does not maintain record or document with regard to his income. Therefore, in absence of any adverse material the Tribunal is not justified to disbelieve the evidence of PW-1 Manjubala Jena, the wife of the deceased that he was earning Rs.3,000/- per month as a mason.

11. At this juncture, it will be profitable to refer to the judgment of the Apex Court in the case of ***Laxmi Devi & Ors. Vs. Mohammad Tabbar and Anr.,*** 2008(2) T.A.C. 394 (S.C.). In the said case, the Tribunal assessed income of the deceased at Rs.15,000/- per annum on the basis of the notional income prescribed in the Second Schedule under Section 163-A of the M.V. Act. Besides, compensation of Rs.2,000/-, Rs.5,000/- and Rs.2,000/- respectively was also allowed towards funeral expenses, loss of consortium to the widow and loss of estate. In an Appeal carried to the High Court, the High Court while determining the income of the deceased held that though the claim of income of Rs.4,200/- per month was not reliable, the notional income should have been held at Rs.36,000/- per annum, i.e., Rs.3,000/- per month. For this proposition the High Court held that the notional income of Rs.15,000/- per annum in the Second Schedule was prescribed in the year 1994 while the accident had taken place in the year 2004. The second reason given by the High Court is that even an unskilled labourer, on those days could easily earn Rs.100/- per day and Rs.3,000/- per month and, therefore, the High Court held the income to be Rs.36,000/- per annum and by deducting 1/3rd of the income of the deceased for his personal expenses, the claimants' dependency was assessed at Rs.24,000/- per annum. The matter was further carried to the Apex Court. The Apex

Court held that the figure arrived by the High Court at Rs.100/- per day and Rs.3,000/- per month appears to be correct.

12. In the instant case, the accident took place in the year 2003. PW-1 in her evidence stated that the deceased, at the time of accident was earning Rs.3,000/- per month as a mason. There is nothing on record to disbelieve the evidence of PW-1. In view of the same, it would be just and proper to take the monthly income of the deceased at Rs.3,000/-. Accordingly, the monthly income of the deceased is determined at Rs.3,000/- and deducting 1/3rd towards his personal expenses his contribution towards family is determined at Rs.2,000/- per month. Considering that the deceased was 33 years old at the time of accident, the Tribunal has applied 17 multiplier, as provided under second schedule of M.V. Act. Therefore, 17 would be the appropriate multiplier. Taking Rs.2,000/- per month as contribution towards maintenance of family and applying 17 multiplier, amount of compensation is determined at Rs.4,08,000/- (Rs.2,000/- x 12 x 17). Apart from this, Rs.9,500/- is awarded towards loss of consortium, loss of estate and for funeral expenses as awarded by the Tribunal. Thus, the claimants are entitled to get compensation of Rs.4,17,500/-.

13. Mr. Sinha opposing to the submission made by learned counsel appearing on behalf of Respondents for enhancement of compensation at the time of hearing of appeal contended that in absence of any appeal filed by the claimant-respondents this Court should not enhance the amount of compensation. This argument of Mr.Sinha is not sustainable in law.

This Court in the cases of ***Kunibala Sahoo & Others vs. Jagmohan Majhi and another and M/s. Oriental Insurance Company Ltd. vs. Kunibala Sahoo & others***, 2011 (1) ILR CUT 115, held as follows:-

> "Section 168 of the M.V. Act deals with award of Claims Tribunal. The said section empowers the Claims Tribunal to determine the amount of compensation which appears to it to be just. Therefore, the Tribunal is duty bound to determine the just compensation under Section 168 of the M.V. Act in the given circumstances in a particular case. There is no restriction that the compensation could be awarded only up to the amount claimed by the claimants. This being the intention of the legislature, the determination of just compensation as required under Section 168 of the M.V. Act is nothing to do with the amount of compensation claimed by the claimants. Amount of just compensation determinable under Section 168 of the M.V. Act may be less or more than the

amount of compensation claimed by the claimant depending upon the facts and circumstances of a particular case.

In the case of ***Nagappa vs. Gurudayal Singh and others, AIR 2003 SC 674,*** the apex Court held that under the provisions of Motor Vehicles Act, 1988, there is no restriction that compensation could be awarded only up to the amount claimed by the claimants. In an appropriate case where from the evidence brought on record if the Tribunal/Court considers that claimant is entitled to get more compensation than the amount claimed, the Tribunal may pass such award. Only embargo is — it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act.

This Court in ***Mulla Md. Abdul Wahid vs. Abdul Rahim and another, 76 (1993) C.L.T. 605*** held that the Tribunal has the duty to determine the amount of compensation which appears to it to be just. The expression "just compensation" would obviously mean what is fair, moderate and reasonable and awardable in the proved circumstances of a particular case and the Tribunal has the power to award compensation more than the amount claimed by the claimants."

Law postulates determination of just compensation. Therefore, even in absence of an appeal by the claimant in an appropriate case this Court can enhance the quantum of compensation payable.

14. The second question is as to whether the driver of the offending vehicle possessed a valid driving licence at the time of accident. According to Mr.Sinha, the licence possessed by the driver, Ranjan Kumar Das was renewed by the Licensing Authority, Chandikhol is not genuine as the original DL issued in the name of Dilip Kumar Mohanty by the Licensing Authority, Bhubaenswar is a false DL. It is not the case of the Insurance Company that the Licensing Authority, Chandikhol has not renewed the licence in question in the name of driver Ranjan Kumar Das. No evidence was either adduced before the learned Tribunal or before this Court to prove that no such driving licence was renewed in the name of the driver Ranjan Kumar Das by the Licensing Authority, Chandikhol, who is the competent authority to issue/renew Driving Licence. Similarly, the Insurance Company-appellant has also not adduced any evidence either before the Tribunal or before this Court in support of his contention that the original licence issued

in the name of Dilip Kumar Mohanty by the Licensing Authority, Bhubaneswar is false/fake.

The foundation of the argument of Mr. Sinha is that admittedly the original Driving Licence issued by the Licensing Authority, Bhubaneswar is false/fake one, but the owner of the vehicle never admitted that the original licence issued by the Licensing Authority, Bhubaneswar is fake. On the contrary, the case of the owner of the vehicle is that the driver possessed a valid driving licence at the time of accident.

