2012 (II) ILR - CUT- 709

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

W.P.(C) NO. 23268 OF 2011(Dt.28.03.2012)

DHOBEI SAHOO & ANR. …… Petitioners

.Vrs.

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

A. CONSTITUTION OF INDIA, 1950 – ART. 226.

Writ of quo warranto – PIL filed by public spirited persons for issuance of the writ of quo warranto challenging the appointment of O.P.3 which is contrary to the service regulations – Held, writ petition is maintainable. (Para 21)

B. CONSTITUTION OF INDIA, 1950 – ART.226.

Writ of quo warranto – It confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions.

In the present case O.P.3 while functioning as Chairman of the Board of Management, CESU the Commission (OERC) passed orders assigning him to discharge the duties and responsibilities of Chief Executive Officer as an alternative arrangement with monthly honorarium of Rs.70,000/- which is contrary to Clause 5 of the Scheme and against the service regulations – Abuse of power of the Commission – Held, writ of quo warranto issued for quashing the impugned orders – Direction issued to CESU to recover from O.P.3 the amount paid to him towards honorarium.

Case law relied on:-

AIR 2011 SC 1267 : (Centre for PIL & Anr.-V-Union of India & Anr.)

Case law Referred to:-

AISLJ 2011(2) V-98(p.4) : (Girjesh Shrivastava & Ors.-V-State of M.P. & Ors.)

For Petitioners - M/s. K.N.Jena, B.P.Bal, D.K.Mohapatra, A.K.Sahu.

For Opp.Parties - Govt. Advocate (for O.P.No.1)

M/s. S.Mohanty & H.Parida, (for O.P.No.2)

M/s. J.Pattanaik, Sr. Advocate,
B.Mohanty, T.K.Patnaik,
B.S.Rayguru(for O.P.Nos.3,4).

V.GOPALA GOWDA, C.J. This Writ Petition is filed by the petitioners, who claim themselves to be the public spirited persons and taking up different causes of the public to ameliorate their grievances, difficulties and sufferings and to seek remedy and justice for them, who are helpless and to protect the public interest. The petitioner no.1-Dhobei Sahoo is the Secretary of Orissa Electricity Employee Federation and working for development of Electrical Energy Sector of State of Orissa and also to protect the rights and interest of electrical consumers of State of Orissa and to see that the power sector functions efficiently for the growth of industry, agriculture and for strengthening the economic position of the State. The petitioner no.2-Debaprasad Mohapatra is a consumer of electricity and a practicing Advocate. Both of them seeking redressal of the grievances of the consumers have filed this Writ Petition urging various facts and grounds.

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2. The following facts and rival legal contentions are to be examined with a view to find out as to whether the petitioners are entitled to the relief as prayed for in this Writ Petition.

3. Prior to enactment of the Electricity Act, 2003, the Orissa Electricity Reforms Act, 1995 (hereinafter referred to as "The Reforms Act") was enacted by the Orissa State Legislative Assembly which was assented to by the President of India.

4. The GRID Corporation of Orissa (in short "GRIDCO") was a single bundled entity under Section 13 of the Reforms Act as a successor of Orissa State Electricity Board combining the functions of procurement, transmission and distribution with additional power of coordination with generating companies, State Govt. and contiguous States, the Commission, the Regional Electricity Board and the Central Electricity Authority. GRIDCO was then functioning under two licenses namely, the Orissa Distribution Supply License, 1997 and the Orissa Transmission and Bulk Supply License, 1997 granted to it by the then Commission on 1.4.1997. The process of unbundling of Electricity Industry started on 19.11.1997 with creation of four wholly owned subsidiary companies of GRIDCO, namely, CESCO, SOUTHCO, NESCO and WESCO. The Commission issued distribution and retail supply licenses to the aforesaid distribution companies on 1.4.1999. Later on during 1999, private companies took over the majority shares in the said Distribution Companies. However, the transmission business remained

with Orissa Power Transmission Company Limited (in short "OPTCL") which is a 100% Govt. owned Company. Nevertheless, the electricity industry in Orissa has now been fully unbundled and distribution companies as well as the transmission companies now licensees over whom the opp. party no.2-OERC exercises full regulatory control, independently of State Govt. as a regulator. It is stated that the CESCO was initially managed by an American company called as AES. The management of CESCO was handed over to AES from 1.9.1999. Due to heavy loss caused on account of mismanagement, there was hue and cry and the Company left India taking more than 600 crores of rupees along with it, but no action has yet been taken by the State Govt. or OERC to recover the same which is shown as loss to the CESU licensee and the same is being shown as liabilities of CESU. The Commission revoked the licence of CESCO w.e.f. 1.4.2005. The OERC has converted CESCO as Central Electrical Supply Utility (in short "CESU") which became fully owned Government Company, keeping the regulatory power on its own hand and also with the State Govt. through its Secretary, Energy Department, who is also a member in the Board of CESU to look after and to see for proper and efficient functioning of CESU in accordance with law to protect the interest of the State and the consumer at large. The State Govt. is having 51% share in this utility (CESU) which is public money.

5. The State Govt. has not framed any rules under Section 180 of Electricity Act, 2003, so also the OERC has not yet framed any Regulations regarding appointment, salary and other benefits for the officers and employees of the CESU so far. However, the employees of the CESU are drawing salary, allowances, house rent etc. and it is alleged that they are using vehicles indiscriminately and going on expensive tours at their pleasure for no public purpose and enjoying other benefits at their whims and sweet will at the cost of the public money causing great loss to the Company by siphoning of public funds which is the tax payers money.

6. Neither the State Govt. nor the Commission has prescribed the terms and conditions of service of officers of CESU and also the power and duties of the Chief Executive Officer of CESU, as a result of which the Chief Executive Officer is going on giving appointments to the officers in different grades after their retirement illegally and without authority of law and in contravention of law though they are not qualified and eligible to hold such posts without following due procedure of recruitment as provided in law and without inviting application to fill up the posts and conducting the interview for selection and appointment to the posts. It is alleged that the CESU which is a Govt. owned Company has been made rehabilitation centre for retired

persons and deadwoods at the cost of public money and transferring the liabilities on the consumers in fixing tariff rates.

7. In order to regulate the service and allied matters of employees of CESU, the Chief Executive Officer issued an office order on 28.11.2006 adopting all the service Rules, Regulations, Notifications, Office Orders, Circulars together with amendments thereof framed by OSEB/GRIDCO/CESCO, which are followed by CESCO as on the date of vesting with CESU for regulating the service matter of employees of CESU till the Utility frames its own regulations.

8. The erstwhile OSEB vide Office Order dated 30.8.1961 adopted the service conditions of Government servants, the Orissa Service Code, the T.A. Rules, etc. for the erstwhile employees of the Board. The GRIDCO vide its Office Order dated 25.4.1996 has also adopted the Regulations relating to service and allied matters for the employees of the Board transferred to GRIDCO under Sections 23 & 24 of the Orissa Electricity Reform Act, 1995. It is stated that officers and employees of the CESU are also governed by the Regulations of Orissa State Electricity Board Employees (Age of Retirement) Regulations 1979 and Orissa Civil Service Pension Rule, 1992.

9. It is stated that one Swapan Kumar Dasgupta joined as Chief Executive Officer on 1.1.2008, after he left the job on 9.8.2010, the Commission relieved Mr. Dasgupta on the same day i.e. 9.8.2010 A.N. To fill up the said post of Chief Executive Officer of CESU, the opp. party no.2 immediately on 10.8.2010 under pressure and for extraneous consideration passed the order holding that "Since it will take quite some time for the selection of a Chief Executive Officer or to make alternative arrangement, the Commission have now decided that the function, duties and responsibilities of Chief Executive Officer of CESU shall be discharged by Sri B.C. Jena, Chairman, CESU Management Board until further order or until alternative arrangement is made by the Commission." This order is under challenge in this Writ Petition contending that the said order is contrary to the Central Electricity Supply Utility of Orissa (Operation and Management) Scheme, 2006 (hereinafter referred to as 'the Scheme') as amended up to 2010 vide notification dated 12.11.2010**.** It is stated that there are different Grades in Executive Grade in the CESU. Chief Executive Officer is holding highest executive post and is above Executive Grade-9 post. For appointment to the post of Executive Grade-9, Regulation 13 of the GRIDCO Officers Service Regulations has to be followed; that has not been done in the instant case with an ulterior motive to facilitate opp. party no.3, who is the Chairman of CESU appointed by the Commission, to the Board of

Management of CESU to be in-charge to discharge the function of Chief Executive Officer to get all service benefits, such as salary and other perks as the Chairman post does not carry any service benefits and salary and other perks.

10. It is contended by Mr. Jena, learned Senior Advocate appearing on behalf of the petitioners that the appointment has been given contrary to the Regulation 13 (1) (2) (3) of GRIDCO Officers' Service Regulations, which provides that:

> "(1) The appointment of Officers in the executive Grades above E-9 shall be by way of selection only. The Committee of the Board shall be entitled to prescribe the eligibility and conditions to be satisfied for appointment to the such grades.
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> (2) For this selection, persons in executive grade E-9 are to be considered in the first instance and if sufficient suitable persons are not available from E-9 then the management will have the right to go and select the person(s) from grade E-8.
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> (3) The appointment to grades above E-9 shall be on a contract basis initially for a period of 3 years and renewable thereafter for such period(s) as the Board for the Committee of the Board may prescribe until the Officer attains the age of superannuation as provided in these Regulations."

11. The Chief Executive Officer of CESU-opp. party no.3, who has been appointed by the Commission after his retirement, is holding the post of Chairman of the Board of Management of CESU. Therefore, the action of the Commission is in violation of provisions of law and Regulations required to be followed at the time of appointment of O.P.No.3 as Chief Executive Officer of the CESU by the impugned order dated 10.8.2010, which is sought to be quashed as the same is illegal. It is stated that by virtue of the said appointment order, the opp. party no.3 is getting salary of more than Rs.70,000/- per month along with all facilities which is in contravention of Clause-19(1) of Remuneration Structure of GRIDCO Officers Service Regulations and he is going on giving appointments to retired persons of his own choice without adopting any procedure of law, Rules and Regulations and without publishing advertisement and without conducting any interview by the selection committee, prescribing qualification, eligibility criteria and adopting the procedure required to be followed for appointment of such employees and officers. The action of opp.party no.3 in giving appointments

to the persons without following the regulations of the recruitment rules has caused aggregated technical and commercial loss, which will affect the public interest and violates the rules of law and relevant rules for which this Court is required to exercise its power of judicial review, as the appointment order impugned under Annexure-3 is illegal, arbitrary against the interest of general public and not sustainable in the eye of law. Therefore, the petitioners have sought for quashing of the said appointment order. The further case of the petitioners is that on 9.8.2010 one Mr. B.K. Lenka was the Chief Executive Officer of CESU who had been changed within 24 hours thereafter. The impugned order was passed by the Commission assigning the Chairman of the Board of Management, CESU to discharge the duties and responsibilities of Chief Executive Officer, which is not legal and valid. It is further contended that the powers and functions of Chairman and Chief Executive Officer of CESU have been prescribed in the Scheme of the CESU.

12. Further it is stated that the appointment of the Chairman-opp. party no.3 as Chief Executive Officer would be contrary to the powers and functions conferred upon him as he is required to supervise the function of the Chief Executive Officer and he will be under the control of the Board of Management which is headed by the opp. party no.3 as its Chairman. Therefore, the petitioners have prayed for issuance of a writ of quo warranto calling upon the opp. party nos.1 to 3 to show cause on what legal authority opp. party no.3 is being appointed after superannuation to hold the dual post of Chairman and Chief Executive Officer of the CESU and further sought for a declaration that the post of Chairman-cum-Chief Executive Officer of CESU is vacant and injunct opp. party no.3 from functioning as Chief Executive Officer of CESU and direct the opp. party no.3 to refund all the pecuniary benefits/salary he has received from CESU so far from the date of his appointment by virtue of the appointment order and illegally holding the post and drawing salary and other perks.

13. The prayer of the petitioners is opposed by opp. party no.2-OERC by filing a detailed counter statement sworn to by one Pravakar Swain, who is the Secretary, O.E.R.C. traversing various averments and sought to justify the impugned order. With reference to the petitioners' averments made in para-2 of the writ petition, it is stated that the Commission has not given any appointment to opp. party no.3 as Chief Executive Officer of CESU, but it has assigned the functions, duties and responsibilities of the said post to him till an alternative arrangement is made by the Commission which is purely temporary in nature. The said order of the Commission was communicated to opp. party no.3 by the Secretary of the Commission. CESCO Officers

Service Regulations has been adopted by CESU, but not GRIDCO Officers Service Regulations as alleged. The said function, duties and responsibilities were conferred by virtue of the impugned order upon the opp. party no.3, who was the Chairman of the CESU taking into account his bright Engineering Career and vast experience in the distribution sector irrespective of his age and retirement from service. Therefore, it is stated that there is no violation of provisions of Orissa Service Code and Pension Rules although the opp. party no.3 is getting his pensionary benefit after his retirement. The said temporary arrangement has been made by the Commission only for the interest of the Utility and the larger interest of the public and consumers of CESU. Holding of share of 51% by the State is not disputed. Opp. party no.2 after hearing appointed an administrator and vested with him the CESCO's undertaking (assets and staff) for smooth management so that the general public do not suffer on account of M/s.AES abandoning the business and further averments made in paragraph-8 of the writ petition is not correct and denied. The opp. party no.2 vide order dated 5.5.2007 has clearly prescribed the power, duties and responsibilities of all high officials of CESU such as Chief Executive Officer, Chief Operating Officer, Chief Commercial Officer, Chief Financial Officer, Chief Human Resource Development Officer, Chief Project Implementation Officer treated as Members of the Management Board of CESU. The power, duties and responsibilities of Chief Executive Officer of CESU have been clearly defined by the Commission in their order already stated. The averments made in paragraphs-9 & 10 of the writ petition are not traversed as they do not require any comment. The service conditions of CESU are governed by CESCO's Officers Service Regulations and not by GRIDCO's Officer Service Regulations. But there has been no violation of any Service Rules and Regulations in the matter of appointment of officers as there is no specific version alleged in the writ petition. Averments made in paragraph 13 of the writ petition are also denied and the allegation made in the said paragraph that the opp. party no.2 has assigned the functions, duties and responsibilities of Chief Executive Officer of CESU upon opp. party no.3-Chairman, CESU Management Board, his age is not material. It is further stated that the said order has not been made by the Commission on any pressure put on it, but taking into account his administrative efficiency and vast experience in Power Distribution Sector, the opp. party no.3 has been conferred with the said duties and responsibilities of Chief Executive Officer of CESU. At paragraph 13 of the counter affidavit, while denying the averments made in paragraph 14 of the writ petition, it is stated that in consideration of the responsibilities and function both as Chairman-cum-Chief Executive Officer, CESU, the Commission has been pleased to allow Sri Jena to get a consolidated honorarium of Rs.70,000/- per month in

addition to usual perquisites as were being enjoyed by the former Chief Executive Officers. His predecessor Chief Executive Officer was getting total salary of Rs.1,67,284/- per month along with other perquisites which was meant for the post of Chief Executive Officer and also the honorarium allowed to Sri Jena-opp. party no.3 by opp. party no.2 is not more than the pay and allowances allowed to other Directors appointed in CESU. The opp. party no.3 is providing his service for the full time for the day to day operation and management of the utility. When the then Chief Executive Officer was being paid Rs.1,67,284/- per month besides other benefits, the opp. party no.3 is being paid only a consolidated amount of Rs.70,000/- per month with usual perquisites applicable to the Chief Executive Officer, so there is no illegality in providing the said monetary benefit by opp. party no.2 which is not wastage of public money and not a burden on the consumers of CESU. The various averments made in the affidavit traversing the averments made in the writ petition are not required to be adverted in this order, as the question we are required to examine is the legality and validity of the impugned order with reference to the scheme referred to supra. Therefore, the other averments are not adverted.

14. Another counter affidavit has been filed on behalf of opp. party nos.3 & 4 sworn to by Sri Bijoy Chandra Jena, who is working as Chief Executive Officer, CESU on the similar manner as has been narrated in the facts of the case on behalf of opp. party no.2. He has seriously disputed the claim made by the petitioner no.1, who is a Public Spirited Person and the Secretary of Orissa Electricity Employee Federation and petitioner no.2, a practicing Advocate. It is contended that no public interest is involved as the petitioner no.1 is an interested person and he is very much against opp. party no.3 and petitioner no.2 is a practicing Advocate. Therefore the writ petition is also not maintainable placing reliance upon the judgments of the Supreme Court where the Apex Court has deprecated in various pronouncements that public interest litigation filed on behalf of practicing Advocate is not maintainable.

15. It is further stated that the Public Interest Litigation is not maintainable as it is purely a Service matter. In the Public Interest Litigation the appointment of opp. party no.3 as Chief Executive Officer cannot be challenged. In this regard, the Apex Court has rendered the judgment indicating therein that Public Interest Litigation with regard to service matter is not maintainable and denied the appointment of Chief Executive Officer as illegal and arbitrary. It is stated by him that the Commission has not given appointment to him as Chief Executive Officer, but has assigned the functions, duties and responsibilities of the said post till alternative

arrangement is made by the Commission, which is purely temporary in nature. Further it is stated at paragraph 9 of the counter affidavit that GRIDCO Officers Service Regulations adopted by CESU does not provide for selection to the post of Chief Executive Officer of CESU by OERC and hence question of violation of the said provision in the selection to the said post does not arise. The Commission has assigned the duties and responsibilities upon the Chief Executive Officer of CESU as he is being the Chairman of the Board Management as he has a bright Engineering Career and vast experience in the power distribution sector irrespective of his age and retirement from service. Therefore, the allegation that his appointment is bad in law is not correct and further stated that there is no violation of service code and pensionary scheme as he is getting pension after his retirement. The said temporary arrangement has been made by passing the impugned order by the Commission in the interest of the consumers Utility. The allegations made at paragraph 14 of the writ petition are denied and reliance is placed upon the impugned order stating that he is holding a full time post in addition to the responsibilities of the Chairman, Management Board of CESU and looking after the day to day affairs of the Utility. In consideration of the responsibilities and functions, both as Chairman-cum-Chief Executive Officer, CESU, the Commission was pleased to allow the present opposite party no.3 to draw a consolidated honorarium of Rs.70,000/- per month in addition to the usual perquisites. The other averments sworn to in the affidavit are not necessary for our purpose to examine the legality and the validity of the impugned order. Hence the same are not adverted in this judgment.

16. Rejoinder affidavit filed by the petitioners to the counter filed by opp. party no.2-OERC is not required to be adverted to in this case.