15. Law is well settled that renewal of a license is nothing but grant of a fresh licence.

In ***Provash Chandra Dalui & Anr. Vs. Viswanath banerjee & Anr.,*** AIR 1989 SC 1834, the Supreme Court dealing with a case under the provisions of Calcutta Thika Tenancy Act, 1949, explained the distinction between extension and renewal of lease, observing that extension merely means prolongation of the lease where as 'renewal' means a new lease.

16. Apart from the above, the Tribunal has come to the conclusion that the insured has verified the licence renewed by Licensing Authority,, Chandikhol, tested the driver about his capability to drive heavy vehicle and on being satisfied about his capacity to drive such vehicle he appointed him as driver prior to one year of the incident. At this juncture, it will be appropriate to extract the relevant paragraph of the order of the Tribunal which deals with the DL of the driver of the offending vehicle:-

> "As regard the validity of D.L. seizure list reveals D.L.No.283/94-95 in the name of Ranjan Kumar Das has been issued by L.A. Chandikhol which was valid till 1.6.06. Driver badge number is 185. It is submitted on behalf of O.P. No.2 that the renewal driving license number 283/94-95 of L.A.Chandikhol is in the name of Ranjan Kumar Das. Its original driving license No. is 2107/84 of L.A. Bhubaneswar. On verification it is found that the original D.L. No.2107/84 of L.A. Bhubaneswar is in the name of Dilip Kumar Mohanty but not in the name of Ranjan Kumar Das. Accordingly it is submitted by O.P. No.2 that the renewed D.L. No.283/94-95 of L.A. Chandikhol in the name of R.K.Das has not been issued on the basis of original D.L. Hence it is a fake one. On the other hand it is submitted on behalf of O.P. No.1 that D.L. No.283/94-95 of L.A. Chandikhol is in the name of R.K.Das who was authorised to drive H.G.V. and HPMV with effect from 11.6.94 and renewed up to 25.6.2000 with effect from 26.6.97 and it was again

renewed up to 1.6.06 with effect from 2.6.2000. Besides that the owner and his son are experienced drivers having valid D.Ls. and they have verified Chandikhol driving licence, tested the driver about his capability to drive heavy vehicle and on being satisfied about the capacity to drive heavy passenger vehicle appointed him as driver prior to one year of the incident, and they have no knowledge about driver's fake driving licence if any. As the owner examined, saw the driving licence and after being satisfied him-self that the driver had licence and was driving very well there is no breach of policy and therefore the insurance Company would not then be absolved of its liability. In this case insurance company has also not proved that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding driving of vehicle by duly license driver. In this connection ld. Counsel for O.P. No.1 has relied on the decisions reported in case of L.Chand Vs. Oriental Insurance Co., Ltd., 2006 (II) OLR (SC)-700 and M.Samantaray and another Vs. Oriental Insurance Co. Ltd. and another (2006) 33 OCR-766 and New India Assurance Company through its Divisional Manager, Bhubaneswar Vs. Kalia Behera and others, 2007 (I) OLR-637. So in view of the principles laid by the Hon'ble Court and Apex Court of India, evidence of O.P.W.1 supported with documentary evidence that they have verified the renewed licence issued by L.A. Chandikhol to drive heavy passenger vehicle and they are being experienced drivers and after testing driver's driving who is able to driver such vehicle they appointed him as driver prior to one year of the accident. At the absence of any material from the side of Insurance Co. that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding driving of the vehicle by duly licensed driver the insurance company can not be absolved of its liability and shift burden on O.P.No.1."

17. In view of the above, the Tribunal is justified in holding that there is no breach of policy condition by the insured with regard to driving licence of the driver of the offending vehicle and therefore the Insurance Company is liable to pay the amount of compensation.

18. On 24.04.2011 a written notes of submission was filed by the appellant-Insurance Company. In the written notes of submission, it is stated that the appellant-Insurance Company filed a verification report of the Licensing Authority, Bhubaneswar from which it transpires that the same was issued in the name of Dilip Kumar Mohanty. Thereafter, it is stated that it is immaterial whether the original driving licence was fake or not. Since

original licence was issued in the name of Dilip Kumar Mohanty, renewal of licence in the name of the accused driver Ranjan Kumar Das is not valid. The above contention of Mr.Sinha is contrary to the ground taken in ground Nos.2 and 3 of appeal memo. In ground no.2, it is stated that the original driving license is a false driving licence which was issued in the name of Dilip Kumar Mohanty. Hence, renewal of Driving Licence in the name of the driver of the offending vehicle, namely, Ranjan Kumar Das by Licensing Authority, Chandikhol is not valid. In ground No.3, it is stated that when the original Driving Licence stands fake a right of recovery ought to have been given in favour of the appellant-Insurance Company. Since the written note of submission with regard to validity of Driving Licence possessed by the driver of the offending vehicle is at variance with the grounds of appeal, the same merits no consideration.

In any event, in view of the reasons stated in preceding paragraphs, with regard to question no.(ii) this Court is of the considered view that the driver of the offending vehicle, Ranjan Kumar Das had possessed a valid driving licence on the date of accident and there is no breach of policy condition by the insured with regard to Driving Licence of the driver of the offending vehicle.

19. The third question relates to the appellant's entitlement to be granted with right of recovery of the amount of compensation from the owner of the vehicle.

20. In the written note of submission, it is stated that in a claim case, the issue is confined to the entitlement of the claimant to get the award for the injury or death of the road accident victims. During trial of such claim case where the effectiveness of driving licence has been challenged by the Insurance Company the inter se dispute between the owner/insured and the insurance Company touching the validity of the driving licence or the violation of policy condition is not to be adjudicated. Learned Tribunal should keep such inter se dispute open/alive for being adjudicated at a later stage where the presence of claimants will not be required at all. In such a situation, the learned Tribunal can not give a positive finding that he is satisfied that there exists a valid driving licence for which the right of recovery cannot be afforded to the Insurance Company ignoring the positive plea of the Insurance Company that the driver had no valid driving licence.

The above stand of Mr. Sinha is not acceptable. Mr. Sinha has not cited any provisions of law in support of his above proposition. A mere challenge to the validity of a driving licence possessed by the driver of the offending vehicle at the time of accident by the Insurance Company is not

sufficient. The Insurance Company has to prove its case. Where the Insurance Company simply takes a stand that the Driving Licence possessed by the driver of the offending vehicle is not valid/genuine and fails to prove the same, the Tribunal will be justified to reject such stand and shall take a decision on the materials evidence available on record. It cannot be kept open/alive for being adjudicated at a later stage as claimed by Mr. Sinha. If the stand taken by Mr.Sinha is accepted then the same would be against the concept of finality and amount to allow the litigation to prolong for no valid reason/sanction of law. Needless to say that unless the insurer proves its right to recover the amount from the owner of the vehicle for breach of policy condition such a right cannot be given to the insurer in a routine manner as claimed by Mr.Sinha.

In view of my discussions in the preceding paragraphs, the appellant is not entitled to be granted with the right of recovery of amount of compensation from the owner of the offending vehicle.

21. In the fact situation, this Court directs the appellant-Insurance Company to deposit the compensation amount of Rs.4,17,500/- along with interest at the rate of 6% per annum before the Tribunal from the date of filing of the claim application i.e. 16.12.2003 till the date of deposit and cost of Rs.2,000/- within eight weeks from today. On deposit of the compensation amount along with interest and cost as directed above, the Tribunal shall disburse the same to the respondents in both the appeals in the manner directed in its order.

22. On production of evidence /receipt in support of deposit of the above amount of compensation along with interest and cost before the Tribunal, the Registrar (Judicial) of this Court shall refund the statutory deposit of Rs.25,000/- along with interest accrued thereon to the appellant-Insurance Company.

23. In the result, both the appeals are dismissed with the above directions.

Appeals dismissed.

2011 (II) ILR- CUT- 875

S.C.PARIJA, J.

M.A.C.A. NO.954 OF 2009 (Decided on 20.9.2011)

KRUSHNA RAKASA & ANR. ……Appellants.

.Vrs.

SARAT CHANDRA PANIGRAHI & ANR. ……Respondents.

MOTOR VEHICLE ACT, 1988 (ACT NO.59 OF 1988) – S.147 (1) (b).

Motor insurance – Offending vehicle is a tractor fitted with a trailer/trolley – Goods carriage vehicle covered under a valid policy of insurance – Owner of the tractor/trolley admitted that the deceased was working as a labourer in his vehicle – Held, policy issued in respect of the said tractor-trolley covers the risk of the deceased labourer – Impugned finding of the learned Tribunal holding the owner of the vehicle liable to pay the compensation amount is not proper and justified and the same is accordingly set aside and the Insurance Company is liable to pay the same.

Case laws Referred to:-

1.2003 ACJ 1550 : (Ramashray Singh-V- New India Assurance Co.Ltd.
2.109(2010) CLT 63 : (The Divisional Manager, Oriental Insurance Co.Ltd.-V-Minka Munda & Ors.).

For Appellant - Biranchi N. Rath
For Respondents - A. K. Jena

This appeal by the claimants-appellants, is directed against the judgment/award dated 20.8.2009, passed by the 4th Motor Accident Claims Tribunal, Jharsuguda, in MAC No.26 of 2009, awarding an amount of Rs.3,85,000/- as compensation, along with interest @ 6% per annum from the date of filing of the claim application, i.e., 13.3.2009 and directing the owner of the vehicle (respondent no.1) to pay the same.

Learned counsel for the claimants-appellants submits that as the offending vehicle, i.e., tractor fitted with trolley is a goods carriage and has been insured as such, learned Tribunal erred in fixing the liability on the owner of the vehicle. It is submitted that as the insurance policy issued in respect of the tractor-trolley covers the risk of the driver and helper/labourer,

working in the tractor and the deceased was admittedly working as a helper/labourer in the said tractor-trolley, the insurance policy did cover the risk of the deceased-helper and the insurer is liable to pay the compensation amount awarded.

Learned counsel for the claimants has relied upon a decision of the apex Court in the case of **Ramashray Singh Vrs. New India Assurance Co.Ltd**, 2003 ACJ 1550, in support of his contention that Section 147(1)(b) first proviso of the M.V.Act, 1988, provides insurance coverage to the workman or labourer carried in goods carriage vehicle. In this regard, learned counsel has also relied upon a decision of this Court in **The Divisional Manager, Oriental Insurance Co. Ltd. Vrs. Minka Munda & Others**, 109 (2010) CLT 63.

Learned counsel appearing for the Insurance Company-respondent no.2 while supporting the impugned award submits that as the deceased was travelling as a gratuitous passenger in the offending tractor-trolley, the insurance policy issued in respect of the said vehicle does not cover the liability of such a person. In this regard, it is submitted that as the seating capacity of the tractor is only one, i.e. driver, any other person carried in the tractor, even as a labourer, is not covered under the policy, unless extra premium is paid for covering the risk of such a labourer. It is further submitted that the assessment of the compensation amount is not proper and justified.

On a perusal of the impugned award, it is seen that the owner of the offending tractor-trolley appeared before the Tribunal and filed written statement admitting the employment of the deceased Arjun Rakasa as a labourer in the said tractor-trolley and that he died in an accident on 5.6.2008, by falling down from the tractor-trolley, while he was travelling in the same. The owner further stated in his written statement that as the tractor-trolley was covered under a valid policy of insurance, the insurer is liable to pay the compensation amount.

Learned Tribunal, on the basis of the evidence on record, while coming to find that the deceased was working as a labourer and died while travelling in the tractor-trolley has proceeded to observe that there is no evidence to show that the deceased was being carried as a representative of the owner of the goods and therefore, even if it is accepted that the deceased was being carried in the vehicle and died in an accident, he shall be treated as a gratuitous passenger and is not covered under the policy of insurance. Accordingly, learned Tribunal has proceeded to hold that the owner of the vehicle is liable to pay the entire compensation amount.

Admittedly, the offending vehicle, i.e., tractor fitted with a trailer/trolley is a goods carriage, which is covered under a valid policy of insurance, no extra premium is required to be paid to cover the liability of a labourer carried in such a goods vehicle, in view of the provisions contained in Section 147 (1) of the M.V.Act, 1988. In the instant case, as the evidence on record, including the admission of the owner of the tractor-trolley clearly goes to show that the deceased was working as a labourer in the said vehicle, the policy issued in respect of the said tractor-trolley covers the risk of the deceased labourer.

In view of the above, the impugned findings of the learned Tribunal holding the owner of the vehicle-respondent no.1 liable to pay the compensation amount is not proper and justified and the same is accordingly set aside. Instead, the insurer is held liable to pay the same. As regards the quantum of compensation amount awarded and the basis on which the same has been arrived at, I feel, the interest of justice would be best served, if the awarded compensation amount of Rs.3,85,000/- is modified and reduced to Rs.3,25,000/-, which is payable by the insurer. The impugned award is modified to the said extent.