17. Mr. J. Pattanaik, learned Senior Counsel appearing for the opp. party nos.3 & 4 places reliance upon the judgment of the Supreme Court reported in 2011(2) V AISLJ-98 in which it has been held that PIL in service matters is not maintainable in law except for issuance of a writ of quo warranto and the said judgment is applicable to the fact situation and the writ petition is not maintainable and the petitioners are not entitled for issuance of a writ of quo warranto. He places reliance upon the decisions of the Apex Court in AIR 2010 SC 3515 (paragraphs 9 & 20), AIR 2010 SC 2550 (paragraphs 189 & 192), AIR 2011 SC 1267 (paragraphs 37 & 45). The said legal contentions have been strongly relied on by Mr. Pattanaik in support of the case of opposite party nos.3 & 4 and in justification of the impugned order.

18. Mr. K.N. Jena, learned Senior Advocate appearing for the petitioners places reliance upon the judgment of the Supreme Court in the case of ***Centre for PIL and another V. Union of India and another,*** reported in AIR 2011 SC 1267. In the said case the appointment of Central Vigilance Commissioner was questioned on the ground that the appointment of the Vigilance Commissioner is in contravention of provisions of 2003 Act, wherein the Supreme Court while examining its power under Article 32 of the Constitution of India with reference to Section 4(1) proviso to Central Vigilance Commission Act (45 of 2003) after referring to certain earlier decisions held that the writ petition in the nature of quo-warranto is maintainable and the public duties of the State Government or the statutory corporations are to be enforced to protect the rights and interests of the public. Therefore, he submits that the said decision with all fours is applicable to the fact situation for grant of relief as prayed in the writ petition.

19. In view of the above rival legal contentions urged on behalf of the learned counsel, the following points arise for consideration:-

(i) Whether prayer for issuance of writ of quo warranto by the public spirited persons is maintainable?

(ii) Whether the impugned order under Annexure-3 is in consonance with the Central Electricity Supply Utility of Orissa (Operation and Management) Scheme, 2006? and the alternative arrangement made till the selection to the post of Chief Executive Officer and assigning the functions, duties and responsibilities of the Chief Executive Officer of CESU to opp. party no.3 with the monthly honorarium is legal and valid?

(iii) Whether continuation of the order granting a consolidated honorarium of Rs.70,000/- per month to O.P.No.3 in addition to usual perks like telephones, vehicles, travelling allowances which were being enjoyed by the then Chief Executive Officer w.e.f.11.8.2010 vide order dated 12.11.2010 is legal and valid ?

(iv) What order ?

20. The petitioners have sought for issuance of a writ of quo warranto against opp. party no.3 and for quashing Annexures-3,4 & 5 as the same are in violation of recruitment rules and the Commission is not empowered to assign functions, duties and responsibilities of the Chief Executive Officer upon the Chairman. On the other hand, Mr. Pattnaik, learned Senior

Advocate appearing for the opp. party nos.3 & 4 placing reliance upon the decision of the Supreme Court in the case of ***Girjesh Shrivastava and others V. State of M.P. and others,*** reported in AISLJ 2011(2) V-98 (paragraph 24) submitted that the prayer cannot be entertained.

In Girjesh case, the appointment of a group of Grade II and III school teachers working in Panchayat Schools as Samvida Shala Shikshak was challenged in two Public Interest Litigations on the grounds that no proper advertisement for reservation for ex-servicemen had been made and that the selection was in contravention of Para 5(viii) of the order passed by the State Government as members of the selection committee had their near relatives appear as candidates for selection. In one of the writ petitions, the High Court allowed the writ petition and ordered the cancellation of appointments,inter alia, on the grounds that appointments were illegal as members of the selection committee allowed their near relatives to appear in the selection process and that there was contravention of Rule 5 (4)(b) as no proper advertisement had been made so as to invite applications from ex-service men. In the other writ petition, though the High Court allowed the petition in view of contravention of provision for 10 per cent reservation, it held in the said writ petition, near relatives of the members of the selection committee did not appear for selection and therefore did not strike down the selection. Instead it invalidated the selection only for being in violation of Rule 5(4)(b). Review petitions were filed by some of the selected candidates, inter alia, on the ground that in service matter where express remedy is available, a Public Interest Litigation is not maintainable which were rejected on the ground that in view of the grave irregularity in the selection process, quashing of the entire selection was just and proper. In the appeal before the apex Court, the main argument against entertaining the writ petitions was on the ground that a PIL in a service matter is not maintainable which was found favour by the apex Court. As regards the violation of reservation policy, the apex Court held that if at all there was an issue with respect to the reservation policy of the ex-serviceman it ought to have been brought up as a service dispute and not in a PIL. In that case, the apex court held that the alleged participation of near relatives in the selection process was not such a factor as to vitiate the entire selection process and even if there were some illegal beneficiaries from the selection process, they should have been weeded out instead of striking down the entire selection process. But in the case at hand, the facts and circumstances are totally different. Here the allegation is that the post of Chief Executive Officer, CESU has not been filled up in accordance with the service regulations of GRIDCO which is followed by CESU. The post of Chief Executive Officer is above the Executive Grade-9 Post which shall be filled up by way of selection from

officers of Grade 9 and if sufficient suitable persons are not available in Grade 9, then the management will have the right to go and select from Grade 8. Certainly, the Chairman being higher in rank than the CEO could not have been asked to discharge the functions of the CEO and granted honorarium of Rs.70,000.00 per month in additional to the usual perquisites being enjoyed by the former CEO. In view of the aforesaid, Girjesh's case relied upon by Mr.Patnaik, learned senior counsel, has no application to the case at hand. We deem it appropriate to refer to the decision of the apex Court in **Centre for PIL v. Union of India**, AIR 2011 SC 1267. In that case writ petition in the nature of quo warranto was filed challenging the appointment of Central Vigilance Commission as being in contravention of the provisions of 2003 Act. In that case, it was submitted on behalf of the respondent no.2 that the case was neither a case of infringement of the statutory provisions of the 2003 Act nor of the appointment being contrary to any procedure or rules. It was urged that it is well settled that a writ of quo warranto applies in a case when a person usurps an office and the allegation is that he has no title to it or a legal authority to hold it. Learned counsel argued that for a writ of quo warranto to be issued there must be a clear infringement of the law and in that case, he submitted there has been no infringement of any law in the matter of appointment of respondent no.2 as Central Vigilance Commission.

In paragraph-35 of the judgment, the apex court has analyzed the procedure of quo warranto as under:

> " The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the court inter-alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority."

The apex Court further held that if public duties are to be enforced and rights and interests are to be protected, then the court may, in furtherance of public interest, consider it necessary to inquire into the state of affairs of the subject matter of litigation in the interest of justice. Another Constitutional Bench of the Supreme Court in B.N.Nagarajan v. State of Mysore, AIR 1966 SC 1942 interpreted Articles 309 and 162 of the Constitution of India and held that the power under Article 309 does not abridge the power of the execute to act

under Article 162 of the Constitution without a law. It further held that the executive must abide by the Act or Rule and it cannot, in exercise of the executive power under Article 162 of the Constitution, ignore or act contrary to that Rule or the Act. In the case at hand, appointment of Chief Executive Officer of CESU is governed by the service regulations of GRIDCO.

21. In the case at hand, opp. party no.3 is a retired officer and he has been appointed in the post of Chairman to the Management of the Board of CESU, which is an undisputed fact. To fill up the post of Chief Executive Officer or to make or cause an alternative arrangement under the guise of temporary period, the nature of appointment and the service regulations provided for such appointment is required to be examined. Service Regulations do not provide for such temporary appointment or arrangement or keeping any other Officers of the same grade or higher grade in the Organization in additional charge to discharge the functions, duties and responsibilities of the Chief Executive Officer for day to day work. We may here profitably note what the Supreme Court said in the case of Ramana Dayaram Shetty v. International Airport Authority of India, AIR 1979 SC 1628.

> "……It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of the Act, the violation of them."

By a careful reading of the impugned order under Annexure-3 makes it very clear that it was couched in such a way as to indicate that some time was required to fill up the post, till then as an alternative arrangement, the opp. party no.3 was assigned the post of Chief Executive Officer to discharge the functions, duties and responsibilities of that post of CESU. If, that is so, Annexure-5 fixing honorarium of Rs.70,000/- and other perquisites could not have been issued. Even if such arrangement was for a temporary period, we have to construe that Annexure-3 is an appointment order to the post of Chief Executive Officer of CESU for which opposite party no.3 is not eligible and service regulations do not provide for the same and such arrangement is contrary to the service Regulations and law laid down by the apex Court Therefore, we have to record a finding that the Commission has acted illegally and arbitrarily in appointing the Chairman as the Chief Executive Officer, who is also one of the Members of the Board Management of CESU. Thus, the prayer made in the writ petition for issuance of a writ of quo warranto is certainly maintainable and the decision of the Supreme Court in

the case of ***Centre for PIL and another V. Union of India and another*** (supra) is aptly applicable to the case at hand and the first point as formulated above with regard to maintainability of the writ petition is accordingly answered in favour of the petitioners.

22. Having answered point no.(i) in favour of the petitioner, we may now proceed to consider point nos.(ii) and (iii). To appreciate the rival legal contentions urged on behalf of the parties, it is necessary for this Court to refer to clause 4 (iv) of the Scheme, which reads thus:-

> "(iv) The CEO, CFO and COO should not hold any other posts/office during their tenure in the CESU. The terms of office, emoluments and conditions of service of CEO, CFO and COO shall be such as to be decided by the Commission by order issued under this Scheme. The Commission may extend their tenure for a further period, as it thinks fit."

Clause (5) of the said Scheme clearly speaks about the powers and functions of Chairman, Chief Executive Officer (CEO), Chief Finance Officer (CFO), Chief Operating Officer (COO).For our purpose, it is necessary to extract the powers and functions of the Chairman and Chief Executive Officer (CEO), which read as under:

> "(i) <u>Chairman</u>
>
> (a) He shall preside over all Board Meetings.
>
> (b) He shall guide, advise and have overall superintendence and control over the CEO, CFO and COO for smooth and efficient functioning of the CESU.
>
> (c) He shall decide all the matters referred to him by the Board.
>
> (d) He shall discharge all other duties assigned by the Commission under the Scheme.
>
> (ii) <u>Chief Executive Officer (CEO)</u>
>
> Subject to overall supervision, control and delegation of power by the Management Board and directions of the Commission –

(a) He shall act as Chief Executive and Chief Spokesman of the CESU.

(b) He shall manage the day-to-day affairs and management of CESU and shall represent the CESU before the Commission and other Authorities.

(c) He shall carry out and implement the orders and directions issued by the Commission to the CESU.
(d) He shall carry out and implement the resolutions/decisions taken by the Management Board.

(e) In consultation with the Management Board, he shall design and implement the organizational structure and management of the CESU.

(g) In the name and on behalf of the CESU, he shall enter into contract with all external agencies and take loans from funding/financial institutions.

(h) On behalf of the CESU, he shall discharge all its statutory/regulatory requirement and obligations.

(i) Any other function as may be assigned by the Commission or the Management Board from time to time under the Scheme.

(j) The CEO shall report to the Chairman."

23. On reading of all the aforesaid relevant clauses it is very clear that the Chairman of the CESU is required to supervise the smooth functioning of the CESU and Chief Executive Officer is to act under the control of the Chairman. That being the position and the opp. party no.3, who is a retired officer and the Chairman of CESU could not have been appointed as Chief Executive Officer. If the post of Chief Executive Officer in the Organization falls vacant in view of the urgency of either temporary appointment can be made or in charge arrangement can be made for temporary period, but the same power could not have been conferred upon the Chairman as the Chairman is required to supervise and control the function of Officers of the Board as well as in the Organization, therefore his appointment as Chief Executive Officer as an alternative arrangement is contrary to Clause 5 of the Scheme referred to supra. The powers and functions of the Chief Executive Officer have been extracted above. Further, as could be seen

from the impugned order, the appointment in question is styled as temporary in nature. If the post falls vacant, it is the duty of the Commission to see that the post is filled up by following the service regulations. Instead of following the service regulations, the Commission has proceeded to fill up the post of Chief Executive Officer by conferring the functions, duties and responsibilities of the Chief Executive Officer on the Chairman and further passed the subsequent impugned order dated 12.11.2010 under Annexure-5, the last two unnumbered paragraphs read thus:-

> "In continuation of this office letter No.4639 dtd.10.08.2010 and in pursuance of the aforesaid order dtd.10.08.2010, the Commission has been pleased to allow Shri B.C. Jena to continue as Chairman-cum-CEO to discharge the duties and responsibilities as Chairman and CEO until further orders over and above his current assignments, if any.
>
> Further, in pursuance to the order dated 10.08.2010 and in consideration of his responsibilities and functions both as Chairman and CEO, CESU the Commission has been pleased to allow Shri Jena a consolidated honorarium of Rs.70,000/- (Rupees Seventy Thousand only) per month in addition to the usual perquisites being enjoyed by the then CEO like telephones, vehicles, traveling allowances etc. (but not house rent). This will be applicable w.e.f. 11.08.2010, the date of joining as CEO in CESU."

24. The contention urged on behalf of opp. party no.2-Secretary, OERC is that only temporary arrangement has been made fixing a monthly honorarium of Rs.70,000/- which is payable to the Chief Executive Officer. It is unknown to the service jurisprudence that an employee/officer who is put in charge of another office or post in addition to his own duty is to be granted honorarium. The same is totally impermissible in law. On reading Annexures-3 & 5, we are of the view that it is not legally correct on the part of the Commission to appoint the Chairman as the Chief Executive Officer, which is contrary to the service regulations. Opp. party no.3 should not have been placed on temporary arrangement as the Chief Executive Officer having regard to the nature of powers and functions required to be discharged by the Chairman who has been put in charge of the Chief Executive Officer who is under the control and supervision of the Chairman. He cannot supervise his own work which is the violation of principle of natural justice. He cannot find out his own defect and discharge his responsibilities.

25. Therefore, we are of the view that the Commission has acted illegally and in violation of service regulations placing the opp. party no.3 in the post of Chief Executive Officer and further granting him honorarium w.e.f. 11.08.2010 vide letter dated 12.11.2010 under Annexure-5, which is a clear case of abuse of power of the Commission and the said appointment order is without authority of law and opp. party no.3 should not have been entrusted with the duties, functions and responsibilities of the Chief Executive Officer while functioning as Chairman of CESU. Therefore, we are of the view that both Annexures-3 & 5 are liable to be quashed and the same are accordingly quashed and a writ of quo warranto is issued forthwith as the opp. party no.3 is not competent to hold the post of Chief Executive Officer of CESU.

26. For the foregoing reasons, we have answered point nos.2 & 3 in favour of the petitioners, as they have rightly filed this writ petition in the interest of public. Opp. party no.3 was empowered to discharge the function of the Chief Executive Officer of CESU by virtue of Annexures-3 & 5. Hence, payment of honorarium of Rs.70,000/- and other perks are not permissible in law. The amount of Rs.70,000/- is a huge amount, which is tax payers' money which should not be spent in this manner, although opposite party no.3 has been asked to discharge the function, duties and responsibilities of CEO by opp. party no.2.

27. Accordingly, we direct the CESU to recover from opposite party no.3 the amount paid to him towards honorarium within a period of four weeks from the date of receipt of this order.

28. So far as the prayer for a direction to opposite party no.1 to frame rules is concerned, we leave it to the State Govt. to frame the rule having regard to the aims and objects of the statute. Since we have already answered issue nos.2 & 3 in favour of the petitioners and against the Commission and CESU, the Commission shall immediately take steps to fill up the post of Chief Executive Officer within a period of two months from the date of receipt of copy of this judgment. Till filling up of the post of Chief Executive Officer, the Chairman shall not be allowed to function as Chief Executive Officer as he is not competent to do so. It is however open to the Commission to keep some other responsible officer of CESU to act as in-charge CEO till regular CEO is appointed/posted, as directed above.

With the aforesaid observation and direction, the writ petition is allowed. There would however be no order as to costs.

Writ petition allowed.

2012 (II) ILR - CUT- 726

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

W. A. NOS. 59 & 93 OF 2012 (Dt.18.05.2012)

BIJU PATNAIK UNIVERSITY OF TECHNOLOGY & ANR. .....Appellants

.*Vrs.*

C.V. RAMAN COLLEGE OF ENGINEERING & ORS. .....Respondents

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION ACT, 1987 (ACT NO.52 OF 1987) – Ss.2 (h), 3 & 10(m) r/w Section 5(iii) of the BPUT Act, 2002.

Grant of autonomous status to technical Institutions – Respondent No.1-College applied in the format basing on the XIth Plan guidelines framed by U.G.C. – Provisions in the UGC Act, 1956 relate to grant of status of deemed University which is different from grant of autonomy – Such power only vests with the AICTE for framing of regulations U/s. 10 (m) of the AICTE Act for grant of autonomous status to an affiliated College by the BPUT to which respondent No.1-College is affiliated – So the process made for grant of autonomy basing on the guidelines of UGC have no statutory force and putting promissory estoppel against BPUT regarding grant of autonomous status to the College is untenable in law – Held, the impugned judgment passed by the learned single Judge is set aside and the writ petition filed by respondent-No.1 College is dismissed. (Para 11,16)

Editors Note :- Decision of the learned single Judge reported in 2012(I) ILR Cut-694, reversed.

Case laws Referred to:-

1.AIR 1968 SC 718 : (Union of India-V- Anglo Afghan Agencies)
2.AIR 1979 SC 621 : (Motilal Padampat Sugar Mills Co.Ltd.-V-State of U.P. & Ors.)
3.AIR 1995 SC 874 : (Basinka Trading & Anr.-V-Union of India & Anr.)
4.AIR 1997 SC 3910 : (Pawan Alloys & Casting Pvt. Ltd.,Meerut etc.etc.-V-U.P.State Electricity Board & Ors.)
5.AIR 2004 SC 297 : (State of Orissa & Ors.-V-Mangalam Timber Products Ltd.,)

6.AIR 2004 SC 4559 : (State of Punjab-V- Nestle India Ltd. & Anr.)
7.(2010)3 SCC 274 : (State of Bihar & Ors.-V-Kalayanpur Cement Ltd.)
8.AIR 1986 SC 806 : (Union of India & Ors.-V-Godfrey Philips India Ltd.)
9.2011(1) SCALE 368: (Syndicate Bank-V- Ramachandran Pillai & Ors.)
10.(1993)4 SCC 357 : (Union of India & Ors.-V-S.L.Abbas)
11.(2007)8 SCC 212 : (Chief Commercial Manager, South Central Railway, Secunderabad & Ors.-V-G. Ratnam &Ors.)

12.JT 2012(1)SC 307 : (Collector, Distt. Gwalior & Anr.-V-Cine Exhibitors P.Ltd.& Anr.)

For Appellant - M/s. S.Palit, A.K.Mohapatra, A.Mishra, A.K.Mahana & A.Kejriwal.
For Respondents- M/s. B.Routray, Sr. Advocate, K.K.Jena, A.K.Mohapatra & S.N.Das, (for R.No.1)
Mr. J.K.Misra, Sr. Advocate(for R.No.2)
Mr. R.K.Mohapatra, Govt. Advocate(for R.No.3)
M/s. J.Das, Sr. Advocate, A.N.Das, N.Sarkar, E.A.Das (for Intervenors)

V.GOPALA GOWDA, C.J. Since both the writ appeals involve common facts, on consent of the learned counsel for the parties, they were heard together and are being disposed of by this common judgment.