The Insurance Company-respondent no.2 is directed to deposit the modified compensation amount of Rs.3,25,000/- along with interest @ 6% per annum calculated from the date of filing of the claim application with the learned Tribunal within six weeks hence. On deposit of the amount, the same shall be disbursed to the claimants proportionately, as per the direction of the learned Tribunal given in the impugned award.
MACA is accordingly disposed of.

Appeal disposed of.

2011 (II) ILR- CUT- 878

B.K.PATEL, J.

RVWPET NO.25 OF 2009 (Decided on 16.09.2011)

RAMKINKAR SINGH DEO .....Petitioner.

.*Vrs.*

COLLECTOR, NUAPADA & ORS. .....Opp.Parties.

ORISSA LAND REFORMS(GENERAL)RULES 1965-RULE 27-B& 27-C

It is incumbent upon the Revenue Officer-cum-Tahasilidar to Comply with the provision under Rule 27-B and 27-C of the OLR (General) Rules 1965 before passing an order on an application U/s 36-A of the OLR Act.1960 which is mandatory in nature.

In this case there is non- Compliance of the mandatory provisions under Rules 27-B and 27-C of the 1965 Rules which made the entire process illegal – Held, this is a fit case for review .

(para-26)

Case laws Referred to:-

1.1985 (1) OLR 62 : (Kalicharan Paikaray-V-Benga Bewa)
2.AIR 1992 Orissa 133 : (Rabindra Kumar Badajena-V-Bichitrananda Khatei)
3.AIR 2010 SC 142 : (Biecco Lawrie Ltd.-V-State of West Bengal)
4.46(1978) CLT Notes 85) 43 : (Hajari Jayasingh-V-State of Orissa & Ors.)

For Petitioner - M/s. C.A.Rao, B.Pr.Das, S.K.Behera, B.M.Sarangi, & A.Patnaik.
For Opp.Parties - A.S.C. (for O.P.4)
M/s. D.P.Sahoo, N.Chakravorty.
M/s. K.N.Kanungo, D.P.Patnaik,
M/s. Akhil Mohapatra, J.M.Rout & S.C.Nayak for O.P.5)

B.K.PATEL,J. Petitioner has filed this petition for review of the order dated 7.2.2007 dismissing O.J.C. No.6709 of 1994.

2. Facts culminating in filing of this review petition may be stated as follows:

Opposite party no.5 filed OLR Case No.42 of 1976 under Section 36-A of Orissa Land Reforms Act, 1960 (for short 'the OLR Act') claiming to be Bhag Chasi in respect of Ac.4.49 decimals of land belonging to petitioner's

father late Satyabrata Singh Deo. By order dated 15.11.1976, petitioner's application was disallowed by the Revenue Officer-Cum-Tahasildar, Khariar on the basis of the finding that opposite party no.5 was a "C" class contractor having no land near the case land and no agricultural land anywhere. It was also observed that case land, adjoining to Khariar-Nuapada road is not capable for growing crops as claimed by opposite party no.5 and is rather suitable for development into house site. OLR Appeal No.4 of 1997 preferred by opposite party no.5 against the said order was dismissed by order dated 22.3.1977 passed by Additional District Magistrate, Kalahandi. Opposite party no.5 filed Revision Case No.145 of 1977 before the Revenue Divisional Commissioner, Southern Division, Orissa, Berhampur (for short 'the R.D.C.') assailing the orders passed by Revenue Officer-Cum-Tahasildar and Additional District Magistrate. By order dated 6.12.1979, the revision was allowed and the matter was remanded to the Revenue Officer-Cum-Tahasildar, Khariar with specific directions. Relevant part of the order passed by the R.D.C. in Revision Case No.145 of 1977 reads:

> "3. The original O.L.R. Case record in No.42/1976 before the Revenue Officer does not show if any notice was served on the villagers under rule 27-B of the Rules inviting objections to the settlement claimed by the petitioner. The record also does not show notice having been issued to members of the Local committee for consultation. Rule-27(C) of the Rules prescribe that the Revenue Officer shall consult the committee in a meeting on the appointed day. This rule has not been complied with by the Revenue Officer in his order dated 15.11.1976 though he has stated that he "consulted the local committee members". Mere mention about consultation is not sufficient compliance to the requirement of the statutory rules. It is, therefore, clear that Rule-27(B) and Rule-27(C) of the Rules have not been complied by the Revenue Officer. This is a serious omission which vitiates the proceedings.
>
> 4. In the result the orders of Lower court are set aside and the case is remanded to the Revenue Officer, Khariar for convening a meeting of the Local Committee for consultation and to come to the finding keeping in view evidence on behalf of the petitioner and during the local enquiry collected earlier.
>
> 5. Revision allowed."

Upon remand, OLR Case No.42 of 1976 was dealt with by the Revenue Officer-Cum-Tahasildar, Khariar on different dates. Finally by order dated 21.6.1980 opposite party no.5's application under Section 36-A

of the OLR Act was allowed. O.L.R. Ceiling Appeal No.2 of 1989 and O.L.R. Revision Case No.9 of 1991 preferred against aforesaid order by the petitioner and his mother opposite party no.6 having been dismissed by order dated 19.6.1990 passed by Sub-Collector, Nuapada and order dated 25.6.1994 passed by Collector, Nuapada respectively, the petitioner filed O.J.C. No.6709 of 1994 assailing the orders passed by Sub-Collector and Collector upon remand.

Order dated 7.2.2007 passed in O.J.C. No.6709 of 1994, sought to be reviewed, reads:

"Heard.

2. This Writ application has been filed inter alia challenging the order dated 25.6.1994 passed by the Collector, Nuapada in OLR Revision Case No.9/91.

3. A petition was filed under Section 36-A of the O.L.R. Act before the Tahasildar, Khariar by opposite party no.5 praying to settle the disputed lands measuring Ac.4.49 decimals appertaining to Plot No.283 of Khata No.60 situated in village Godramunda, P.S: Khariar. The Tahasildar registered the said application as OLR Case No.42/76 and after conducting necessary enquiry rejected the petition on the ground that the said petitioner was not the "bhaga chasi". Being aggrieved an appeal was filed before the A.D.M., Kalahandi. After hearing the parties the appellate court also rejected the petition. Thereafter the applicant preferred a revision before the R.D.C., (SD), Berhampur. The R.D.C. was pleased to remand the case to Tahasildar for de novo trial. Thereafter it appears that the Tahasildar after holding elaborate enquiries came to the conclusion that in fact the applicant was occupying the land in question as "Bhaga Chasi" since last 12 years allowed the petition and recognized the petitioner as a tenant. The said order was assailed before the Collector. An appeal was preferred against the said order, which was confirmed. Thereafter the aforesaid revision was filed before the Collector. The Collector after perusing the materials and discussing the evidence confirmed the finding arrived at by the authorities below. The Collector further observed that in the meanwhile the case lands had vested in the State in consonance with the provisions under the O.L.R. Act as the same were declared ceiling surplus land. The landowner having received compensation amount, according to Collector it was not open to him to assail the

order of vesting of the disputed land as he ceases to be landlord any further.