2. Both the appellants, namely, Biju Patnaik University of Technology (in short, "BPUT") and the State Government question the correctness of the impugned order dated 17.1.2012 passed by the learned Single Judge of this Court in W.P.(C) No.15864 of 2011 holding that the action of the State Government in defying the decision of the University Grants Commission (in short, "UGC") for conferment of autonomous status to the present respondent no.1-college is unsustainable in law and quashing the decision of the Government not to accord the status to the present respondent no.1 – college communicated to the BPUT vide its letter dated 21.5.2011 and directing both the State Government and the BPUT to take immediate steps to carry out their respective obligations under the XIth Plan Guidelines of the UGC for grant of autonomous status to the respondent no.1-college, urging various facts and legal contentions.

3. Necessary brief facts of the case are stated hereunder for the purpose of appreciating the rival legal contentions urged by the learned

counsel appearing on behalf of the parties to find out as to whether the impugned order is vitiated in law.

4. Present respondent no.1-college challenged the inaction of the BPUT in implementing the decision of the UGC in granting autonomous status to the college and taking necessary action in this regard. The UGC under its XIth Plan Guidelines prepared a Scheme for conferment of autonomous status to colleges to increase the number of autonomous colleges in the country with a target to make 10% of eligible colleges autonomous by the end of XIth Plan period, i.e., 2007-2012. In terms of the said guidelines of UGC, the respondent no.1-college submitted its proposal for autonomous status from the academic session 2010-2011 in the prescribed format duly signed and recommended by the Registrar, BPUT, to the Secretary, UGC vide its letter dated 18.1.2010. On the basis of the said letter, the UGC wrote letters dated 23.4.2010 to both the appellants stating that it has constituted an Expert Committee consisting of three members to evaluate the performance and the academic attainments for conferment of autonomous status on the respondent no.1-college. Accordingly, both the appellants were requested to nominate their respective nominee to be the members of the Expert Committee. In the said letters of the UGC, it was clearly mentioned that if the State Government fails to provide its nominee within ninety days from the date of issuance of the letter, the Expert Committee may go ahead with the process to evaluate the performance and academic attainments of the college. Since the State Government did not nominate its nominee to the Expert Committee, again UGC wrote the letter dated 25.8.2010 requesting the State Government to nominate its nominee to the Expert Committee and further instruct him to attend and visit the respondent no.1-college from 30.8.2010 to 1.9.2010. The college vide its letter dated 27.8.2010 also requested the State Government to nominate its representative for the Expert Committee constituted by the UGC for inspection of the respondent no.1-college which was to be conducted on 30.8.2010. Ultimately, the State Government through the Department of Industries vide its letter dated 8.9.2010 intimated to the UGC that one Mr D.K. Mallick, Joint Director (Academic), Office of the DTE & T, Orissa, Cuttack is nominated as the State Government nominee to the Expert Committee for the purpose of evaluation of the performance and academic attainments of respondent no.1-college.

5. Since the State Government failed to nominate its nominee in time despite reminders, the Expert Committee of the UGC consisting of the nominee of BPUT and others conducted inspection of the respondent no.1-college from 30.8.2010 to 1.9.2010 and submitted its detailed report

recommending that the respondent no.1-college be made autonomous for a period of six years from 2011-12 to 2016-17. Based on the said recommendation of the Expert Committee, the UGC vide its letter dated 15.10.2010 agreed to confer autonomy to respondent no.1-college which was communicated to all concerned including both the appellant and the respondent no.1-college with a request to the BPUT for issuing necessary orders in this regard. Subsequently, the UGC wrote another letter on 13.1.2011 and requested the BPUT to issue necessary orders for conferment of autonomy upon the college. The college also took up the matter with the BPUT for issuing orders/notification. The BPUT vide letter dated 17.3.2011 intimated to the college that the matter regarding conferment of autonomous status was already taken up by the BPUT and the same shall be intimated shortly. The UGC vide its letter dated 15.4.2011 nominated Prof. (Dr.) D.S. Chauhan, Vice-Chancellor, Uttarakhand Technical University as its nominee to the Governing Body of the college, but the appellant-BPUT as well as the State Government did not nominate its representative to the Governing Body of the college. The college made further request in this regard. Having failed to elicit any response either from the State Government or from the BPUT and due to the inaction on the part of the BPUT in passing necessary orders notifying the autonomous status of respondent no.1-college, it had approached this Court seeking appropriate relief. During pendency of the writ petition, the college came to know subsequently that the State Government vide its letter dated 21.5.2011 intimated to the BPUT its decision not to accord autonomous status to respondent no.1-college. Same was also challenged by way of amendment of the writ petition.

6. The prayers of the writ petitioner were opposed by the State Government and also the BPUT traversing the petition averments contending that respondent no.1-college is not entitled to conferment of autonomous status and for grant of autonomous status, the provision of section 10(m) of the All India Council for Technical Education Act, 1987 (in short, “AICTE Act”) is applicable and no regulations are framed therefor and it is the All India Council for Technical Education (in short “AICTE”) which is competent to confer the status of autonomy under the said Act and not the UGC, which is a statutory body established under the University Grants Commission Act, 1956 (in short, “UGC Act”) and the XIth Plan Guidelines for grant of autonomous status to respondent no.1-college in order to carry out the National Policy on Education 1986-1992 of the Central Government is not traceable to section 10(m) of the AICTE Act. Section 3 of the UGC Act deals with the conferment of the status of Deemed University in relation to the recognized university as defined under section 2(f) of the said Act.

Further, it is contended that the Expert Committee report is not binding on the State Government. The decision of the UGC conferring autonomy on respondent no.1-college is in violation of its own norms prescribed in the XIth Plan Guidelines. Hence, the same cannot be enforceable in law. Therefore, the decision of the Government not to accord autonomous status to respondent no.1-college cannot be found fault with. The appellant-BPUT also filed counter-affidavit reiterating the plea that there is no provision for grant of permanent affiliation in the BPUT 1st Statute of 2006. As required in the XIth Plan Guidelines of the UGC, no autonomous status can be granted to the college. Further, in the additional affidavit filed by the BPUT in the writ petition, it has been clearly spelt out that to the two questions addressed to the UGC, i.e., (i) whether the Guidelines for the Scheme of Autonomous Colleges is by way of any Regulation, Rules or Act of UGC, and (ii) whether such notification/Gazette copy if any be provided, the specific answer of the UGC under the R.T.I. Act was to the following effect :

> "The guidelines for autonomous colleges have been formatted in pursuance of the objective laid down under National Policy in Education 1986. The guidelines have not been notified as Regulation under the provision of UGC Act, 1956."

Therefore, it is stated that the writ petition itself is not maintainable for grant of the first relief, i.e. issuance of a writ of mandamus, as the petitioner has no enforceable statutory right and in support of his contention, a copy of the said document was filed as Annexure-E/2 to the additional affidavit dated 7.9.2011. It is further stated that the XIth Plan Guidelines of UGC being in the nature of guidelines and/or instructions, the BPUT is not bound to comply with the same. Especially, the State Government in the Industries Department decided not to accord autonomous status to respondent no.1-college and at the time of hearing had taken a plea that respondent no.1-college is governed by the AICTE which alone can take a decision regarding grant of autonomy to respondent no.1-college under section 10(m) by framing the regulations. Therefore, the UGC has no authority to grant autonomy to the college. In the writ petition, the UGC filed a counter-affidavit strongly relying on the recommendation made by the Education Commission (1964-66) with regard to the college autonomy, the UGC documents on the XIth Plan profile of higher education in India highlighting the importance of autonomous colleges and also the objectives of the XIth Plan to carry out the National Policy on Education (1986-1992) according to which an autonomous college will have the freedom to :

- Determine and prescribe its own courses of study and syllabi, and restructure and redesign the courses to suit local needs; and
- Prescribe rules for admission in consonance with the reservation policy of the State Government;
- Evolve methods of assessment of students' performance, the conduct of examinations and notification of results;
- Use modern tools of educational technology to achieve higher standards and greater creativity; and
- Promote healthy practices such as community service, extension activities, projects for the benefit of the society at large, neighbourhood programmes, etc.

and also referred to Clause-2(b) of the XIth Plan Guidelines which provides for the relationship with the parents university, the State Government and other educational institutions and further emphasis is made on Clause-3 thereof which deals with the Eligibility Target Groups and provides for the criteria for identification of institutions for grant of autonomy. Whether the college has got temporary or permanent affiliation comes under the Target Groups eligibility conditions for grant of autonomous status. The UGC has considered both the categories of colleges for grant of autonomous status. Further it was stated that it has received proposal from respondent no.1-college in January, 2010 and accordingly the UGC constituted an Expert Committee and requested both the State Government and BPUT to send their nominees. The Expert Committee conducted its inquiry and submitted a report which was accepted and a letter was written to the State Government to act upon the said report for conferring autonomous status upon respondent no.1-college. Strong reliance was placed upon the UGC Act, 1956 which is enacted under the provisions of Entry 66 of List I of the Seventh Schedule to the Constitution, the definition of "University" under section 2(f) of the UGC Act and also sections 12 and 20 of the said Act and it was sought to justify that the Government and also the BPUT were to act upon the letter issued for conferment of autonomous status by the BPUT which has not been done. Therefore, the prayer sought for in the writ petition which has been granted in favour of respondent no.1-college is also justified.

7. The ground of attack to the impugned order is that the impugned order is contrary to the statutory provision contained in section 10(m) of the AICTE Act and the legal principles laid down by the apex Court on the question of the doctrine of promissory estoppel on which strong reliance has

been placed by the learned counsel for respondent no.1-college which has been accepted by the learned Single Judge after elaborately explaining and extracting the relevant passages from the judgments of the apex Court in the case of ***Union of India vrs. Anglo Afghan Agencies***, AIR 1968 SC 718, ***Motilal Padampat Sugar Mills Co. Ltd. vrs. State of Uttar Pradesh and others***, AIR 1979 SC 621, ***Basinka Trading and another vrs. Union of India and another***, AIR 1995 SC 874, ***Pawan Alloys and Casting Pvt. Ltd., Meerut etc. etc. vrs. U.P. State Electricity Board and others***, AIR 1997 SC 3910, ***State of Orissa and others vrs. Mangalam Timber Products Ltd.***, AIR 2004 SC 297, ***State of Punjab vrs. Nestle India Ltd. and another***, AIR 2004 SC 4559, ***State of Bihar and others vrs. Kalayanpur Cement Ltd.***, (2010) 3 SCC 274, and ***Union of India and others vrs. Godfrey Philips India Ltd.***, AIR 1986 SC 806. The further ground of attack is that the XIth Plan Guidelines framed for implementing the National Policy on Education (1986-1992) which have been framed on the basis of the Education Commission (1964-66) regarding grant of autonomy to colleges have no application to the fact situation for the reason that the National Policy on Education (1986-1992) formulated with the objective of college autonomy must be in conformity with the provision of section 10(m) of the AICTE Act which governs the field in relation to grant of autonomy in favour of any technical institution. Section 10(m) provides for laying down regulations/guidelines by the AICTE for the purpose of conferment of autonomous status. Further, placing of reliance on section 12 or section 20 of the UGC Act and accepting the case of respondent no.1-college, grant of relief in favour of the writ petitioner is wholly untenable in law as the same is contrary to the statutory provisions contained in the AICTE Act or the Biju Patnaik University of Technology Act, 2002 (in short, "BPUT Act"). Therefore, the impugned order passed by the learned Single Judge is vitiated in law and the reliance placed upon the XIth Plan Guidelines which have no statutory force constituting the Expert Committee to conduct inspection of the academic attainments for conferment of autonomous status on respondent no.1-college is totally impermissible in law and asking the State Government and the BPUT to nominate their members to the Committee and the Committee's report in favour of respondent no.1-college for conferment of autonomous status asking the State Government to issue necessary instruction for issuance of no-objection certificate on the basis of their report and not granting the no-objection certificate and the decision of the UGC regarding conferment of autonomous status should have been set aside as the same is not in accordance with law and therefore the learned Single Judge gravely erred in law. Reliance has been placed upon the catena of decisions by the learned counsel for respondent no.1-college in support of their contention that once the format of the college was forwarded

by respondent no.1-college to the Registrar of the BPUT nominating its nominee to the Committee promising to respondent no.1-college for conferment of autonomous status, they could not have gone back. Therefore, the principle of promissory estoppel is applicable to both the State Government and the BPUT as respondent no.1-college has nominated its nominee in the Committee and Clauses 2(b) and 3 of the XIth Plan Guidelines framed by the UGC upon which strong reliance has been placed by the learned counsel, have no statutory force and could not have been relied on. Hence, Mr. Palit contended that the said finding is contrary to law. He has placed reliance upon the decision of the Supreme Court in the case of ***Union of India and others vrs. Godfrey Philips India Ltd.***, AIR 1986 SC 806. He pointed out that the guidelines are mere administrative instructions and as such, for the enforcement thereof no direction can be issued by the writ court as it has no statutory feature. In support of his contention, he placed reliance on the decisions of the apex Court in the case of ***Syndicate Bank vrs. Ramachandran Pillai & ors***, 2011 (1) SCALE 368, ***Union of India and others vrs. S.L. Abbas***, (1993) 4 SCC 357, ***Chief Commercial Manager, South Central Railway, Secunderabad and others vrs. G. Ratnam and others***, (2007) 8 SCC 212, and ***Collector, Distt. Gwalior and another vrs. Cine Exhibitors P. Ltd. and another,*** JT 2012(1) SC 307, and submitted that the reliance placed on sections 12(1) and 20 ignoring section 10(m) of the AICTE Act is vitiated in law. Hence, the impugned order is liable to be set aside as the findings and the reasoning recorded by the learned Single Judge on the rival and legal contentions are contrary to law. Section 2(f) read with sections 12 and 20 of the UGC Act and XIth Plan Guidelines framed by the UGC are not relatable to the regulations and are not applicable for the purpose of grant of autonomous status to the technical institutions as the same has not been framed by the AICTE which is a statutory authority empowered as per the provision contained in section 10(m) of the AICTE Act. Therefore, the provisions of the XIth Plan Guidelines are totally inapplicable to the fact situation. Hence, the impugned order is vitiated in law and accordingly the same is liable to be set aside.

8. Mr B. Routray, learned Senior Advocate appearing for respondent no.1-college and Mr J. Das, learned Senior Advocate appearing for the intervenor-students, and also Mr S.S. Das, learned counsel appearing for Silicon Institute of Technology- respondent no.1 in the connected W.A. No.114 of 2012 filed by the BPUT also supported the finding of the learned Single Judge on similar grounds and prayed for dismissal of the appeals. We will deal with W.A. No.114 of 2012 separately.

9. With reference to the aforesaid legal rival contentions urged by the learned counsel for the parties, the following points arise for consideration in these appeals.

(i) Whether applying the XIth Plan Guidelines framed by the UGC under the National Policy on Education (1986-1992) to formulate the objectives to confer autonomous status upon technical institutions in the absence of any regulations framed under section 10(m) of the AICTE Act, the relief granted is legal and valid ?

(ii) Whether the XIth Plan Guidelines (2007-2012) have got statutory force ?

(iii) Whether there is any promissory estoppel against law ?

(iv) What order ?

10. Points (i) and (ii) are required to be answered together as they are inter-related.

11. It is an undisputed fact that respondent no.1-college is a technical institution, as defined under the provision of section 2(h) of the AICTE Act which reads thus :

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
>
> "technical institution" means an institution, not being a University, which offers courses or programme or technical education and shall include such other institutions as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare as technical institutions;"

Section 2(f) thereof defines "regulations" which means regulations made under this Act. Section 3 deals with establishment of the Council which says that with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be established a Council by the name of the All India Council for Technical Education which is a body corporate. Sub-section (4) of section 3 provides that the Council shall consist of members mentioned in clauses (a) to (t) thereof. It is also undisputed fact that "College" has been defined under section 2(f) of the BPUT Act and respondent no.1-college, in terms of the said definition, is an institution admitted to the University in accordance with the provisions of the

said Act and the Statutes. Section 2(b) thereof relates to "affiliated institution" which means a College or an institution affiliated to the University and includes a College or an institution deemed to be an affiliated College or institution under the said Act. Sub-sections (i) to (xxiii) of Section 5 of the BPUT Act, confer number of powers upon the University which are subject to such orders, rules, regulations, guidelines and directions, as may be issued from time to time, by the Central Government or the Council under the provisions of the All-India Council for Technical Education Act, 1987. The relevant sub-section is sub-section (iii) of section 5 which is regarding grant of autonomy to any affiliated college or institution imparting education of engineering and technology. Therefore, the power to confer autonomous status in the case on hand vests with the university-BPUT. The same is no doubt subject to the orders, rules, regulations or guidelines either by the Central Government or the Council under the AICTE Act. In the case on hand, in view of section 10(m) of the AICTE Act, the AICTE has the power to frame such regulations. Therefore, the guidelines framed by the Central Government under the XIth Plan upon which strong reliance has been placed, are not applicable. Those guidelines could have been framed by the Central Government and made applicable, had the field not been occupied by law. The case of respondent no.1-college is that XIth Plan Guidelines are framed by the UGC in exercise of its power under the National Policy on Education (1986-1992) on the basis of 1964-66 Education Committee report for standardization of education in the field of technical education to achieve good standard in the said education are not framed under the provisions of the AICTE Act by the AICTE but are framed by the UGC. The UGC Act does not deal with the matter of conferment of autonomous status on a college affiliated to a university under the BPUT Act. The UGC Act deals with the conferment of deemed status under section 3 of the UGC Act. Section 10(m) of the AICTE Act deals with the conferment of autonomous status on a college affiliated to a university. Therefore, the conferment of powers for grant of autonomy under section 5 of the BPUT Act to a college or institution is subject to orders, rules, regulations and guidelines framed by the Central Government or the Council under the provisions of the AICTE Act and the provisions of the XIth Plan Guidelines are not traceable to the guidelines framed under the AICTE Act. Therefore, seeking enforcement of the right of the college placing strong reliance upon the XIth Plan Guidelines is contrary to section 3 read with section 10(m) of the AICTE Act and also section 5 thereof. Further, in the additional affidavit filed by Dr. Prasanta Kumar Satpathy, Registrar-in-charge of the BPUT, opposite party no.2 in the writ petition, the specific answers of the UGC obtained by him under the R.T.I. Act and the two specific questions addressed to the UGC, which have already been extracted above, have been referred to.

12. On a careful reading of the said information, it is very clear that those guidelines have not been notified under the Regulations of the UGC Act and it is not the case of the UGC that it is not framed by itself. Even if it is framed by it, section 5 of the BPUT Act clearly confers the power upon the University to grant autonomous status subject to the regulations/guidelines that may be framed by the Central Government or the Council under the AICTE Act. Therefore, the entire process made for grant of autonomous status on the basis of the guidelines by the UGC is contrary to the statutory provisions referred to supra. Accordingly, point nos.(i) and (ii) are answered in favour of both the appellants, i.e. BPUT and the State, respectively.

13. Rightly it is submitted by Mr Palit, learned counsel for the appellant-BPUT that the guidelines of the UGC have no statutory force and the decisions referred to supra cited by him have got application to the fact situations. Therefore, for non-consideration of the aforesaid decisions by the learned Single Judge, the impugned judgment is vitiated in law.

14. Since point nos.(i) and (ii) are answered in favour of the appellants, point no.(iii) also must be answered in their favour for the following reasons.

15. It is a well established principle of law that promissory estoppel cannot be pleaded against law. A three-Judge Bench of the apex Court in the case of Union of India and others vrs. Godfrey Philips India Ltd., referred to supra, has crystallized the principle as under :

> " …… that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make"

The said decision rendered by the three-Judge Bench has been referred to and followed by the apex Court in its subsequent decision in the case of Collector, Distt. Gwalior and another vrs. Cine Exhibitors P. Ltd. and another, referred to supra and the said decision applies to the fact situation of the present appeals.

16. With reference to the statutory provisions of the AICTE Act and the BPUT Act, it is clear that the procedure required to be followed for

conferment of autonomous status by the BPUT is provided in section 5(iii) of the BPUT Act. The format submitted by respondent no.1-college is on the basis of the UGC Guidelines which have no statutory force. While answering to points (i) and (ii), we have recorded a finding that conferment of autonomous status on the college is governed by the AICTE Act but not the UGC Act. Sections 2(f), 3 and 12 of the UGC Act relate to grant of status of deemed university. Grant of status of deemed university is different from grant of status of autonomy. The power to grant the status of deemed university vests with the UGC under section 3 whereas the power to grant autonomous status to the university to which respondent no.1-college is affiliated is subject to regulations or guidelines to be framed by the Central Government or the Council under the AICTE Act. Therefore, the field is occupied by the AICTE Act for framing of regulations under section 10(m) of the AICTE Act for grant of autonomous status to an affiliated college by the BPUT to which respondent no.1-college, in the instant case, is affiliated. Therefore, the format forwarded by the Registrar of the BPUT as per the request of respondent no.1-college appointing its nominee to be a member of the Expert Committee as requested by the UGC and the State Government appointing its nominee in the Governing Council cannot be put against the BPUT or the State as promissory estoppel and the entire proceeding initiated by the UGC is without competence and jurisdiction as the UGC is not empowered to frame guidelines and such power only vests with the AICTE under section 10(m) of the AICTE Act. Therefore, the entire action of the UGC is void ab initio in law and hence forwarding of the nominee to the Expert Committee cannot be made use against the BPUT and the State stating that it is a promissory estoppel on their part. Reliance placed by the learned Single Judge upon a catena of decisions in the impugned judgment is totally inapplicable to the fact situations and referring to the fact situations, the finding of putting promissory estoppel against the BPUT regarding grant of autonomous status to the college is wholly untenable in law and the decisions applied by the learned Single Judge in the impugned judgment have no application. Hence, the finding recorded by the learned Single Judge on this point is an error of law. Accordingly, point no.(iii) is also answered in favour of the appellants.

17. For the reasons stated above, the appeals are allowed, the impugned order is set aside and the writ petition is dismissed.

Appeals allowed.

2012 (II) ILR - CUT- 738

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

W.P.(C) NO.13791 OF 2005 (Dt.05.07.2012)

PARADEEP PHOSPHATES MAZDOOR UNION ……Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

CONTRACT LABOUR (REGULATION & ABOLITION) ACT, 1970 (ACT NO.37 OF 1970) – S.10.

Prohibition of Contract Labour – O.P.3 engaged contract labourers for over 18 to 20 years in sixteen establishments – Petitioner Union alleged there is requirement of regular employment as the work is permanent and perennial in nature – State Advisory Board Constituted a committee for inquiry – Committee after making spot enquiry advised to abolish contract labour in respect of sixteen establishments – Govt. abolished one establishment out of sixteen for which a writ petition was filed and this Court directed the Government to reconsider the report of the advisory Board – Government instead of accepting the report of the Advisory Board constituted another committee consisting some Government officials and called for its views – Second committee recommended not to impose abolition – Hence the present writ petition.

Held, constitution of another committee by the State Government is extra legal as there is no legal sanction to constitute such committee – Impugned order passed by O.P.1 refusing to abolish contract labour with respect to remaining fifteen areas of operation is quashed – Direction issued to O.P.1 to take a decision on the recommendation made by the State Advisory Board.

(Para 8,9,10)

Case law Referred to:-

AIR 1974 SC 960 : (Gammon India Ltd.-V- Union of India).

For Petitioner - M/s. Biswanath Rath, J.N.Rath, S.K.Jethy, M.K.Panda, P.S.Samantara, s.B.Mohanty, P.R.Sahoo, P.K.Behera & S.K.Mishra.

For Opp.Parties - M/s. Ganeswar Rath, T.K.Praharaj, S.Mishra, S.Rath.

Heard learned counsel for the petitioner and the learned counsel appearing for the State as well as opposite party no.3.

2. The petitioner being a Trade Union, affiliated to the Indian National Trade Union Congress, has filed this writ application seeking a mandamus against opposite party no.1 to forthwith issue notification under Section 10 of the Contract Labour (Regulation and Abolition)Act, 1970, hereinafter called as the 'Act' for brevity, prohibiting contract labour system in remaining fifteen areas of the Establishment of opposite party no.3 and issue a writ of certiorari to quash Annexure-3, in which the State Government has upheld the decision taken earlier to declare only one area of work to be prohibited from the contract labour excluding fifteen other areas of the work.

3. Opposite party no.3 is a private establishment carrying out different types of jobs, though there is requirement of regular employment, bit it is pleaded by the petitioner that for personal gain and with vested interest, they carries on various jobs through contract labourers engaged through contractors for a long time, as a result of which there was dissatisfaction amongst the contract labourers. The petitioner-Union agitated the matter before the Management again and again which went unheard, as a result of which, the State Advisory Contract Labour Board, hereinafter referred as the "Advisory Board" for brevity, in its meeting held on 28.01.1997 and on 26.07.1997 constituted a Committee for making an enquiry and to submit a report for the purpose of a decision by the Advisory Board. The Committee after making spot enquiry submitted its report stating that the contract labour with respect to sixteen areas of work should be abolished. The Advisory Board, in its 21st Meeting, unanimously resolved to recommend the State Government to abolish the contract labour system in the above mentioned jobs in the place, for which such a recommendation has been made by the Committee.

4. It is contended by the petitioner that in the enquiry by the competent authority, it has been established that the process, operation and the works, for which prohibition is recommended, is incidental or necessary for the Industry. Similarly, it is also contended that the particular works, for which prohibition is recommended, is of perennial in nature that is to say it is of sufficient duration. Such work has been carried on by the establishment, keeping in view the nature of industry, trade and business or manufacture.

5. By allowing the opposite party no.3, it is contended, to continue to engage contract labour, injustice has been caused to the employees, who are continuing in the establishment for over 18 to 20 years. Thereafter, it is

pleaded that the report recommended by the Advisory Board was not accepted and the State government took its view to implement the order of abolition of contract labour with respect to only one of the sixteen areas of operation. Against such an order, the petitioner filed O.J.C. No.2751 of 2000, which came up for disposal before this Court on 24.06.2003, wherein this Court held as follows:

> "7. There is no dispute that the State Advisory Contract Labour Board recommended to the State Government to abolish contract labour system in sixteen areas of Paradeep Phosphets Limited, but in the Government Notification dated 28.4.2000 only one area has been mentioned. On reading of the note and order of the Minister extracted above, we are inclined to hold that the Government has not fully considered the recommendation. Therefore, in the interest of justice, the matter needs reconsideration.
>
> 8. For the reasons aforesaid, we direct the State Government (opposite party no.1) to reconsider the recommendation of the State Advisory Contract Labour Board with regard to abolition of contract labour in respect of 15 other areas left out by it and lake appropriate decision according to law within four months of receipt of this order."

The State Government did not take any action on the same within the stipulated period of four months and, as such, a contempt petition was filed before this Court. On receipt of notice of the contempt application, opposite party no.1 brought out an office order dated 05.11.2004 refusing abolition of fifteen left out areas of the Paradeep Phosphets Ltd., which is annexed as Annexure-3.

6. The petitioner contended that no opportunity of hearing was afforded to the petitioner before passing the aforesaid order. It is further apparent from the records that the Government constituted another Committee consisting of some Government officials and called for its views. The Committee called for the view of the Management of the P.P.L. and passed the order refusing to abolish the contract labour system of the establishment. The petitioner contended that constitution of such a Committee, especially after recommendation of the Advisory Board has been received, has not been contemplated under the Act. Moreover, the petitioner-Union was not heard in the matter and that views were not considered. In such view of the matter, the petitioner's claim for the aforesaid reliefs.

7. The opposite parties have filed their counter affidavit, where the only plea of substance taken is that the decision to abolish the contract labour is

within the exclusive domain of the Government under Section 10 of the Act and this Court cannot decide the factual aspect of this case. In course of submission, the learned counsel for opposite party no.3 submitted that the second Committee recommended not to impose abolition of the remaining fifteen areas of operation from contract labour keeping in view the fact that there may be any abolition of post, which will effect a large number of labourers. At the outset, this Court is of the opinion that the submission made by the learned counsel for the opposite party no.3 in this regard regarding abolition of post is untenable in view of the fact that the contract labourers are continuing for about 18 to 20 years and the nature of works they are discharging are perennial in nature.

8. Coming to the question, whether the State Government was correct in not declaring fifteen years of operation to be free from contract labour is correct or not, attention of the Court has been brought to the case of Gammon India Ltd. v. Union of India, AIR 1974 SC 960, wherein the Supreme Court held that the Act provides for regulated conditions of work and contemplates progressive abolition to the extend contemplated by Section 10 of the Act. Section 10 of the Act deals with abolition while the rest of the Act deals mainly with Regulation. On an analysis of the provision of Section 10 of the Act, the Supreme Court further held, it is evident that the appropriate Government has power to prohibit employment of contract labour in any process of operation or other work in any establishment. However, before issuing any notification prohibiting contract labour, the appropriate Government has to consult the Central Board or the State Board as the case may be before issuing any notification under sub-section (1) of Section 10 of the Act prohibiting employment of contract labour, the appropriate Government is bound to have regard not only to the conditions of work and benefits provided for the contract labour in a particular establishment, bit also other relevant factors enumerated in clauses (a) to (d) of sub-section (2) of Section 10 of the Act. These factors are as follows:

(i) whether the process, operation or other work is incidental or necessary for the industry, trade, business or manufacture or occupation that is carried on in the establishment;

(ii) whether the process is of perennial nature;

(iii) whether it is done ordinarily through regular workmen in that establishment;

(iv) whether it is sufficient to employ considerable number of whole-time workmen.

The Supreme Court further ruled that analyzing the provision of Section 10 of the Act all that is required by the appropriate Government is to consult the Advisory Board and take into consideration the aforesaid factor as well as the conditions of work and the benefit provided for the contract labour in the establishment. Once the Government undertakes the aforesaid exercise, the requirements of Section 10 of the Act are complied with.

9. Such being the settled law guiding the field, the case in hand has to be examined. It is apparent that the Government did not take any decision itself. Rather, the State Government constituted another Committee, which is extra legal in the sense that there is no legal sanction for constituting any such Committee. Secondly, the said Committee issued notice to the Management but did not thought it proper to hear or give a reasonable opportunity of hearing to the Trade Union representing the labourers. On submission of its report, the State Government without examining and giving weight to the report submitted by the Committee constituted by the State Advisory Board acted on the conclusions arrived at by the extra-legal Committee and has come to the conclusion that the rest of the fifteen numbers of areas of operation do not require abolition of contract labourers.

10. In that view of the matter, the writ application is allowed. Annexure-3, the order given by the opposite party no.1 refusing to abolish contract labour with respect to remaining fifteen areas of operation is hereby quashed. It is further directed that the opposite party no.1 shall take a decision as per the observations made in this judgment within a period of two months from the date of communication of this order. While reconsidering the matter, the State Government shall ignore the report submitted by the extra-legal Committee constituted by and give due weightage to the recommendation made by the State Advisory Board and take a decision whether the process is perennial in nature etc. as discussed in one of the preceding paragraphs of this judgment. No cost.

Writ petition allowed.

2012 (II) ILR - CUT- 743

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

W.P.(C) NO. 19255 OF 2011 (Dt.08.05.2012)

M/S. K.J. ISPAT LTD. .....Petitioner.

.Vrs.

COMMISSIONER OF COMMERCIAL TAXES, ORISSA, CUTTACK & ANR. .....Opp.Parties.

A. ORISSA VAT ACT, 2004 (ACT NO.4 OF 2005) – S.43.

Re-assessment – Re-opening of assessment on mere change of opinion – Not permissible – Re-opening of assessment permissible if the adverse material is not utilized in the original assessment – Held, in this case question of change of opinion of the Assessing Officer does not arise. (Para 9)

B. ORISSA VAT ACT, 2004 (ACT NO.4 OF 2005) –S.43.

Re-opening of assessment at the behest of higher authority – Assessing Officer has to apply his own mind to the materials in his possession after confronting the same to the assessee and being satisfied that the alleged turnover had escaped assessment.

In this case the Assessing Officer after applying his mind and being satisfied that the alleged turnover had escaped from assessment, initiated the re-assessment proceeding – He has not mechanically re-opened the completed assessment and abdicated and surrendered to the report of the higher authority – Held, re-opening of assessment U/s.43 OVAT Act is justified. (Para 11,12)

C. Violation of Principles of natural Justice – Dealer likely to be affected by use of any material collected by the revenue against him in the assessment proceeding – Must be brought to his notice for rebuttal – Assessing Authority is entitled to collect materials behind the back of the assessee – All materials need not be confronted but only those materials which the assessing officer wants to utilize against the assessee are to be disclosed – Moreover the assessee has a right to Cross-examine any person whose statement the assessing authority relies for the purpose of assessment. (Para 20,28,30,34)

D. Evidence – Onus – Slip recovered from the premises of the assessee – Initial burden lies on the assessee to explain the slip

recovered – Where the dealer disowns the slip, unless it is established by the revenue that noting made in the slip relates to unaccounted business transaction of the dealer, no adverse inference can be drawn. (Para 36)

Demand of Tax – No demand can be raised in an assessment on suspicion and conjecture – So before utilizing the said slip against the petitioner/assessee the Assessing Officer has to prove that through the said noting in the slip the assessee has sold materials which was not disclosed in the books of account. (Para-38)

Case laws Referred to:-

1.(2008)12 VST.31(Orissa) : (Larsent & Tubro Ltd.-V-State of Orissa & Ors.)
2.1977(39)STC 478 : (State of Kerala-V-K.T. Shaduli Yusuf).
3.1970(26)STC 22(Orissa) : (Murli Mohan Prabhu Dayal-V-State of Orissa).
4.1995(97)STC 10 (Dredging Corporation of India-V- State of Orissa).
5.(2009)21 VST 280 : (Lakhiram Jain-V- STO).
6.(1997)105 STC 112 : (Kanak Cement Pvt. Ltd.-V-Sales Tax Officer, Assessment Unit Rajagangpur).
7.(2007)6 VST 783(SC) : (Binani Industries Ltd. -V- Asst. Commissioner of Commercial Taxes).
8.(2006)148 STC 61 : (Indure Limited-V- Commissioner of Sales Tax,Orissa & Ors.)
9.AIR 1989 SC 997 (State of U.P.-V- Maharaja Dharmandar Prasad Singh).
10.(1962)45 ITR 206 : (C.Vasantlal & Co.-V-Commissioner of Income-tax, Bombay City).
11.(1980)125 ITR 713 : (Kishinchand Chellaram-V-Commissioner of Income-tax, Bombay City-II).
12.(1991)Supp.1 SCC 600 : (Delhi Transport Corporation-V-D.T.C.Mazdoor Congress).
13.(1998)8 SCC 194 : (Basudeo Tiwary-V-Sido Kanhu University).
14.(1998)109 STC 16 : (J.S. Refineries Ltd.-V-Commissioner of Sales Tax).

For Petitioner - M/s. Subas Ch. Lal, Sr. Adv.
Sumit Lal, Sujit Lal & M.Agrawal.
For Opp.Parties- Mr. R.P. Kar, Sr. Standing Counsel (Commercial Tax Deptt.).

B.N.MAHAPATRA,J. This writ petition has been filed challenging the impugned order of assessment dated 25.06.2011 passed under Section 43

of the Orissa Value Added Tax Act, 2004 (in short, "OVAT Act") and the demand raised thereunder for the period from 01.04.2006 to 31.03.2010 vide Annexure-9 and praying for quashing of the said assessment order and the demand notice on the ground that the computation of demand has not been made on the basis of the books of account maintained in the regular course of business and that no computation on the basis of SION formula can be made to work out the quantum of raw material required to produce one tonne of sponge iron. Further prayer of the petitioner is to quash the direction issued by the Special Commissioner (Investigation) as the same does not have statutory force.

2. Petitioner's case in a nutshell is that it is a Company registered under the Companies Act, 1956 having its registered office at Kalinga Nagar Industrial Complex in the district of Jajpur. The petitioner-Company has established a Sponge Iron Factory for manufacturing Sponge Iron at Kalinga Nagar Industrial Complex which started its commercial production from 15.3.2006. It has been registered under the OVAT Act and the Central Sales Tax Act, 1956 (for short, "CST Act") and under the Orissa Entry Tax Act, 1999 (for short, "E.T. Act"). For the period 1.4.2005 to 31.3.2006 audit assessment was completed resulting in nil demand. Subsequently, opposite party no.2–Deputy Commissioner of Sales Tax, Jajpur Range, Jajpur Road issued notice dated 15.12.2010 (Annexure-1) under sub-rule (1) of Rule 50 in Form VAT-307 for assessment of tax on escaped turnover for the period 01.04.2006 to 31.03.2007. Another notice dated 05.01.2011 (Annexure-2) in Form 307 of the OVAT Act for assessment of tax on alleged escaped turnover for the tax period 1.4.2007 to 31.3.2010 was also issued fixing the date to 7.2.2011 for appearance and production of books of account. The order of assessment reveals that opposite party no.2 had issued the above two separate notices in Form VAT-307(Annexures-1 & 2) under Section 43 of the OVAT Act in view of two tax evasion reports; one received from the Sales Tax Officer, Vigilance, Bhubaneswar Division, Bhubaneswar for the period 2006-07 and another from the Deputy Commissioner, Sales Tax, Vigilance, Bhubaneswar Division, Bhubaneswar for the period 2006-07 to 2009-10. Pursuant to said notices, the petitioner appeared before opposite party no.2 through its authorized representative on four different dates. In course of assessment proceeding though the petitioner was confronted with the contents of two vigilance reports, the copy of the vigilance report was not supplied to the petitioner for giving effective reply. However, the petitioner denied the allegations made in the said two reports. Opposite party no.2 passed the impugned assessment order under Section 43 of the OVAT Act for the period from 1.4.2006 to 31.3.2010 raising a tax demand of Rs.6,25,02,224.00. Hence, the present writ petition.