4. It is submitted by learned counsel for the petitioner that the entire proceeding initiated under Section 36-A of the OLR Act was not maintainable as the lands were vested as ceiling surplus land in the State before passing any order. The landlord also knowing about the said fact submitted his choice not to retain the lands. In view of the aforesaid fact the submission made is not tenable. This observation is made only on the basis of submission made by the parties.

5. After going through the impugned order, I do not find any infirmity or illegality therein and decline to interfere with the same.

Consequently the Writ Petition is dismissed."

3. Petitioner filed W.A. No.11 of 2007 before this Court assailing the order dated 7.2.2007 dismissing O.J.C. No.6709 of 1994. Order dated 19.1.2009 by which W.A. No.11 of 2007 was disposed of reads:

> "Mr. C.A. Rao, learned counsel for the appellant prays to withdraw the writ appeal with liberty to file a review application.
>
> Accordingly, the appeal stands dismissed as withdrawn with the liberty to move an application for review."

4. Sri C.A. Rao, learned Advocate appearing for the petitioner submitted that remand order in Revision Case No.145 of 1977 was passed solely on the ground of non-compliance of mandatory provisions under Rules-27-B and 27-C of the Orissa Land Reforms (General) Rules, 1965 (for short 'the Rules). It was not an open remand of the matter to the Revenue Officer-Cum-Tahasildar to hold enquiry afresh. It was categorically observed that Rules-27-B and 27-C of the Rules have not been complied with which is a serious omission by the Revenue Officer-Cum-Tahasildar vitiating the proceeding. While setting aside the orders passed by Revenue Officer-Cum-Tahasildar and appellate authority direction was made by the revisional authority for convening meeting of the local committee for consultation to arrive at a finding keeping in view the evidence adduced on behalf of the petitioner and collected during local enquiry earlier.

5. It was further submitted that, after the remand, by order dated 13.2.1980 Revenue Officer-Cum-Tahasildar took note of the fact that proceeding was remanded for non-compliance of provisions under Rules 27-B and 27-C and issued notices to members of local committee fixing the date

for meeting to 29.2.1980. However, without waiting till the date fixed for the meeting, the matter was taken up by the Revenue Officer-Cum-Tahasildar on 19.2.1980. Order dated 19.2.1980 indicates that Revenue Officer-Cum-Tahasildar once again took note of the remand order for compliance of provisions under Rules 27-B and 27-C of the Rules and directed for issuance of notice to petitioner's father to appear on 31.3.1980 and of proclamation/general notice inviting objections from the villagers within fifteen days. At the same time it was observed in the order dated 19.2.1980 that members of the local committee who were noticed were present in court, meeting was held and proceeding was drawn up. Thereafter, the Revenue Officer-Cum-Tahasildar proceeded to pass order dated 21.6.1980 by which application under Section 36-A of the OLR Act was allowed.

6. It was strenuously contended by Mr. Rao that the Revenue Officer-Cum-Tahasildar passed the order allowing the application under Section 36-A of the OLR Act in violation of the remand order without complying with provisions under Rules 27-B and 27-C of the Rules. Rule 27-B of the Rules contemplates issuance of general notice to the villagers to file objections within a period of fifteen days whereas Rule 27-C of the Rules provides for service of notices on the members of the local committee for consultation seven clear days before the meeting. In the present case, no general notice was issued by order dated 13.2.1980. Though by order dated 13.2.1980 notices were issued to members of local committee fixing the date for meeting on 29.2.1980, proceeding was taken up on 19.2.1980 when general notices to the villagers and notice to petitioner's father were directed to be issued. Though local committee meeting was fixed to be convened on 29.2.1980, said meeting was stated to have been held on 19.2.1980 without waiting for clear seven days from the date of issuance of notices. Therefore, it was argued, order passed by the Revenue Officer-Cum-Tahasildar directing to settle the case land in favour of opposite party no.5 is not sustainable in law in view of non-compliance of mandatory provisions under the Rules. In this connection, learned counsel for the petitioner placed reliance on the decisions of this Court in **Kalicharan Paikaray –vrs.- Benga Bewa** : 1985 (1) OLR 62 and **Rabindra Kumar Badajena –vrs.- Bichitrananda Khatei** : AIR 1992 Orissa 133.

7. It was further submitted that specific grievance was made and contentions were raised before the appellate and revisional authorities assailing the order of the Revenue Officer-Cum-Tahasildar on the ground of non-compliance of mandatory provisions. Both the authorities having failed to consider the petitioner's grievance, petitioner approached this Court in O.J.C. No.6709 of 1994 in which it was contended that provisions under the above

said Rules as well as the remand order were not complied with by the Revenue Officer-Cum-Tahasildar. It was also contended that application under Section 36-A of the OLR Act was not made by opposite party no.5 in accordance with Rule 27-A of the Rules. Though application was required to be submitted under Form No.19, application had been made in Form No.1 of the Rules.

8. It was further submitted that none of the members of the local committee stated to have attended the meeting on 19.2.1980 belonged to village Godaramunda in which case land is situated.

9. It was argued that the Revenue Officer-Cum-Tahasildar in allowing the application under Section 36-A of the OLR Act arrived at the finding that opposite party no. 5 is a Bhag Chasi on the basis of earlier evidence. It was argued that on the basis of self-same evidence the Revenue Officer-Cum-Tahasildar could not have come to a finding different from one recorded earlier by the same authority. In this context, Sri Rao, learned counsel for the petitioner placing reliance on the decision of the Hon'ble Supreme Court in **Biecco Lawrie Ltd. –vrs.- State of West Bengal** : AIR 2010 SC 142 contended that it was not open for the same forum to appreciate the same evidence differently.