3. Mr. S.C. Lal, learned Senior Advocate appearing for the petitioner submitted that although there exists an alternative remedy of appeal, the same would be futile in view of the direction of Special Commissioner of Commercial Taxes as well as the letter of the Dean, NIT prescribing the method of computation of production of Sponge Iron on the ground of specified quantum of raw material. This is binding on opposite party no.2 as well as the appellate authority.

4. Mr. Lal, learned Senior Advocate further submitted that the present assessment order has been passed violating the principle of natural justice by depriving the petitioner an opportunity to produce expert opinion on the ratio production pattern of sponge iron in the factory of the petitioner on the basis of grade of iron ore, grade of coal consumed and dolomite used. Opposite party no.2 on the basis of communication of the Dean of NIT, Rourkela adopted the hypothetical and theoretical formula of the SION to arrive at total production. Opposite Party no.2 without scrutinizing the books of account of the petitioner and the statement regarding generation of fines and consumption of iron ore fed to the Kiln drew his conclusion adopting the SION formula. Had opposite party no.2 examined the books of account particularly the sale account of fines arising out of crushing of iron ores as aforesaid, his conclusion would have been different. The assessment has to be done on the basis of actual books of account and not on hypothetical formula. Authenticity of SION formula given by the Dean of NIT, Rourkela was not confronted to the petitioner. Opposite party no.2 has entirely proceeded on the basis of vigilance report in which the SION formula has been adopted to arrive at the calculation relating to production of alloys and sale suppression, which are absurd.

5. The report of the Dean of NIT, Rourkela clearly shows that the production of sponge iron will vary from plant to plant depending on consumption and quality of raw materials and the operating conditions. Perusal of SION report of the Dean would show that same is at variance with the letter of the Special Commissioner of Commercial Taxes in respect of inputs required for production of 1 tonne of sponge iron. Placing reliance on the case of Larsen & Tubro Limited Vs. State of Orissa and Ors., (2008) 12 VST 31 (Orissa), Mr. Lal submitted that taxation by way of administrative instructions, which are not backed by any authority of law, is unreasonable and is contrary to Article 265 of the Constitution. In the instant case, since the assessment has been done on the basis of direction of the Special Commissioner as well as the report of the Dean of NIT, Rourkela adopting the SION method, the same does not have statutory support as the same constitutes arbitrary exercise of power and is hit by Articles 14 & 265 of the

Constitution of India. The petitioner was not allowed to produce expert opinion with regard to the SION formula. The vigilance report is based on the direction given by Special Commissioner of Commercial Taxes (Enforcement) dated 31.10.2009 for adopting the norms prescribed in the said letter while investigating into the business activities of sponge iron units. Report of the Vigilance officials and its conclusion having been based on the hypothetical formula prescribed by the Special Commissioner of Commercial Taxes (Enforcement), the same is not at all reliable for determining the actual production and sale figures of the petitioner. The entire assessment with regard to the alleged sale suppression of sponge iron is based on imaginary and hypothetical formula which is devoid of realities and as such the order of assessment is liable to be quashed. Opposite party no.2 has abdicated the exercise of his discretion by blindly accepting the report of the Vigilance officials wherein the SION formula has been adopted for arriving at the production and sale of sponge iron and the alleged sale suppression. No evidence has been produced about the sale suppression or any clandestine sale to any buyer to avoid payment of OVAT. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Oudh Sugar Mills Ltd. V. UOI*, 1978 (2) ELT (J172) (SC) Mr.Lal submitted that the demand of duty cannot be on the basis of assumption and presumption and charge of sale suppression of sponge iron has to be established by the Department by producing tangible, acceptable, cogent and convincing evidence. SION norms do not have any statutory force for making an assessment. The petitioner maintains all the books of account as required under the Central Excise Laws and Sales Tax Laws. In fact, Sales Tax Officer, Jajpur Road has seized various records from the factory of the petitioner relating purchase of iron ores, iron ore fines, coal, coal fines and dolomite. The registers seized on 4.5.2010 are still in the custody of the Sales Tax Officer. Had opposite party no.2 scrutinized the aforementioned documents, he would have found the truth instead of applying the SION norms. On the basis of a slip recovered from the factory premises of the petitioner containing the words 'Saurabh' and 'Sunil Babu' 'Rs.15,000/-, no adverse inference should have been drawn without allowing the petitioner to examine the third party as requested by the petitioner. Without affording an opportunity of confrontation, opposite party no.2 on the basis of the said slip treated a sum of Rs.12,15,922/- as sale suppression. Thus, there has been violation of principles of natural justice. In support of his contention the petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of *State of Kerala v. K.T. Shaduli Yusuf* reported in 1977 (39) STC 478 and the decisions of this Court in *Murli Mohan Prabhu Dayal v. State of Orissa* reported in 1970 (26) STC 22 (Orissa) and *Dredging Corporation of India v. State of Orissa*, 1995 (97) STC 10. With regard to allegation of under-

invoicing to M/s. Prinik Steels Pvt. Ltd. to the tune of Rs.7,19,733/-, it was argued that it does not have any transaction with M/s.Jai Maa Bhawani and the petitioner does not receive any cash from any buyer and all transactions are carried on by cheques and drafts. Therefore, if there is any entry in the books of account of a stranger, namely, M/s. Jai Maa Bhawani, same cannot be utilized against the petitioner.

6. Due to non-supply of copies of the Vigilance report to the petitioner containing adverse materials against the petitioner which have been relied upon by opposite party no.2 for completing the assessment and raising huge tax demand even after production of books of account amounts to violation of principles of natural justice. In support of his contention, learned counsel relied upon the judgment of this Court in Lakhiram Jain v. STO, (2009) 21 VST 280. Opposite party no.2 having completed the audit assessment for the period 2006-07 and being fully satisfied with the books of account relating to purchase of raw materials and sales of finished products, the re-opening of the assessment on the basis of vigilance reports amounts to change of opinion and no assessment is permissible by changing the opinion of the assessing officer.

7. Per contra, Mr. R.P. Kar, learned Senior Standing Counsel for Commercial Taxes Department raised objection regarding maintainability of the writ petition on the ground that against the assessment order remedy by way of appeal is provided under the OVAT Act. He submitted that sufficient opportunity was given to the petitioner before passing the impugned order of assessment. Further placing reliance on the judgment of this Court in *Kanak Cement Pvt. Ltd. vs. Sales Tax Officer, Assessment Unit, Rajgangpur, [1997] 105 STC 112,* Mr. Kar submitted that the petitioner is not entitled to get a copy of the tax evasion report No.20 dated 29.4.2009 submitted by the Vigilance Wing of the Commercial Taxes Department and tax evasion report No.51 dated 31.10.2010 submitted by the Vigilance Official, Commercial Tax Department. Concluding his argument, Mr.Kar submitted for dismissal of the writ petition.

8. On the above rival contentions, the following questions fall for consideration by this Court:

(i) Whether in the present case, the completed assessment has been reopened by mere change of opinion ?

(ii) Whether the assessing officer has passed the impugned assessment order on the dictate of his higher authority

i.e. on the basis of the direction of the Special Commissioner as well as the report of the Dean of NIT prescribing the SION method ?

(iii) Whether the assessment order has been passed in violation of principles of natural justice ?

9. So far as question no.(i) is concerned, undisputedly the audit assessment for the period 2006-07 was completed on the basis of books of account maintained by the petitioner relating to purchase of raw material, sales of finished products etc. But in the said assessment order the adverse material utilized against the petitioner in the impugned assessment order had not been utilized. The Hon'ble Supreme Court in the case of ***Binani Industries Ltd. V. Asst. Commissioner of Commercial Taxes***, (2007) 6 VST 783 (SC) held that reopening of assessment is not permissible by mere change of opinion of the Assessing Officer. Merely because, the Assessing Officer changes his opinion that cannot have any effect on the assessment, which has been completed on the basis of the view taken on the turn over considered in the earlier assessment. This Court in the case of M/s. Bharat Petroleum Corporation Ltd. V. The Sales Tax Officer, Cuttack-I East Circle, Cuttack in W.P.(c) No.14234 of 2009 disposed of on 16.3.2012, held that assessment by change of opinion means, in respect of a particular income/transaction if the Assessing Officer after application of mind, takes a view that the particular goods or income is not liable to tax and accordingly completed the assessment, subsequently reopening of said assessment is not permissible by mere change of opinion of the Assessing Officer to levy tax on such goods or income. As stated above, in earlier assessment order, the adverse material utilized against the petitioner in impugned assessment order had not been utilized. Hence, the question of change of opinion of Assessing Officer does not arise in the facts and circumstances of the case.

10. In view of the above, the first ground of challenge that the competed assessment has been reopened under Section 43 of the OVAT Act by mere change of opinion fails, the same being misconceived.

11. Question no. (ii) is as to whether opposite party no.2 has passed the impugned assessment order on the dictate of his higher authority i.e. Special Commissioner as well as on the report of the Dean, NIT prescribing the SION method. Law is well settled that the Assessing Officer has to apply his own mind for making the assessment on the basis of the books of account maintained and any material in his possession after confronting the same to the assessee. He should not mechanically complete the

assessment and abdicate and surrender to the report of any higher authority (see the judgment of this Court in ***Indure Limited v. Commissioner of Sales tax, Orissa & others,*** (2006) 148 STC 61 and the decision of the Hon'ble Supreme Court in ***State of U.P. v. Maharaja Dharmandar Prasad Singh***, AIR 1989 SC 997). Perusal of the impugned order clearly reveals that the Assessing Officer after applying his mind and being satisfied that the alleged turnover had escaped from assessment, initiated the reassessment proceeding. The Assessing Officer applied his mind and examined the case of the assessee with reference to his contention made. He has not mechanically reopened the completed assessment and abdicated and surrendered to the report of the higher authority.

12. In view of the above, we are of the considered opinion that on receipt of report of the Additional Commissioner of Commercial Taxes, the learned Assessing Officer applied his mind and initiated the reassessment proceedings after examining the documents, returns etc. filed by the petitioner and passed the impugned reassessment order.

The decision of this Court in (2008) 12 VST-31 (Orissa) has no application to the present case.

13. Question No.(iii) is as to whether the assessment order has been passed in violation of principles of natural justice. Mr. Lal, learned Senior Advocate submitted that for passing the assessment order, opposite party no.2-Assesing Officer has utilized two numbers of tax evasion reports against the petitioner. Out of the two reports, tax evasion report no.20 dated 29.4.2009 for the period of 2006-07 was submitted by the Sales Tax Officer, Bhubaneswar Division, Bhubaneswar alleging sales suppression of Rs.7,19,733/-. Another tax evasion report no. 51 dated 30.10.2010 was received from the Deputy Commissioner of Sales tax, Vigilance, Bhubaneswar for the periods from 2006-07 to 2009-10.

14. Tax evasion report No.20 dated 29.4.2009 was submitted on the basis of information received from the officials of the Director General of Central Excise, Intelligence, Regional Unit, Rourkela according to which a lot of incriminating evidence has been unearthed by them during their raids in the premises of M/s. Prinik Steels Pvt. Ltd. on 22.8.2006. As per the said report, M/s. Prinik Steels Pvt. Ltd. had been maintaining two separate accounts; one in the name of M/s. Prinik Steels Pvt. Ltd. which was its own regular books of account and another, in the name of M/s Jai Maa Bhawani which was its clandestine and undisclosed account. Mr. Ghanashyam Das Agarwal, the shareholder and the constituted Attorney of M/s. Prinik Steels

Pvt. Ltd. in his statement dated 22.8.2006 admitted that all the documents recovered from the premises related to M/s. Prinik Steels Pvt. Ltd. and no excise duty had been paid on the sales that were effected in the name of M/s Jai Maa Bhawani and finally agreed for payment of Central Excise duty on that score. M/s. Prinik Steels Pvt. Ltd. had effected unaccounted purchases from M/s. K.J. Ispat Ltd. in the name of M/s Jai Maa Bhawani during the year 2006-07 showing therein details of purchases of sponge iron and payments made thereto. Subsequently, M/s. K.J. Ispat Ltd. was noticed by the Vigilance officials to verify as to whether the unaccounted purchases of M/s. Prinik Steels Pvt. Ltd. in the name of M/s Jail Maa Bhawani had been reflected in the sales Register of M/s. K.J. Ispat Ltd.

Thus, in the tax evasion report No.20 dated 29.04.2009, the allegation is that the petitioner M/s. K.J. Ispat Limited has effected unaccounted sale to M/s. Prinik Steels Pvt. Ltd. which were recorded in the fake name of M/s. Jai Maa Bhawani. The Assessing Officer utilized the said allegation against the petitioner-assessee for making the assessment without confronting the 3rd party with the petitioner.

15. In the tax evasion report No.51 dated 30.10.2010 the following allegations were raised against the petitioner on the basis of vigilance officials' visit to the premises of the factory as well as office of the petitioner on 04.05.2010:

(i) The Vigilance Officials discarded the quantity of production shown by the petitioner company in its books of account with reference to the raw materials consumed applying SION norms. According to them, considering the quantity of iron ore utilized for production of sponge iron, the petitioner has suppressed quantity of finished products and sold the suppressed quantity of finished products to the tune of Rs.51,89,16,210.00 during the years 2006-07 to 2009-10. When this allegation was confronted to the authorized representative of the dealer, he stated that he does not have any technical expertise and he would come with a technical person on the next date of hearing to make the clarification and submit his explanation on that point.

(ii) The Assessing Officer dropped the second allegation on purchase of suppression of coal to the tune of Rs.13,11,609/- on being satisfied with the explanation of the petitioner arising out of the sundry creditors list of Audit Reports.

(iii) The third allegation relates to sales suppression of Rs.12,15,922/- on the basis of written slip No.96 of enclosure-7 which was

seized from the factory premises of the dealer-assessee on 04.05.2010 in course of inspection. On scrutiny of the slip, it was inferred by the Vigilance Officials that the slip reflects sale transaction of different qualities of sponge iron to Sunil Babu (Sourav) for which Sunil Kumar Agarwal had received a sum of Rs.15,000/- towards commission from M/s. K.J. Ispat Ltd. From the said slip, the Vigilance Official further drew inference that Sourav appearing in the slip stands for M/s. Sourav Alloys Limited with whom the petitioner has sale transactions on different occasions from 10.04.2009 to 17.04.2009 through Mr. Sunil Kumar Agarwal for which he had received a commission of Rs.15,000/-. In absence of any satisfactory explanation, the Vigilance Officials treated the said transactions as sales suppression by the petitioner.

16. On being confronted the authorized representative of the dealer-petitioner stated that they did not know any one in the name of Sunil Kumar Agarwal, who had received payment of Rs.15,000/- as commission. Further, it was stated that the slip in question was not seized from the factory premises which might have been fetched from Cuttack Office during the visit of the vigilance officials on 04.05.2010. The case of the Assessing Officer is that irrespective of the place of seizure since the slip in question belongs to the assessee-petitioner which was seized by the vigilance officials with the signature of MD of M/s. K.J. Ispat Ltd. on it at the time of recovery, the assessee is duty bound to explain the said slip. Finally, the assessee appeared on 25.06.2011 along with Advocate Sri Raj Kishore Chapolia and filed hazira praying therein for third party confrontation. The reports were again confronted to brush the memory of the authorized-person as well as for knowledge of the learned Advocate. The authorized person in consultation with the advocate contended that there cannot be any standard formula for production since it depends on a lot of factors like quality of raw-materials, quality of machinery, un-interrupted power supply etc. It was further narrated that the process of manufacturing goes like – CLO (iron ores)are received from the mines, then crushed in their crushing unit for production of desired size of Iron ore to be put to the furnace for production of sponge iron. The learned Assessing Officer disbelieved the explanation furnished by the authorized person and adopting the SION norms held that the petitioner has suppressed sales to the tune of Rs.51,89,16,210/-.

17. With regard to allegation of sales suppression of Rs.12,15,922/-, the learned Assessing Officer came to the conclusion that since the slip was seized from the business premises of the petitioner-assessee, the onus of explaining the said slip lies on the assessee. In absence of any plausible explanation, the learned Assessing Officer accepted the report of the vigilance officials that the petitioner has suppressed sales to the tune of

Rs.12,15,922/-. The Assessing Officer further held that there is no need for 3rd party confrontation i.e. with M/s. Sourav Alloys Ltd. or so called alleged Sri Sunil Kumar Agarwal, whose address is not mentioned in the report as prayed for by the authorized person Sri Sharma as well as Petitioner's Advocate Sri Chapolia. According to the Assessing Officer, a clear-cut case of suppression has been established.

18. Mr. S.C. Lal, vehemently submitted that without following the principles of natural justice, the impugned assessment order has been passed. It was further argued that in response to the notice, the petitioner produced its books of account and asked for the copy of the tax evasion reports and the same being not provided to the petitioner, he was deprived of his right to refute the allegation raised against him.

19. Undisputedly, in the present case the allegations made in two tax evasion reports are utilized and huge demand of tax and penalty has been imposed on the petitioner-assessee.

In letter dated 25.05.2011 addressed to opposite party No.2, it is stated that the petitioner was present along with its advocate and its books of account in response to the said notice issued by opposite party no.2. In the said letter it is further stated that "in the interest of justice, kindly allow confrontation to 3rd party involved in the allegation and issue summons to them for appearance and allow us for cross examination".

20. Law is well settled that if any dealer is likely to be affected by the use of any material collected by the revenue against him in the assessment proceedings, those are to be brought to his notice for refutal. This is the requirement of the natural justice. The principle of natural justice is based on two basic pillars, i.e, nobody shall be condemned unheard (audi alteram partem), nobody shall be judge of his own cause (nemo debet esse judex in propria sua causa).

21. The Hon'ble Supreme Court in ***C. Vasantlal and Co. v. Commissioner of Income-tax, Bombay City [1962] 45 ITR 206*** observed as follows:

> "… The Income Tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it."

22. The Hon'ble Supreme Court in ***State of Kerala V. K.T.Shaduli Yusuff (1977) 39 STC 478*** held as under :

> "… The tax proceedings are no doubt quasi-judicial proceedings and the sales tax authorities are not bound strictly by the rules of evidence, nevertheless the authorities must base their order on materials which are known to the assessee and after he is given a chance to rebut the same…"

23. In ***Kishinchand Chellaram V. Commissioner of Income-tax, Bombay City-II, (1980) 125 ITR 713***, the Hon'ble Suprme Court held that it was true that proceedings under the income-tax law were not governed by the strict rules of evidence, and, therefore, it might be said that even without calling the manager of the bank in evidence to prove the letter dated February 18, 1955, it could be taken into account as evidence. But before the income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine the manager of the bank with reference to the statements made by him.