10. It was further contended that though orders passed by the Revenue Officer-Cum-Tahasildar, appellate authority and revisional authority were assailed in OJC No.6709 of 1994 on the ground of non-compliance of mandatory provisions and the grounds stated above, by order dated 7.2.2007 the writ petition was dismissed on other grounds which are factually disputed. It was specifically contended that no concession was made on behalf of the petitioner regarding non-retention of case land or regarding receipt of compensation. It was contended that no compensation has been received by the petitioner for the case land. On the contrary, it was argued, in case the case land vested with the State Government as ceiling surplus land, it could not have been settled with opposite party no.5 as a Bhag Chasi. Ceiling surplus land vests with the Government free from all encumbrances. Therefore, recognition of opposite party no.5 as Bhag Chasi on the basis of application under Section 36-A of OLR Act is illegal and untenable.

11. It was contended that petitioner's contentions having not been dealt with and order having been passed on misconception, petitioner preferred W.A. No.11 of 2007 which was permitted to be withdrawn with liberty granted to the petitioner to file review petition.

12. In reply, Sri A. Mohapatra learned counsel for the opposite party no.5 submitted that while dismissing O.J.C.No.6709 of 1994 by order dated 7.2.2007 not only notice was taken of the observations of the Collector to the effect that in the meanwhile case land had vested in the State as the same was declared ceiling surplus land and the land owner has received compensation, but also of the submissions made on behalf of the petitioner that the case land was vested as ceiling surplus land in the State and the landlord had submitted his choice not to retain the case land. It was further argued that compensation in respect of the case land having already been received, there is no basis for the petitioner's claim.

13. Admittedly, application under Rule 36-A of the O.L.R. Act filed by the petitioner was initially rejected by the Revenue Officer-Cum-Tahasildar on the ground that opposite party no.5 failed to substantiate his claim as Bhag Chasi. It is also evident from the order dated 6.12.1979 passed in Revision Case No.145 of 1977 extracted above that the proceeding was remanded by the R.D.C. on the basis of categorical finding that provisions under Rules 27-B and 27-C of the Rules were not complied with by the Revenue Officer-Cum-Tahasildar. Specific direction was issued to convene a meeting of the local committee. Remand order was not to hold a *de novo* enquiry. On the contrary, specific direction wasthat after compliance of provisions under the above stated Rules, Revenue Officer-Cum-Tahasildar was to "come to the finding keeping in view evidence on behalf of the petitioner and during local inquiry collected earlier." The order has attained its finality.

14. In **Kalicharan Paikaray –vrs.- Benga Bewa**(supra) it has been pointed out that because of the far-reaching consequences that ensue from a determination under section 36-A, safeguards have been built into the rules regulating proceedings under the said section .

15. Rule 27-A provides that application under section 36-A shall be made in Form No.19.

Rule 27-B of the Rules reads:

> "(1) Before declaring the non-resumable land of the tenant under Section 36-A the Revenue Officer shall give a notice to the tenant and hear them.
>
> (2) A general notice shall also be served on the villagers of the village or villages in which the land situated inviting objections within a period of fifteen days from the date of issue of the notice to the settlement asked for by tenant.

(3) The notice shall be served in the manner provided in Rule 4." Rule 27-C of the Rules reads:

(1) For the purpose of consulting local committee under Section 36-A, the Revenue Officer shall inform the members of the Committee of the date, time and place of its meeting by a notice specifying the matters for such consultation and the said notice shall be served seven clear days before the meeting. A copy of the notice signifying the service on the person concerned shall be retained by the Revenue Officer and shall form part of the case record.

(2) The Revenue Officer shall consult the Committee in the meeting on the appointed day.

(3) The proceedings of the meeting of Committee shall form part of the proceeding under Section 36-A.

(4) If consultation with the Committee on the appointed day is not possible due to absence of the members or due to their disinclination or inability to express their opinion, the fact shall be recorded by the Revenue Officer and it shall thereupon constitute sufficient compliance with the requirement of consultation with the committee."

16. Thus, a general notice is required to be served on the villagers of the village or villages in which the land is situated inviting objections within a period of fifteen days from the date of issue of the notice to the settlement asked for by tenant under Rule 27-B. That apart, for the purpose of consulting local committee Revenue Officer is required to inform the members of the committee of the day, time and place of its meeting by notice specifying the matters for such consultation and the said notice is required to be served seven clear days before the meeting. Sub-rule (4) of Rule 4 of the Rules provides the manner of service of general notice/proclamation.

17. In **Kalicharan Paikaray –vrs.- Benga Bewa**(supra) it has also been held that not only must notice be issued to the parties as arrayed and impleaded in the application, but a general notice is mandatorily required by Rule 27-B(2) to be served on the villagers of the village or villages in which the land is situated inviting objections within a period of 15 days from the date of notice to the settlement asked for by the tenant. The general notice is by way of a safeguard against collusive or *mala fide* applications. The notice is required to be served in the manner provided in Rule 4 of the Rules. The manner in which the provision relating to general notice has been

framed in Sub-rule(4) of Rule 4 leaves no manner of doubt that institution of a proceeding under section 36-A should receive wide publicity. The provision exhibits the rule makers concern. The institution must be proclaimed in the village and in presence of at least two villagers. It was further held that Rule 27-C prescribes in detail the mode of consultation with the local committee. Analyzed, the rule breaks into the following elements: (a) the consultation with the committee shall be in a meeting, (b) the members shall be intimated about the date, time and place of the meeting by a notice, (c) notice must specify the matters as regards which consultation is necessary and (d) the notice shall be served on the members seven clear days before the meeting. The two most essential features of the provision are that the members must be apprised a week before the meeting of the matter for consultation and that the consultation must be in a meeting of the members with the Revenue Officer. No other mode of consultation is permissible.

18. In **Rabindra Kumar Badajena –v- Bichitrananda Khatei & others** (*supra*) it has been reiterated that provision under Rule 27-C of the Rules is mandatory.

19. In view of the above, after the remand, it was incumbent upon the Revenue Officer-Cum-Tahasildar to comply with the provisions under Rules 27-B and Rule 27-C of the Rules before passing order on the application under section 36-A of the O.L.R. Act on the basis of evidence already available on record.

20. It appears that after the remand the case was taken up by the Revenue Officer on 13.2.80. The order dated 13.2.80 reads:

> "C.R. put up today. The petitioner Sri K.A.Khan is present. Shri S.K.Babu, Advocate files power for the petitioner. Perused the orders passed by the Revenue Divisional Commissioner(S.D.), Berhampur. The lower court's orders have been set aside by the R.D.C.(S.D.), Berhampur and the case has been remanded for fresh enquiry on the ground that local committee members have not been consulted under rule 27(B) & (C).
>
> Issue notice to the local committee members of R.I.Circle, Khariar for their opinion and convene a meeting on 29.2.80. xxx"

21. Though meeting was convened on 29.2.80, the matter was taken up on 19.2.80. Order dated 19.2.80 of the Revenue Officer-Cum-Tahasildar reads:

"Perused the order passed by the R.D.C.(S.D.) Berhampur, where in has set aside the orders of the lower courts and remanded the case to this court for fresh enquiry and disposal. The Revenue Divisional Commissioner observed in his judgment that the following procedure have not been followed by the Revenue Officer, while disposing the proceeding.

(1) Proceeding of the meeting of the local committee has not been drawn up and attached to the record.

(2) Individual notice was not been issued to the land holder(opposite party).

(3) Proclamation inviting objection from the village has not been issued.

Accordingly, notices were issued to the following members of local committee to appear today.

1. Revenue Inspector, Khariar.

2. Sri Dharamsingh Majhi of Badi

3. Sri Purna Chandsra Panda of Khariar

4. Sri Kalia Harijan of Debahal.

All the members are present in my court room and the meeting was held and proceeding drawn up and attached to the case record.

Issue individual notice to Sri Satyabrata Deo, the land holder, to appear on 31.3.80. Issue proclamation inviting objection from the village giving 15 days time.

Case to 31.3.80. xxx "

22. Thus, admittedly, no general notice was issued to the villagers on 13.2.80 while convening meeting of the local committee on 29.2.80. Though notices were issued to the members of local committee by order dated 13.2.80, meeting of the members of the local committee was held on 19.2.80, i.e. before expiry of seven days from the date of issuance of notices. None of the members of the local committee appears to be resident of village Gadaramunda in which case land is situated. Shri Rao, learned counsel

appearing for the petitioner brought to the notice of this Court order dated 25.6.94 in O.L.R. Revision case No.9 of 1991 and urged that specific contention was made before the Collector that notice was issued to the residents of village Chindaguda instead of Gadaramunda. Also finding of the local committee was in respect of Plot No.18 in case of case Plot No.60. It was also contended that in the revisional order under challenge in the writ petition, specific reference has been made to order dated 19.2.80. However, Collector, Nuapada rejected petitioner's contention on the basis of presumption that Revenue Officer-Cum-Tahasildar was not likely to deviate himself from complying with the remand order of the R.D.C.

23. Thus, it is found that in allowing the application under Section 36-A of the OLR Act, the Revenue Officer-Cum-Tahasildar does not appear to have complied with the mandatory provisions under Rules 27-B and 27-C of the Rules. Petitioner's grievance of non-compliance by Revenue Officer-Cum-Tahasildar of the remand order to comply with provisions under the said Rules and record finding on the basis of evidence collected earlier has not been considered in O.L.R. Ceiling Appeal No. 2 of 1989 and O.L.R. Revision Case No. 9 of 1991.

24. Also, petitioner's contention of non-compliance of said provisions has not been referred to or dealt with in the order dated 7.2.2007 passed in O.J.C. No. 6709 of 1994. In passing the said order, sought to be reviewed in this proceeding, this Court appears to have been actuated solely by the submissions relating to petitioner's choice not to retain the case land, and vesting of the case land with the State as ceiling surplus case land and receipt of compensation by the petitioner. In doing so, the settled position of law, as pointed out in the decision of **Hajari Jayasingh-vrs.-State of Orissa and others** reported in 46 (1978) CLT (Notes 85) 43, that upon declaration of ceiling surplus land on vesting with the State application under Section 36-A of the OLR Act is not maintainable in respect of the land declared to be surplus, does not appear to have been taken note of.

25. Moreover, factual disputes concerning petitioner's choice not to retain the case land, vesting of the case land as ceiling surplus land and receipt of compensation by the petitioner do not appear to have been raised before the Revenue Officer-Cum-Tahasildar. In such view of the matter, order passed by Revenue Officer-Cum-Tahasildar without compliance of the mandatory provisions under the above said Rules as well as appellate and revisional orders upholding the order of settlement under Section 36-A of the OLR Act are not sustainable and liable to be quashed. Order on the application under Section 36-A of the OLR Act is required to be passed afresh by Revenue

Officer-Cum-Tahasildar after strict compliance of the mandatory rules in terms of the remand order.

26. This Court arrives at above conclusion upon consideration of petitioner's grievance of non-compliance of provisions under Rules 27-B and 27-C of the Rules. As Revenue Officer-Cum-Tahasildar shall pass an order afresh after compliance of said provisions of the above said Rules, petitioner is at liberty to raise before him the issue of non-compliance of provisions under Rule 27-A of the Rules and other contentions made before this Court including the contention made by the learned counsel for the petitioner placing reliance on the decision in **Biecco Lawrie Ltd. –vrs.- State of West Bengal** (*supra*).

27. Accordingly, review petition is allowed and order dated 7.2.2007 passed in O.J.C.No. 6709 of 1994 is recalled. Order dated 21.6.1980 passed by Revenue Officer-Cum-Tahasildar allowing application under Section 36-A of the OLR Act as well as order passed in O.L.R. Ceiling Appeal No. 2 of 1989 and O.L.R. Revision Case No. 9 of 1991 upholding the order of Revenue Officer-Cum-Tahasildar are quashed. Revenue Officer-Cum-Tahasildar is directed to proceed with and conclude the proceeding in O.L.R. Case No. 42 of 1976 in accordance with law in the light of observations made above

Review Petition allowed.

2011 (II) ILR- CUT- 890

B.K.NAYAK, J.

O.J.C. NO.11016 OF 1997 (Decided on 18.08.2011)

KAMALA JENA ……...Petitioner.

.Vrs.

BINAPANI CHAND & ORS. …….Opp.Parties.

(A) ORISSA LAND REFORMS ACT, 1960 (ACT NO.16 OF 1960) – S. 36-A.

Unless a person in possession is a tenant, the land in his possession can not be declared as non-resumable U/s. 36-A of the Act – Payment of rent is a necessary ingredient for deciding the status of a tenant – Mere cultivating possession of a person over the land without any proof that such possession was on payment of rent the status of the possessor or occupier of the land would not become tenant under the Act.