24. In ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress [1991] Supp 1 SCC 600;*** the Hon'ble Supreme Court held as follows:

> "…It is now well-settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the rule of law which permeates our Constitution demands that it has to be observed both substantially and procedurally….."

25. In ***Basudeo Tiwary v. Sido Kanhu University,*** [1998] 8 SCC 194**,** the Hon'ble Supreme Court held that in order to impose procedural safeguards, this Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing — it may be implied from the nature of the power — particularly when the right of a party is affected adversely. The justification for reading

such a requirement is that the Court merely supplies omission of the Legislature.

26. This Court in ***J.S. Refineries Ltd. V. Commissioner of Sales Tax, (1998) 109 STC 16*** held that any material sought to be utilized against the dealer has to be brought to his notice.

27. This Court in ***Mitra Trading Company (OJC No.252 of 1968 dated November 9, 1971 —*** Orissa High Court) held as follows:

> "4. The main question for consideration is whether the petitioner should be given opportunity to take copy of the seized account book. The answer to such a question would depend upon whether principle of natural justice would be violated unless such opportunity is given. It is well-settled that principle of natural justice cannot be confined within close jackets. What would be the principle in a particular case would depend on the facts and circumstances of that case. One thing, however, is certain that in an assessment proceeding if any particular material is used against an assessee then the assessee must be given full opportunity to rebut any adverse inference that could be drawn from user of that particular material. This was fully discussed by us in *Muralimohan Prabhudayal v. State of Orissa* [1970] 26 STC 22 (Orissa) wherein a question arose as to whether the assessee could be given opportunity for cross-examination with reference to account books of third party used against the assessee. In paragraph 5 of our judgment we referred to the fourth proposition as follows:
>
> 'In case he proposes to use against the assessee the result of any private enquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible."

28. Needless to say that an assessing authority is entitled to collect the materials behind the back of the assessee. It is not necessary that all the materials so collected by the assessing authority need to be confronted to the assessee. Only those materials which the Assessing Officer wants to utilize against the assessee in doing the assessment are bound to be disclosed to the assessee. In appropriate cases, the assessee can also demand for cross-examination of any person, who stated something adverse to him, and the assessing authority wants to utilize against the assessee.

29. In the instant case though the Assessing Officer utilized the adverse materials on the basis of which fraud case report Nos.20/29.04.2009 and report No.51/30.10.2010 were submitted he has not supplied the copy of the said adverse materials to the petitioner before passing the impugned order.

30. On the basis of the tax evasion report No.20/29.04.2009, the Assessing Officer came to the conclusion that the petitioner has suppressed sale materials to the tune of Rs.7,19,733/- made to M/s. Prinik Steels Pvt. Ltd. in the name of M/s.Jay Maa Bhawani. Such allegation has been made on the basis of the books of account seized from the premises of M/s. Prinik Steels Pvt. Ltd. and statement made on behalf of the said company. Similarly, on the basis of the tax evasion report No.51/30.10.2010, learned Assessing Officer came to the conclusion that during the years from 2006-07 to 2009-10 the petitioner has suppressed sale to the tune of Rs.51,89,16,210.00. To come to such conclusion, opposite party No.2-Assessing Officer relied on the formula of SION adopted by the Dean of NIT, Rourkela. In course of the assessment, since the dealer-assessee is not technical person, they wanted to produce a technical person to examine the correctness of formula of SION which was not allowed to the petitioner. Before utilizing the aforesaid two allegations against the petitioner, principle of natural justice demands that the 3rd party must be summoned and confronted with the petitioner and in case the petitioner demands for cross-examination of third party, he must be allowed to do so.

31. This Court in the case of ***Murlimohan Prabhudayal vs. State of Orissa, [1970]*** 26 STC 22, held that it cannot be said that ample and reasonable opportunity to be given to the assessee would not include within its sweep the right of cross-examination. An assessee would have the right of cross-examination if the facts and circumstances so justify.

32. This Court in the case of ***Dredging Corporation of India vs. State of Orissa, (1995) 97 STC 10,*** held that although the provisions of the Evidence Act, 1872 are not strictly applicable to proceedings under taxing statutes, unless a contrary intention appears, the procedures and principles thereof can be adopted. The applicant wanted to prove through evidence of certain officials of the Port Trust as to what was real essence of the agreement and what was really agreed upon. The parties to the contract were the best persons to say what was the intention. It was open to the Revenue to establish collusion, either by cross-examining the witness or by independent evidence, but to pre-judge that they would collude was without any material basis. Moreover, the different clauses of the agreement had been interpreted differently by the members of the Tribunal. Since the

applicant had not availed the chance of explaining its position on account of refusal by the authorities to summon certain officials of the Port Trust for which it had filed applications, the principle of natural justice had been violated.

33. The Hon'ble Supreme Court in the case of ***K.T. Shaduli Yusuf*** *(supra)* held that since the evidentiary material procured from or produced by 'H' was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to get 'H' summoned as a witness for cross-examination inasmuch as cross-examination is one of the most efficacious methods of establishing the truth and exposing falsehood. The act of Sales Tax Officer in refusing to summon 'H' for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso to Section 17(3) and that vitiated the order of assessment made against the assessee.

34. In view of the above, the Assessing Officer is not justified in denying the prayer for confrontation of the 3rd party with the petitioner-assessee and not allowing it to cross-examine the 3rd party before utilizing the materials recovered or procured from said party and utilized against the assessee.

35. From the tax evasion report No.51/30.10.2010, it is further noticed that the Vigilance Officials in course of inspection conducted on 04.05.2010 found a slip from the premises of the petitioner-company wherein Rs.15,000/- had been written. On the basis of said slip, it is alleged by the revenue that different quantities of sponge iron were sold to Sourav for which Sunil Agarwal had received a payment of Rs.15,000/- towards commission from M/s.K.J. Ispat Limited. Further the Vigilance Officials concluded that 'Sourav' appearing in the slip stands for M/s.Sourav Alloys Limited and the instant-dealer assessee had sale transactions with M/s. Sourav Alloys Ltd. on different occasions from 10.04.2009 to 17.04.2009 through Mr. Sunil Kumar Agarwal for which he had received commission of Rs.15,000/-. On confrontation of the said slip, the authorized person of the company stated that he does not know any person in the name of Sunil Kumar Agarwal.

36. Since the slip was recovered from the petitioner-assessee's premises, the initial burden is on the assessee to explain the slip and prove that the said slip does not relate to any purchase or sale transaction of the dealer-petitioner. However, where the dealer disowns the slip, unless it is established by the revenue that noting made in the slip relates to unaccounted business transaction of dealer no adverse inference can be drawn.

37. In the instant case, the Vigilance Officer discovered the said slip from the business premises of the petitioner-dealer and the Assessing Officer drew certain inferences from the noting made on the slip, but failed to establish such inferences.

38. Law is well settled that no demand can be raised in an assessment on suspicion and conjecture. Therefore, before utilizing the said slip against the petitioner, the Assessing Officer has to prove that through the said noting in the slip, the petitioner has sold materials worth of Rs.12,15,922/- which was not disclosed in the books of account. In the instant case, the same has not been done.

39. For the reasons stated above, we allow the writ petition, set aside the impugned assessment order as well as the demand raised under Annexure-9 and remand the matter to the Assessing Officer to re-do the assessment in due compliance with the principles of natural justice and keeping in view the observations made in the preceding paragraphs. No costs.

Writ petition allowed.

2012 (II) ILR - CUT- 759

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

W.P.(C) NO.10660 OF 2011 (Dt.29.06.2012)

JADHUNATH PRADHAN .....Petitioner

.Vrs.

STATE OF ODISHA & ANR. .....Opp.Parties

ORISSA SUPERIOR JUDICIAL SERVICE & ORISSA JUDICIAL SERVICE RULES, 2007 – RULE 9(c).

Vires of Rule 9 (c) of the Rules 2007 challenged being contrary to Section 6 of the Orissa Reservation of posts and services (For Socially & Educationally Backward Classes) Act, 2008 by not providing age relaxation up to 5 years for candidates belonging to SEBC category – Held, Registrar of this Court to draw the attention of the State Government for consideration of amendment of Rule 9 (c) of Rules 2007 keeping in view the provision of Section 6 of the Act, 2008.

(Para 16,18)

Case laws Referred to:-

1.AIR 2000 SC 1296 : (State of Bihar & Anr.-V- Bal Mukund Sah & Ors.)
2.AIR 1993 SC 477 : (Indira Sahani-V- Union of India).
3.(2001)7SCC 358 : (District Mining Officer & Ors.-V-Tata Iron & Steel Co.&Anr.)
4.AIR 1992 SC 96 : (Union of India & Anr.-V-Deoki Nandan Aggarwal)
5.(1998)6 SCC 626 : (Government of Orissa & Anr.-V-Hanichal Roy & Anr.)

For Petitioner - M/s. B.Mohapatra & S.K.Acharya.

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

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to issue a writ/direction declaring Rule 9(c) of Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (for short, "Rules, 2007") ultra vires and inoperative as it runs contrary to Section 6 of the Orissa Reservation of Posts and Services (For Socially and Educationally Backward Classes) Act, 2008 (for short, "the Act, 2008"). Further prayer of the petitioner is for a direction to the opposite parties to fix the cut off date as 1st January, 2011 for determination of the age of the petitioner instead of 1st August, 2011 under the enabling provision, i.e. Rule 47 of the Rules,

2007 and to allow the petitioner to appear in the competitive examination which was to be held pursuant to advertisement under Annexure-3 by giving 5 years upper age relaxation as per the provision of Section 6 of the Act, 2008.

2. Petitioner in the present case, who is a practising Advocate at Bhubaneswar Bar, challenges the provision of Rule 9 of the Rules, 2007 on the ground of not providing relaxation of age for Socially and Educationally Backward Classes (for short, "SEBC") and other reserved categories and also in fixing 1st day of August, 2011 as the cut off date for calculation of age of the candidates, who intended to appear in the written examination and test for the post of District Judge pursuant to advertisement No.1 of 2011 dated 15.4.2011 published in the English Daily "The New Indian Express" by this Court.

3. Mr. B. Mohapatra, learned counsel appearing for the petitioner submitted that the petitioner has been enrolled as an Advocate vide Orissa Bar Council Enrolment No.0-46/1993. His date of birth is 15th June 1966 and he has been practising as an Advocate at Bhubaneswar Bar since 1993 and he is a member of the Bhubaneswar Bar Association. The petitioner belongs to SEBC category as defined under clause (a) of Section 2 of the Orissa State Commission for Backward Classes Act, 1993 and included in the list of Backward Class at serial No.138 as 'Khandayat' by caste. The petitioner is interested to appear in the written examination and test for the post of District Judge through direct recruitment as advertised by this Court under Advertisement dated 15.4.2011 (Annexure-3). Because of the stipulations made in para-3 under the heading 'Eligibility' in the said advertisement, the petitioner is not eligible to appear in the examination in question as he is over aged by one month sixteen days as on 1st August, 2011. Though the cut off date 1st August, 2011 fixed in the advertisement is in consonance with Rule 9(c) of the Rules, 2007, inclusion of such provision has no nexus with the aims and objectives for recruitment of District Judge through direct recruitment because many experienced Advocates like the petitioner, who were born between 1st January and 1st August, 2011, have become over-aged. As per general service rule and practice, 1st January of a particular year in which recruitment and selection test are held is always fixed as the cut off date for determining the age of a candidate for such selection. But the provision of Rule 9 (c) is a clear-cut deviation from the general practice and does not disclose any objective which sought to be achieved by inclusion of such a cut-off date. If the cut off date would have been fixed to 1st January, 2011 instead of 1st August, 2011, the petitioner would have become eligible to appear for selection to the post in question as his date of

birth is 15.6.1966. Since the advertisement was issued on 15.4.2011, fixing of cut off date to 1.8.2011, would not have been permissible under general recruitment rule. Therefore, Rule 9 (c) of the Rules, 2007 in which 1st August of the year has been fixed as cut off date is contrary to general recruitment rule and also violative of the provision of Articles 14 and 16 of the Constitution of India. In States like Rajasthan, West-Bengal, Delhi and Madhya Pradesh the cut off date has been fixed to 1st January of a particular year in which the recruitment notified is to be made for the post of District Judge. Hence, when other States have accepted 1st January of a particular year as the cut off date for determination of the age of the candidates for the purpose of selection to the post of District Judge through direct recruitment fixing of cut-off date to 1st August by the State of Odisha is arbitrary and unreasonable.

4. Mr. Mohapatra further submitted that the petitioner belongs to SEBC category as per the notification issued by the State Government. Therefore, he has a right to get upper age relaxation upto 5 years as provided under Section 6 of the Act, 2008. Provision of the Act, 2008 has been made applicable to all posts which are meant to be filled up through direct recruitment. The said Act extends to whole of Odisha and the same has overriding effect over all other laws of similar nature. In view of such statutory provision, the petitioner who belongs to SEBC category has a right to get 5 years upper age relaxation in the selection of District Judge through direct recruitment in pursuance of the advertisement under Annexure-3. Such relaxation having not been provided under Rule 9 of Rules, 2007, the said Rules cannot be enforced being illegal and inoperative and it needs amendment as per the provision of Section 6 of the Act, 2008. Such 5 years upper age relaxation has been extended by all other States like West Bengal, Rajasthan and Madhya Pradesh in consonance with the provision of recruitment rules of those States. The petitioner and other Advocates of the Bhubaneswar Bar after noticing such discrepancy in the advertisement made for the year 2010 have submitted a representation on 10.3.2010 before opp. party no.1-Secretary, Department of Law, Government of Odisha for amendment of such provision of Rules, 2007 by extending 5 years upper age relaxation for the candidates belonging to SEBC category and fixing 1st January of the year as cut off date for calculation of the age of the candidates for selection to the post of District Judge through direct recruitment. The said representation is still pending before opp. party no.1 for being considered. Rule 47 of the Rules, 2007 provides that the State Government can relax any provision of these Rules in respect of any category of persons or the posts in service.

5. Per contra, Mr. R.K. Mohapatra, learned Government Advocate reiterating the stand taken in the counter affidavit filed by opp. party no.2 submitted that the advertisement under Annexure-3 is in accordance with the provision of Rule 9(c) of the Rules, 2007. There is no scope for the petitioner to assail the same. The Rules, 2007 have been framed in exercise of power conferred under Article 233 of the Constitution of India. The Rules, 2007 being independent of the Act, 2008, the petitioner cannot bank upon the said Act to fortify his contention and establish his claim. The provisions under the Rules, 2007 have been made in consultation with the High Court. Validity of any of the provisions of the Rules, 2007 cannot be questioned on the ground of inconsistency with the Act, 2008. The cut-off date cannot be relaxed to suit the age of the petitioner and to make him eligible. The cut-off date as alleged is not contrary to the general recruitment rules as pleaded by the petitioner. There is no illegality in fixing cut-off date. Since there is no provision under the Rules, 2007 for relaxation of age for any reserved category candidates for recruitment to the post of District Judge, question of relaxation upto 5 years as provided under Section 6 of the Act, 2008 does not arise. When there is no provision of reservation for recruitment to Orissa Superior Judicial Service (District Judge), the provision under Rule 47 of the Rules, 2007 cannot be invoked. The petitioner has failed to show that the provisions of Act, 2008 shall apply to recruitment of Orissa Superior Judicial Service (District Judge). Hence, challenge to Rule 9(c) of Rules, 2007 on the ground of invalidity merits no consideration.

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

> (i) Whether the provision of Rule 9(c) of the Rules, 2007 needs amendment to deal with relaxation of upper age limit for the candidates belonging to SEBC category in view of Section 6 of the Act, 2008 ?
>
> (ii) Whether fixing of the cut-off date as 1st August, 2011 provided under Rule 9 (c) of Rules, 2007 is just and proper ?

7. Under Clause 3(c) of the Advertisement (Annexure-3) applications were invited from eligible candidates for direct recruitment in the cadre of District Judge from Bar. It provides that a candidate in order to be eligible for direct recruitment to the post of District Judge must not be below 35 years of age and above 45 years as on 1st day of August, 2011. The upper age limit provided in clause 3(c) of the Advertisement is in consonance with Rule 9(c) of the Rules, 2007. Petitioner's grievance is that there should be provision for relaxation of upper age limit in case of SEBC category

candidates in view of Section 6 of the Act, 2008. For ready reference, Section 6 of the Act, 2008 is reproduced herein below :

> "6. For appointment of candidates belonging to Socially and Educationally Backward Class –
>
> (a) the upper age limit prescribed for the recruitment shall be increased by five years; and
> (b) any other relaxation or concession may be allowed by the State Government as may be prescribed."

The stand of the opp. parties is that the Rules, 2007 have been framed in exercise of powers conferred under Article 309 read with Article 233 of the Constitution of India. The petitioner cannot bank upon the said Act, 2008 claiming relaxation of upper age limit increasing the same by 5 years.

8. Admittedly the Rules, 2007 have been framed, in exercise of power conferred by the proviso to Article 309 read with Articles 233, 234 and 235 of the Constitution of India, by His Excellency the Governor of Orissa, after consultation with the Orissa Public Service Commission and the High Court.

9. Article 233 of the Constitution deals with the provision for appointment of District Judge. The same is extracted below :

> "**233. Appointment of district judges**.- (1) Appointments of persons to be, and the posting and promotion of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

10. Article 309 of the Constitution of India which contains the provisions for recruitment and conditions of service of persons serving the Union or a State reads as follows:

> "**309. Recruitment and conditions of service of persons serving the Union or a State.-** Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the

recruitment, and conditions of service of persons appointed, to pubic services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

11. Article 309 is expressly made that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed, to Public Service and Posts in connection with the affairs of Union or of any State. Article 233 of the Constitution, deals with appointment of District Judge which is not subject to any other provisions of the Constitution. Therefore, power under Article 309 conferred upon the appropriate Legislature is subject to the provisions under Article 233 of the Constitution. At this juncture, it would be beneficial to refer to the judgment of the Hon'ble Supreme Court in the case of ***State of Bihar and another v. Bal Mukund Sah and others***; AIR 2000 SC 1296 wherein it is held that :

"While Article 309 deals with recruitment and conditions of service of persons serving the Union or the State, a particular category of post forming the judicial wings has been carved out in Chapter VI in Articles 233 to 235 so far as the question of recruitment is concerned. When Article 309 itself uses the expression "subject to the provisions of this Constitution" it necessarily means that if in the Constitution there is any other provision specifically dealing with the topics mentioned in said Article 309, then Article 309 will be subject to those provisions of the Constitution. In other words, so far as recruitment to the judicial services of the State is concerned, the same being provided for specifically in Chapter VI under Articles 233 to 237, it is those provisions of the Constitution which would override any law made by the appropriate legislature in exercise of power under Article 309 of the Constitution. The State legislature undoubtedly can make law for

> regulating the conditions of services of the officers belonging to the judicial wing but cannot make law dealing with recruitment to the judicial services since the field of recruitment to the judicial service is carved out in the Constitution itself in Chapter VI under Articles 233 to 236 of the Constitution.
>
> xx xx xx In this regard the scheme of the Constitution and its basic frame work that the Executive has to be separated from the Judiciary has to be kept in view. Hence the general sweep of Article 309 has to be read subject to this complete Code regarding appointment of District Judges and Judges in the Subordinate Judiciary."