In the present case there is neither any assertion in the claim petition nor any evidence to that effect that the petitioner was paying rent as a bhag tenant being in cultivating possession of the case land – Held, the appellate authority and the Revisional Authority are justified that the petitioner having failed to prove payment of rent, she has no right to get relief U/s. 36-A of the Act. (Para 6)

(B) ORISSA LAND REFORMS ACT, 1960 (ACT NO.16 OF 1960) – S.36-A. R/w Rule 27-C of Orissa Land Reforms (General) Rules 1965.

Revenue Officer issued notices to the village Committee for the purpose of consultation – Admittedly no consultation for the purpose of declaration U/s.36-A of the Act has been made – Held, Rule 27-C of the Rules being mandatory in nature, non-compliance there of vitiates the proceeding U/s.36-A of the Act. (Para 7)

Case law Referred to:-

AIR 1992 Orissa 133 : (Rabindra Kumar Badajena-V-Bichitrananda Khatei & Ors.)

For Petitioner - M/s. B.H.Mohanty, D.P.Mohanty, S.C.Mohanty, J.K.Bastia & R.K.Nayak.

For Opp.Parties - M/s. Rama Prasad Mohapatra, Miss Deepali Mohapatra

B.K.NAYAK, J. Order under Annexures-2 to 4 passed by the appellate and revisional authorities under the Orissa Land Reforms Act rejecting the claim of the present petitioner under Section 36-A of the Orissa Land Reforms Act (hereinafter referred to as 'the Act') have been challenged by the petitioner, in this writ petition.

2. The petitioner filed O.L.R. Case No.348/1976 before the Revenue Officer-cum-Tahasildar, Bhadrak for declaration of the case land measuring Ac.1.14 dec. as non-resumable under Section 36-A of the Act. The Revenue Officer by order dated 10.02.1983 allowed the petition which was challenged by the predecessor in interest of the present opposite party nos.1 to 4 in O.L.R. Appeal No.31 of 1983 before the S.D.O., Bhadrak, who allowed the appeal and rejected the claim of the petitioner holding that though the petitioner has been able to prove her possession over the land, there has been no assertion or proof with regard to payment of rent to the landlord for such possession, which is a necessary ingredient for conferring status of tenancy on the person in cultivating possession and, therefore, since the petitioner has failed to prove tenancy, the question of non-resumability of the land under Section 36-A of the Act does not arise. The other ground for allowing the appeal was that the requirement of consultation with the local committee under Rule-27-C of the Orissa Land Reforms (General Rules)1965 (hereinafter referred to as 'the Rules') have also not been satisfied.

The revision filed by the petitioner before the A.D.M.(L.R), Bhadrak in Revision Case No. 43 of 1994 challenging the appellate order was dismissed on 25.08.1988 and thereafter a further petition filed by the petitioner before the Collector, Bhadrak to make a reference to the Member, Board of Revenue under Section 59(2) of the Act for a further revision was also rejected in OLR Revision No.13 of 1994 by order dated 16.05.1997.

3. Learned counsel for the petitioner submits that since the Revenue Officer found cultivating possession of the petitioner and accordingly decided the status of her tenancy and declared the land to be non-resumable, the appellate court should not have set aside the said finding without there being any contest by the landlord before the Revenue Officer.

4. Learned counsel for the opposite party nos. 1 to 4, on the other hand, contends that the payment of rent by the tenant to the landlord for his occupation of the land being a necessary ingredient of the tenancy right of the tenant and that having not been proved, the appellate court has rightly held the petitioner to be not a tenant. It is also submitted that the mandatory provision of Rule 27-C of the Rules having not been followed

by the Revenue Officer, the appellate court was justified in setting aside his order.

5. Sub Section (1) of Section 36-A of the Act which is relevant for the purpose of extracted below:

> "***36-A. Tenant to become raiyat in respect of the whole of the land in certain cases***- (1) Notwithstanding anything contained in the foregoing provisions of this Chapter, but subject to the provisions of Sub-section (2) of Section 24, the Revenue officer may on an application made in that behalf by the tenant within two years from the commencement of the Orissa land Reforms (Amendment) Act,1973 (President's Act, 17 of 1973) and after giving the parties interested an opportunity of being heard and after consulting the Local Committee, if any, declare the whole of the land in cultivation of the tenant to be non-resumable and determine the fair and equitable rent and the compensation payable by the tenant in respect of the land in accordance with the provisions of Section 28 and on such determination, the provisions of Sections 29 to 33 (both inclusive), 35-A and 36 shall, so far as may be, apply:
>
> Provided that nothing in this sub-section shall apply to any land where-
>
> (a) the particulars of the resumable and non-resumable portions thereof have already been determined under Section 27 or under Section 35; or
>
> (b) proceeding for the determination of such particulars are pending : 2[* * *]
>
> (c) 2[* * *]"

It is evident from the aforesaid provision that it is a tenant who can claim for declaration that the land in question is non-resumbale. The appellate court has rightly taken into consideration the definition of 'tenant' given in Section 2 (31) of the Act and come to the conclusion that payment of rent in the manner specified in the definition of 'tenant' is a necessary ingredient for deciding the status of tenant. Mere cultivating possession of a person over land without any proof that such possession was under the system known as Bhag, Sanja, Kata or such similar expression under any other system on payment of rent, the status of the possessor or occupier of the land would not become tenant under the Act. Unless, a person in possession is a tenant, the land in his possession can not be declared as non-resumbale under Section 36-A of the Act.

6. Learned counsel for the petitioner does not dispute that even though some witnesses were examined on behalf of the petitioner before the Revenue Office, there is neither any assertion in the claim petition nor any evidence to the effect that the petitioner was paying rent as a bhag tenant being in cultivating possession of the case land. Therefore, the appellate authority and the Revisional Authority are justified in holding that the petitioner having failed to prove payment of rent, she has no right to relief under Section 36-A of the Act.

7. Further, though admittedly the Revenue Officer issued notices to the village committee for the purpose of consultation, admittedly no consultation for the purpose of declaration of Section 36-A of the Act has been made. A Division Bench of this Court in the case of ***Rabindra Kumar Badajena v. Bichitrananda Khatei and others*****; *AIR 1992 ORISSA 133*** have held that Rule 27-C of the Rules is mandatory in nature and non-compliance thereof vitiates the proceeding under Section 36-A of the Act.

8. In the aforesaid view of the matter, I do not find any infirmity in the impugned orders and the writ petition is accordingly dismissed.

Writ petition dismissed.