12. At this stage, it would be appropriate to refer to clause (4) of Article 16 of the Constitution of India, which reads thus:

> "16. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

13. Article 16 of the Constitution of India provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. In the case of ***Indira Sahani v. Union of India****, AIR 1993 SC 477,* the Hon'ble Supreme Court held that Article 16(4) is not an exception to Article 16 but gives a permissible basis.

14. The Act, 2008 was enacted in exercise of power conferred under clause (4) of Article 16 of the Constitution read with relevant entry from List-II of State List of the VII Schedule. Section 6 of the Act, 2008 provides age relaxation upto 5 years for candidates belonging to SEBC category.

15. In view of the above constitutional and statutory provisions, we do not find any reason as to why the relaxation upto 5 years for the candidates belonging to SEBC so far upper age limit is concerned, as provided under Section 6 of the Act, 2008, shall not be available to the candidates appearing for recruitment to the post of District Judge. Needless to say, the members of judicial service as well as the members of other service under the State represent the same social fabric in the State. Article 14 of the

Constitution also mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Therefore, there should not be any inconsistency between the Rules, 2007 and the Act, 2008.

16. In view of the above, the provision contained in Rule 9(c) of Rules, 2007 which was made before enactment of the Act, 2008 needs reconsideration so far 5 years' relaxation of upper age limit of the candidates belonging to SEBC category is concerned, in view of Section 6 of the Act, 2008.

17. However, law is well-settled that the function of the Court is only to expound the law and not to legislate. (***See District Mining Officer & others v. Tata Iron & Steel Co. & another, (2001) 7 SCC 358; Union of India and another v. Deoki Nandan Aggarwal, AIR 1992 SC 96;*** and also ***Government of Orissa and another v. Hanichal Roy and another (1998) 6 SCC 626.***)

18. In view of the above settled legal position, we direct the Registrar of this Court to draw the attention of the State Government for consideration of amendment of Rule 9(c) of the Rules, 2007 keeping in view the provision of Section 6 of the Act, 2008 and our observations made above.

19. So far the prayer for fixing the cut-off date as 1st January, 2011 instead of 1st August, 2011 under Rule 9(c) of the Rules, 2007 is concerned, there is no illegality in fixing the cut-off date as 1st August, 2011 for the purpose of determining the upper age limit. Since the recruitment pursuant to Advertisement No.1/2011 under Annexure-3 is already over, there is no need to deal with other contentions of the petitioner with regard to cut off date as the same would be only a futile exercise.

20. In the result, the writ petition is disposed of with the aforesaid observation and direction.

Writ petition disposed of.

2012 (II) ILR - CUT- 767

B. P. DAS, J.

COPET NO. 21 OF 2007 (Dt.24.09.2012)

PAWAN KUMAR BHAWSINKA ……Petitioner

.Vrs.

M/S. SATYAM REAL ESTATE DEVELOPERS PVT. LTD. & ORS. ……..Opp.Parties

COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – Ss. 433, 434 & 439 r/w Rule 95 of the Companies Court Rules 1959.

Winding up proceeding – Petitioner filed petition for winding up of the Opp.Party-company – Issue involved in respect of supply of goods and payment of outstanding debts of the Opp.Party–company to the petitioner which has been disputed by the Opp.Party-company – Held, winding up proceeding should not be allowed to be used for recovery of payment which is disputed by the Opp.Party-company.

(Para 7)

For Petitioner - Shri D.P.Mohanty, Sr. Advocate
Shri P.K.Mohanty, Advocate.

For Opp.Parties - Shri S.S.Das, P.K.Ghosh, S.S.Pradhan, Miss K.Behera, Smt. S.Modi.

For Intervenors - Shri C.Mohapatra, D.Tripathy, S.Mishra, A.K.Bose, B.K.Mallick, P.K.Das, J. Pal & S. K. Pradhan.

B. P. DAS, J. The petitioner-Pawan Kumar Bhawsinka has filed this Company Petition under sections 433, 434 and 439 of the Companies Act, 1956 read with Rule 95 of the Companies Court Rules praying for winding up of the opposite party company, namely, M/s. Satyam Real Estate Deveopers Pvt. Ltd. for failure of said company to pay the debts and for realization of outstanding amount to the tune of Rs.1,64,203.77 along with interest and costs out of the assets and properties of the opposite party-company.

2. Shortly stated, the case of the petitioner is that while carrying on the business in the name and style “Tyle World” dealing in tiles, marble, cement and other house building materials, he supplied tiles to opposite party-M/s. Satyam Real Estate & Developers Pvt. Ltd. on verbal orders being placed by the Managing Director, Shri Sheo Prakash Jhunjhunwala of the said

company on different dates on credit sale basis during the period between 06.05.2000 and 25.01.2001. According to the petitioner, the materials were being supplied on cash as well as on credit basis on the condition that payment was to be made within stipulated time after sale and delivery.

The petitioner has alleged that in respect of the outstanding credit bill of Rs.1,64,203.77, the opposite party-company through its Managing Director, Shri Sheo Prakash Jhunjhunwala, issued an Account Payee Cheque bearing No.773397 drawn on Syndicate Bank, Cuttack amounting to Rs.1,00,000/- but the same was returned on account of "funds insufficient". Despite personal contact on various dates, the Managing Director of the opposite party-Company has failed to repay the outstanding bill of Rs.1,64,203.77P to the petitioner.

As the Company failed to repay the outstanding amount, the petitioner filed this Company Petition before this Court for the reliefs mentioned above.

The petitioner has filed an affidavit stating that the notice demanding the dues has been served on the opposite party-company and as the company failed to repay the dues, the petition was advertised inviting creditors and other parties to oppose or support the petition. Nobody has come forward either supporting or opposing the petition within the stipulated time. However, subsequently certain parties have filed Miscellaneous Applications bearing Nos.44, 45, 46, 52 & 53/2010, 2 & 3/2011, seeking intervention in the proceeding involving the Company with various prayers. The issues agitated in the Miscellaneous Applications primarily relate to the rights arising out of the assets and properties of the Company involving disputes.

3. The opposite party-company in its reply to the petition has disputed the facts averred in the petition and denied the charges. The company has stated that it has received the goods to the extent of Rs.2,76,662/- against which Rs.2,76,000/- has been paid and only a sum of Rs.662/- remains for payment and in view of that the company having assets of immovable properties valued at crores of rupees cannot be declared to be in a state of insolvency and unable to pay the debt of Rs.662/-.

The opposite party-Company has further stated that it has entered into development agreements with owners of land and the owners of the properties are having their own right and cannot be subjected to liquidation at this stage. Since the company is ready and willing to pay the admitted

amount of Rs.662/- to the petitioner, the winding up petition may be dismissed.

4. It appears that the opposite party-company is a developer engaged in the business of developing lands and buildings. It has entered into agreements with various parties in the process of developing, three apartments, namely, "Classic Apartment", "Satyam Apartment" and "Ambika Garden" at Cuttack. It has entered into development agreements with various land owners which contain the terms and conditions regulating the development of the lands, the rights of the owners, the consideration, the completion time and dispute redressal mechanism and reference to Arbitrator etc.

5. In this proceeding, this Court by order dated 22.01.2009 has appointed the Official Liquidator as the Provisional Liquidator with direction to report about the assets and properties of the Company. The OL has filed two reports, one dated 6.4.2009 and the other dated 5.8.2009, which are on record. Subsequently on hearing various parties, the Official Liquidator was directed to invite claims from the creditors and accordingly he invited claims by way of publication of notice in newspapers and has filed his report relating to claim and debts of opposite party-company, which amount to Rs.66,35,311/- (principal) excluding interest, litigation expenses and other expenses as claimed by 28 claimants. It may be stated here that the Official Liquidator is not in possession of any assets and properties of the opposite party-Company. A civil suit being C.S. No.486 of 2005 has also been filed by one Kamal Kishore Bhawsinka in the court of the Civil Judge (Senior Division), 1st Court, Cuttack, which is now pending in the court of the 1st Addl. Civil Judge (Senior Division), Cuttack, against M/s.Satyam Real Estate Developers Pvt. Ltd. and others, inter alia, for realization of arrear house rent and eviction of the defendants therein. The case record was called for in this proceeding.

In the meantime, one of the land owners, whose land had been mortgaged with the Orissa State Financial Corporation, has repaid the loans and the said land has been released from the charge. This Court after hearing the parties vide order dated 4.7.2012 had directed the opposite party-Company to file the relevant Forms with the Rrgistrar of Companies, Odisha, relating to satisfaction of the charge. It is pertinent to mention here that a Company on its own is required to file the Forms relating to satisfaction of charge with the ROC, Odisha, with filing fees within the stipulated time or the extended time, as the case may be.

6. After hearing the parties, this Court is of the opinion that there are disputes involving the supply of goods by the petitioner to the opposite party company and the payment made by the opposite party-company to the petitioner. That apart, certain disputes have also been raised in the miscellaneous applications filed relating to assets and properties of the opposite party-Company and other issues arising out of development agreements. Various persons, who might have booked apartments either developed or to be developed by the opposite party-company appear to have their rights involving assets and properties of the Company.

7. In view of the above, as the primary issue involved in the winding up petition appears to be in respect of supply of goods and the payment of outstanding debts of the opposite party-Company to the petitioner, which has been disputed by the opposite party-Company, this Court is of the view that the winding up proceeding should not be allowed to be used for recovery of payment which is disputed by the opposite party-Company and filing of a suit would be a proper remedy. Accordingly, this Court declines to pass order for winding up of the opposite party-Company and the petitioner is at liberty to take recourse to appropriate remedy to move before the appropriate forum, if so advised.

8. The petition for winding up is accordingly dismissed. Consequently, the misc. cases as noted above and the affidavits filed in this case have become infructuous. The misc. cases are accordingly disposed of. The order appointing the Official Liquidator as Provisional Liquidator is vacated. The Managing Director of the opposite party-Company is directed to pay the liquidation expenses to the Official Liquidator within seven days from the date of intimation by the Official Liquidator.

The record of the civil suit be sent back immediately to the court below.

Petition dismissed.

2012 (II) ILR - CUT- 771

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

W.P.(C) NO.10994 OF 2008 (Dt.01.08.2012)

AKSHYA KUMAR SAHOO ……Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

AUCTION – Property in question sought to be sold at Rs.22.20 lakhs to O.P.5 – This Court felt it proper to make a bid in the Court to which all the parties agreed – Property settled with the petitioner for Rs.79.00 lakhs being the highest bidder – Purpose of the bid satisfied due to intervention of the Hon'ble Court.

For Petitioner - M/s. S.K.Padhi, Sr. Advocate,
M.Padhi, G.Mishra & A.Das.
For Opp.Parties - Addl. Govt. Advocate,
M/s. B.K.Dash (for O.P.5)
M/s. S.D. Das, Sr. Advocate
(for intervenor)

Heard Mr. S.K. Padhi, learned Senior counsel for the petitioner, Mr. B.K. Dash, learned counsel for opposite party No.5, Mr. J.P. Pattnaik, learned Additional Government Advocate, for the State and Mr. S.D.Das, learned Senior counsel for the intervenor-Secretary, Angul United Central Co-operative Bank.

In pursuance of this Court's order dated 31.7.2012, the petitioner-Akshaya Kumar Sahu. P.O.5- Pradeep Kumar Mishra and Sri N. Das, intervenor-Secretary, Angul United Central Co-operative Bank, being identified by their respective counsel appear before this Court.

As the property in question was sought to be sold to O.P.5 at Rs.22.20 Lakhs, this Court thought it proper to make a bid in the Court, to which all the parties agreed. On 31.7.2012 in this Court the petitioner offered a sum of Rs.60.00 lakhs whereas the intervenor offered a sum of Rs.56.00 lakhs. But as O.P.5 was not present, his counsel, Mr. B.K.Dash, sought for time and prayed to give an opportunity to O.P.5 to participate in the bid, for which this matter was adjourned to today.

Today the intervenor-Secretary, Angul United Central Co-operative Bank, offers a sum of Rs.75.00 lakhs and O.P.5 offers a sum of Rs.78.00

lakhs whereas the petitioner offers a sum of Rs.79.00 lakhs, which is the highest bid amount.

Accordingly, we hold that the petitioner is the highest bidder. He is directed to deposit a sum of Rs.5,00,000/- (Rupees five lakhs) before the Registrar (Judicial) of this Court in shape of demand draft, to which on the last occasion he undertook to deposit, and the Registrar shall keep the said amount in an interest bearing account. The petitioner is further directed to deposit a sum of Rs.35,00,000/- (Rupees thirty-five lakhs) before this Court by 10th August, 2012 and the balance amount of Rs.39,00,000/- (Rupees thirty-nine lakhs) by the end of September, 2012. On deposit of the entire amount by the petitioner, the Linquidator-Sub-Assistant Registrar of Cooperative Societies, Dhenkanal Circle, Dhenkanal, will be at liberty to withdraw the deposited amount. On default of any of the instalments in time, the amount of Rs.5.00 lakhs so deposited in the shape of demand draft before this Court by the petitioner shall be forfeited and the Liquidator shall call upon the second highest bidder, Sri Pradeep Kumar Mishra, O.P.5, to take possession of the property at his offered price of Rs.78,00,000/- (Rupees seventy-eight lakhs) on the same terms and conditions as fixed in this order. If O.P.5 fails, then the intervenor-Secretary, Angul United Central Co-operative Bank shall take the property from the Liquidator at his offered price of Rs.75,00,000/- (Rupees seventy-five lakhs).

Sri N.Das, Secretary, Angul United Central Co-operative Bank, undertakes that he shall file an affidavit before this Court to the effect that they shall vacate the premises of the land and building in question by the end of October, 2012 with due payment of all the up-to –date dues towards electricity, water, Municipality etc. With the aforesaid directions, the writ petition is disposed of.

Writ petition disposed of

2012 (II) ILR - CUT- 773

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

W.P.(C) NO. 11066 OF 2012 (Dt.08.08.2012)

SUSANTA KUMAR TRIPATHY ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. …….Opp.Parties

ORISSA CIVIL SERVICES (C.C.A.) RULE, 1962 – RULE 18 (1).

Dismissal of petitioner from service – Only due to his conviction in vigilance case – In appeal he has been acquitted of the charge – Held, he is entitled to be reinstated in service with all service benefits – Direction issued to O.P.1 to reinstate the petitioner in service.

Case laws Referred to:-

1.2009(II) OLR-709 : (Dr. Prafulla Kumar Sahoo-V-State of Orissa & Ors.)
2.AIR 2010 SC 2927 : (State of West Bengal-V- Subhas Kumar Chatterjee & Ors.)

For Petitioner - M/s. Durgesh Narayan Rath
S.N.Rath, P.K.Rout.
For Opp.Parties - Addl. Govt. Advocate.

Heard Mr. J.Rath, learned senior counsel for the petitioner and Mr. S.Das, learned Additional Standing for the O.Ps.

The petitioner has come up before this Court against the order dated 4.10.2008 passed by the Engineer-in-Chief Electricity-cum-Principal Chief Electrical Inspector, Bhubaneswar, O.P.2 dismissing him from the post of Jr. Engineer (Electrical), (Annexure-1) and the order dated 21.2.2009 (Annexure-3) passed by the Commissioner-cum-Secretary to Government in Energy Department, O.P.1, in appeal confirming the order of dismissal. The petitioner has also made a further prayer to direct the opposite parties to reinstate him in service with all the arrear service benefits.

The brief facts leading to this writ petition tend to reveal that the petitioner, who was working as Jr. Engineer (Electrical), was prosecuted under the provision of Prevention of Corruption Act by the Special Judge, Vigilance, Cuttack, in T.R.Case No.141/2007 and ultimately, he was convicted and sentenced to undergo R.I. for one year and to pay a fine of

Rs.1.00 lakh and in default of payment of fine, to undergo R.I. for a period of six months.

Thereafter, the petitioner was dismissed from service in terms of Rule-13 read with 18(1) of Orissa Civil Service (CCA) Rules, 1962 but no disciplinary proceeding was initiated against the petitioner, as stated.

The aforesaid order of conviction was challenged in Criminal Appeal No.428 of 2008 and a single Bench of this Court while allowing the said Appeal set aside the judgment of the trial court and acquitted the present petitioner of all the charges and directed to release all his seized materials.

Thereafter, the petitioner approached the authority for his reinstatement in service. But as he was dismissed solely on the ground of conviction in criminal case, no action was taken by the authority, which forced the petitioner to approach the Odisha Administrative Tribunal in O.A.No.1342(C)/2012. The Tribunal while disposing of the said Original Application on 17.5.2012 passed the following order :-

> "……..To reiterate under 18(1) of OCS (CCA) Rules 1962 a person is liable to be dismissed from service, if he is convicted for criminal charge. But after he being acquitted of the charges, he is equally entitled to be reinstated in service.
>
> After careful consideration, hearing the learned counsel for both sides, without entering into the merit of the claim of the applicant and in view of the acquittal of the applicant by the Hon'ble High Court. Respondent Nos.2 and 3 are directed to consider reinstatement of the applicant in service with all service benefits.
>
> This be done within two months from communication of this order."

We are sorry to record that despite our repeated directions and observations in different judgments that the purpose of the Tribunal is to adjudicate the matter and not to leave it to the mercy of the authority against whose arbitrariness; original applications are being filed, instated of adjudicating the matter, the Tribunal allows the applicants again to approach the authority. We are constrained to say that the Tribunal is distancing itself from the statutory obligation cast upon it. In this case also the same thing happens, for which we request the Chairman, State Administrative Tribunal to take effective steps so that the matters are adjudicated.

We are constrained to reiterate the decision of this Court in the case of ***Dr. Prafulla Kumar Sahoo vrs. State of Orissa and two others,*** 2009 (II) OLR-709, in which it is held as follows :-

> " It is due to failure on the part of the Administrative Authority to give justice to such claim of persons, who were in Govt. service, the legislatures thought it proper to enact the Administrative Tribunal Act, and the Administrative Tribunals were created and another reason for the same is to reduce the burden of the High Court which was flooded with cases relating to service matters. From the action of the tribunal in sending back the matter to the Government, it appears that the administrative tribunal is acting like a Post Office and not adjudicating the case as the statute demand."

In the case of ***State of West Bengal vrs. Subhas Kumar Chatterjee & Others,*** AIR 2010 SC 2927 in paragraph-23 the apex Court has held as follows :-

> "Whether the Administrative Tribunal can delegate its power of judicial review and confer the same upon a Chief Engineer ? The Tribunals cannot travel beyond the power conferred on them and delegate their essential function and duty to decide service related disputes. Such delegation is ab initio void. It is too elementary to re-state that no judicial tribunal can delegate its responsibilities except where it is authorized to do so expressly. The power conferred upon the Administrative Tribunals under the provisions of the said Act flows from Article 323-A of the Constitution. Such power can never be delegated except under a valid law made by parliament. The Tribunals by their own act cannot delegate the power to decide any dispute which in law is required to be decided exclusively by such Tribunal."

In the case at hand, the Tribunal on one hand held that the petitioner is entitled to be reinstated in service with all service benefits but on the other hand instead of taking a decision in the matter left it in the hands of the authorities to consider his case for reinstatement.

Despite repeated direction, no counter affidavit has been filed by the opposite parties nor has any instruction been obtained by the learned counsel for the State.

Undisputedly, the petitioner was dismissed from service only for his conviction in the vigilance case and such conviction being set aside in appeal, he is entitled to be reinstated in service with all service benefits.

In such view of the matter, we have no hesitation to set aside the order dated 4.10.2008 passed by the Engineer-in-Chief Electricity-cum-Principal Chief Electrical Inspector, Bhubaneswar, O.P.2, (Annexure-1) and the order dated 21.2.2009 passed by the Commissioner-cum-Secretary to Government in Energy Department, O.P.1, (Annexure-3) so also the order dated 17.5.2012 passed by the Odisha Administrative Tribunal in O.A. No.1342 (C)/2012 to the extent of the direction to the respondent-O.Ps. to consider reinstatement of the petitioner in service with all service benefits. The Commissioner-cum-Secretary to Government in Energy Department, O.P.1, is directed to reinstate the petitioner in service and pay him all the consequential service as well as financial benefits within a period of two months from the date of communication of this order.

With the aforesaid observation/direction, the writ petition is disposed of.

Writ petition allowed.

2012 (II) ILR - CUT- 777

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

W.P.(C) NO.16554 OF 2007 (Dt.07.09.2012)

VINAYAKA MISSIONS LORD JAGANNATH INSTITUTE OF DENTAL SCIENCE & RESEARCH,BHUBANESWAR. ….. …Petitioner

.Vrs.

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

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 (ACT NO.33 OF 1962) – S.3-B.

Settlement of Government land on lease – Petitioners obtained lease for opening Dental College and Hospital within a period of one year of the lease – Notice for resumption of land for non-user – Hence this writ petition.

Section 3-B of the Act provides only one ground for resumption of the land i.e. when the land is used for any purpose other than the purpose for which it was leased out – Non user of lease hold land cannot be treated to be user for a purpose other than for which the lease was granted – So Section 3-B cannot be resorted to for cancelling the lease and resuming the land for non-user – Rather the provisions in Section 111 of the T.P. Act which provides grounds for determination of lease would apply – Held, impugned order of cancellation of lease of the petitioner and resumption of the said land U/s.3-B of the Act is illegal hence quashed – If possession of the property has been taken over by the state the same shall be restored to the petitioner within two months. (Para 6 to 9)

Case laws Referred to:-

1.AIR 1938 Privy Council 103 : (Martin Cashing & Ors.-V-Peter J. Cashing)
2.2005(II) OLR 77 : (Smt.Sandhya Rout & Ors.-V-State of Orissa & Ors.)
3.2008(II) OLR 806 : (Sri Narana Nayak-V- State of Orissa & Ors.)

For Petitioners - M/s. Milan Kanungo, D.Pradhan, Y.Mohanty, S.K.Mishra & A.Pattanaik.
For Opp.Parties - Mr. B. Bhuyan, Addl. Govt. Advocate.

B.K.NAYAK, J. In this writ application the petitioner Vinayaka Missions Lord Jagannath Institute of Dental Science & Research, Bhubaneswar, which is managed by a Medical Educational & Charitable Trust, challenges the order dated 08.12.2007 under Annexure-9 passed by the Collector, Khordha resuming the land leased out in favour of the petitioner for running the Dental and Medical College.

2. It is the case of the petitioner that the petitioner-Institution initially started functioning in 1998 in Toshali Plaza, Bhubaneswar with 60 dental students. In the year 1999 the second batch of students were admitted. The Institution was approved by the Dental Council of India for running in the premises of Toshali Plaza. Both the batches of students have completed the BDS Courses in 2004 & 2005 respectively. It is stated that initially on the application of the petitioner for allocation of land for running the Dental & Medical College, the State Government in the Revenue and Excise Department vide their order no.43931/R dated 30.09.1996 gave advance possession of fifty-five acres of land in Mouza Sijua and Ranasinghpur with certain terms and conditions which was subsequently by Government letter dated 18.11.1998 reduced to forty acres. However, ultimately in pursuance of direction of this Hon'ble Court vide order dated 11.12.2001 passed in OJC No.10775 of 2005, the lease deed under Annexure-2 was executed on 22.12.2001 by the Government in favour of the petitioner for seven acres of land for 99 years with certain terms and conditions. It is stated that against all adversities, the petitioner trust constructed around 20,000 sq. ft. plinth area with three big size rooms of 4000 square feet each for hospital, office and store on the leased out land, which was the preliminary requirement to start the Dental College in a new place. The construction was made with prior approval of plan by the Bhubaneswar Development Authority. However, after two batches of 1998 and 1999, the petitioner's Institution could not take up further admission due to want of permission from the Dental Council of India because of inadequate infrastructure and teaching staff. Now, the petitioner trust has shifted all materials and instruments from the old building to the leased out land and has also installed own transformer for electrical connection after settlement of an electrical dispute with the concerned authorities. It is stated that during the year 2005 the petitioner received notice dated 17.10.2005 under Section 3-B of the Orissa Government Land Settlement Act, 1962 (in short 'the OGLS Act') from the Additional Tahasildar, Bhubaneswar calling upon the petitioner to show cause as to why the land covered under the lease deed should not be resumed under Section 3-B of the OGLS Act. The petitioner submitted its show cause reply under Annexure-7 indicating inter alia that the land in question has not been used by the petitioner for any purpose other than for which it was

allotted/leased out, whereafter the matter was not further pursued. However again the petitioner received a notice dated 28.7.2007 (Annexure-5) from the Collector, Khordha-opposite party no.3 under Section 3-B of the OGLS Act for explaining the following :

"i. The institute lessee has violated Sub-clause 15 of Clause-I of the lease agreement by not using the land for the purpose of which it was sanctioned.

ii. The institute- Lessee has entered into agreement with private parties for availing loan without prior permission of the Competent Authority.

iii. The Institute lessee has also not obtained the permission of the Competent Authority for functioning of the Institute of Dental Science."

It is alleged that no detailed particulars with regard to the allegations in notice in relation to entering into agreement with private parties for availing loan and violation of Sub Clause-15 of Clause-II of the lease agreement were indicated in the notice. The petitioner, however submitted his show cause reply under Annexure-8 indicating that he has not violated any condition of the lease agreement. Thereafter, by order dated 08.12.2007 (Annexure-9) opposite party no.2 intimated that the Government-opposite party no.1 vide their letter no.48193/R & DM dated 07.12.2007 decided to resume the case land for which the lease agreement was cancelled and the land was resumed to the Government.

3. It is submitted by the learned counsel for the petitioner that the cancellation of lease of the petitioner and resumption of land has been made by the opposite parties under Section 3-B of the OGLS Act for violation of Sub Clause-15 of Clause-II of the lease agreement for non-user of the land for the purpose for which it was leased out. It is his submission that Section 3-B of the OGLS Act has no application inasmuch as, the said section contemplates resumption of land on the ground of user for any purpose other than the purpose for which it was settled or allotted. It is submitted that non-user of the land does not amount to user for any purpose other than the purpose for which it has been leased out and, therefore, the cancellation of the lease and resumption of the land in question taking recourse to Section 3-B of the OGLS Act is wholly arbitrary, illegal and erroneous and therefore, liable to set aside. It is also submitted by the learned counsel for the petitioner that at the behest of opposite party no.2 the Director of Medical Education and Training, Orissa furnished an enquiry report dated 11.4.2007 (Annexure-4) indicating therein that there is substantial civil construction with lots of chairs, cots, tables, almirahs, electrical fans, lights, medical and

dental instruments, dental chairs, chemical laboratory, etc., in the leased out area along with an electrical sub-station. The report also indicated that since all instruments and infrastructure are present and the ban period is over, a dental college can come up there with full strength with provision of staff etc. It is the contention of the petitioner that since the enquiry report of the Director of Medical Education and Training, Orissa was in favour of the petitioner, the decision of the opposite parties that the land is used for purpose other than the one for which it was leased out as contemplated in Section 3-B of the O.G.L.S. Act is based on no material and hence arbitrary.

4. A counter affidavit has been filed on behalf of the opposite parties stating that initially advance possession of fifty five acres of land was given to the petitioner in 1996 for establishment of Dental Medical College and Hospital within one year and to inform the authority about such utilisation. The petitioner having failed to utilise the land in question, it was ultimately reduced to seven acres in respect of which lease was executed under Annexure-2 and as per sub Clause-15 of Clause-II of the lease agreement the lessor has right to resume the land under Section 3-B of the OGLS Act, if the lessee does not used the land for the purpose for which it was granted within one year of the execution of the lease. Even after one year of execution of the lease, the petitioner has not used the land for establishment of the Dental College and Hospital but has kept some materials in the half constructed houses over the case land. Referring to the report (Annexure-4) of the Director, Medical Education and Training, it is stated that nowhere in his report the Director has stated that the land has been used by the lessee for running the Dental College and Hospital. Rather, the report corroborates the earlier reports of the Revenue Inspector and the Tahasildar regarding non-utilisation of the land for the purpose for which it was leased out. In such circumstances, the Government decided to resume the land and accordingly notices were issued to the petitioner as per Section 3-B of the O.G.L.S. Act and after considering his reply, the Government decided to resume the land by cancelling the lease on being satisfied that the petitioner failed to utilise the land for running the Dental Medical College and Hospital. Inquiry report of the Tahasildar, Bhubaneswar dated 21.11.2006 about non-utilisation of the land in question by the petitioner for running the college has been annexed as Annexure-E/2. Some averments have been made in the counter affidavit regarding clandestine agreement dated 26.07.2011 entered into by the petitioner with one M/s. Sahu Trust for transferring the control and management of the petitioner with all assets and liabilities together with the interest in respect of forty acres of Government land. However, this Court feels that the details of such transaction are not necessary to be adverted to, since this does not constitute the ground on which the land has been

resumed. It is stated further in the counter that even after the Director of Medical Education and Training submitted its report (Annexure-4), the petitioner has not taken any steps to establish the Dental medical College and Hospital till the lease was cancelled and the land resumed. It is further stated that the Tahasildar was directed to publish a copy of the order in the locality as well as over the case land and to take over possession of the land and for correction of record of right. The order was published as directed in presence of witnesses and the Revenue Inspector was directed to take over possession on 10.12.2007 of the case land after observing all formalities and the petitioner (lessee) was directed to remain present on the said date. As per the report of the R.I., Annexure-H/2, the possession of the case land was taken over on 10.12.2007 in presence of the witnesses and watchers of the petitioner-Institution. It is thus submitted by the learned State Counsel that there is nothing wrong to resume the land resorting to Section 3-B of the O.G.L.S. Act.

5. In the light of the facts and submissions noted above the question that falls for determination is whether the Government has the right to cancel the lease in question and resume the land covered thereunder and whether such resumption can be made taking recourse to Section 3-B of the O.G.L.S. Act. In order to determine the question, certain relevant terms and conditions contained in different sub clauses of Clause-II of the lease agreement are to be taken note of which are as follows:

> 1. The lessee shall not use the land hereby demised for any purpose other than the specific purpose for which the land is granted, namely, establishment of a dental college and hospital.
>
> 6. That on breach or non-observance of any of the aforesaid condition of this indenture, the lessee may declare that the lease has been determined and that on the expiry of one month from the date of such order, the lesser or any officer or person appointed by him in that behalf shall be entitled to re-enter and take possession of the demised land of the building and other structure etc. erect thereon.
>
> Provided……. …
>
> 8. That on the question of breach of non-observance of any of the terms or conditions of this indenture, the lesser shall be the sole judge and an order of the lesser declaring that there has been such breach or non-observance shall be final and conclusive proof of such breach or non-observance as between the parties thereto and shall be binding on both the parties.

> 15. That the lesser reserves the right to resume the land leased out as mentioned in the land schedule U/s. 3-B of O.G.L.S. Act,1962 if the lessee does not use the land for the purpose for which it is granted within one year of this agreement."

6. Apparently some terms and conditions of the lease deed have not been properly worded and not appended in an orderly manner. However, in order to understand the intention of the parties to the lease and the various terms and conditions to which they agreed, the document itself has to be read as a whole.

The question of construction of a deed came up for consideration before the Privy Council in the case of ***Martin Cashing and others v. Peter J. Cashing***; AIR 1938 Privy Council 103. Lord Maugham speaking for a five Judge Bench laid down the principle as follows :

> "Their Lordships wish to add that in a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him-not because he has read it or understands it, but because he has chosen to execute it."

7. A condition has been prescribed in Sub-clause-15 of Clause-II of the lease agreement that the lessee (petitioner) has to establish the Dental College and Hospital on the demised land within one year from the date of the lease and the violation of the condition gives right to the lessor to determine the lease and resume the land. But the manner of resumption which has been stipulated therein shows that it would be under Section 3-B of the O.G.L.S. Act,1962. Therefore, the sub-clause consists of two parts, one giving the right to the lessor to determine the lease and resume the land for the failure of the lessee to establish the Dental College within one year and the second, i.e., the manner and procedure that may be resorted to for resuming the land.

Section 3-B of the O.G.L.S. Act,1962 provides as under:

> "**3-B. Resumption of land and imposition of penalty**-(1) Any officer authorised under Clause (a) of Section 3 may resume any land settled by him, if he has reasons to believe that the person with whom the land was settled has used it for any purpose other than

that for which it was settled and may impose a penalty of an amount not exceeding one hundred rupees on such person :

Provided that no order under this sub-section shall be passed without giving such person a reasonable opportunity of being heard in the matter.

Section 3-B of the O.G.L.S. Act provides only one ground for resumption of the land, i.e., when the land is used for any purpose other than the purpose for which it was settled/leased out. Non-user of the land in question by the lessee for opening the Dental College and Hospital, within a period of one year of the lease may not satisfy the requirement of Section 3-B of the O.G.L.S. Act and may not furnish a ground for resumption taking recourse to Section 3-B of the O.G.L.S. Act. But non-application of Section 3-B of the O.G.L.S. Act does not deprive the less or of its right to determine the lease and resume the land for violation of condition of non-user of the land within one year from the date of grant of lease under the general law. Lease of immovable property, as defined in Section 105 of the Transfer of Property Act, is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, on consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee. The OGLS Act, 1962 has been enacted in order to bring uniformity in the principles regarding settlement or lease of Government land in the whole of the State of Orissa overriding the provisions of various Acts, Rules, Orders, Customs, Practices and Usages enforced in various parts of the State. The Act however cannot be said to have overriding effect on the provisions of the Transfer of Property Act,1882, dealing with 'lease' which is the general law. In that sense, the Rules and Principles under the OGLS Act must be held to be only supplemental to and not in derogation of the principles governing lease of immovable property contained in the Transfer of Property Act. Therefore, though Section 3-B of the OGLS Act contemplates termination of lease of Government land and resumption of the same for user of the property for any purpose other than that for which the lease was granted, still the provisions of the Transfer of Property Act relating to determination of lease would apply. Section 111 of the Transfer of Property Act envisages different grounds in Clauses (a) to (g) thereof for determination of lease. Clause (g) of Section 111 provides for determination of lease by forfeiture, among others, for breach of any condition of the lease subject to the lessor giving notice in writing to the lessee of his intention to determine the lease.

8. As has been seen above, it is the stand of the State-opposite party in their counter affidavit that the cancellation of the lease and resumption of the land has been done in accordance with the provision of Section 3-B of the O.G.L.S. Act. It is trite, as has been pronounced by this Court in several decisions including the ones reported in 2005 (II) OLR 77; ***Smt. Sandhya Rout and others v. State of Orissa and others*** and 2008 (II) OLR 806; ***Sri Narana Nayak v. State of Orissa and three others*** that non-user of the demised land cannot be treated to be user for a purpose other than for which the lease was granted and, therefore, Section 3-B cannot be resorted to for cancelling the lease and resuming the land for non-user. Therefore, the order of cancellation of the lease of the petitioner and resumption of the land under the provisions of Section 3-B of the O.G.L.S. Act is illegal and unsustainable.

9. In the aforesaid view of the matter, we quash the cancellation and resumption order dated 08.12.2007 under Anenxure-9. If the possession of the property has been taken over by the State, as contended in their counter affidavit, it shall be restored to the petitioner within a period of two months. This, however, does not debar the State from taking recourse to any other ground and procedure legally admissible for determination of the lease.

The writ application is accordingly disposed of. No costs.

Writ petition disposed of.

2012 (II) ILR - CUT- 785

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

JCRLA NO. 76 OF 2003 (Dt.04.04.2012)

NAGA @ NAGESWAR BINDHANI …….. Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

A. EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.24.

Extra judicial confession made by the appellant before the villagers – Villagers tied the appellant and persuaded him to confess the guilt – All the witnesses examined in this regard were present at the spot – Held, such extra judicial confession cannot be accepted.

(Para 7)

B. EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.27.

Recovery of weapon of offence at the instance of the appellant – Though P.W.1 stated that after half an hour police visited the spot and started investigation and during investigation the appellant confessed before the police to have killed his wife and produced the axe rest of the witnesses who were also present have not stated any thing supporting the statement of P.W.1 – On the other hand P.W.2 in Cross-examination stated that after arrival the police asked the appellant to bring the weapon of offence and recovered the same from the house of the appellant – P.W.2 was silent about any disclosure statement made by the appellant before the police – No other circumstantial evidence is there to support the charge – Moreover availability of human blood on the weapon of offence by itself cannot prove the charge U/s.302 I.P.C. in the absence of any supporting evidence to show that the appellant was in any way connected with the alleged Crime – Held, prosecution has failed to prove the charge U/s.302 I.P.C. against the appellant.

For Appellant - M/s. Debabrata Mohanty, M.B.Das, S.K.Das, B.C.Satar & B.Ray.

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

L. MOHAPATRA, J. This appeal arises out of the judgment and order dated 28.5.2003 passed by learned Ad hoc Additional Sessions Judge (Fast

Track Court), Baripada in Sessions Trial Case No.18/32 of 2002. The appellant stood charged for commission of offences under Sections 302/309 of the I.P.C. and was found guilty of both the charges and convicted thereunder. He has been sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/- and, in default, to undergo R.I. for six months for his conviction under Section 302 of the I.P.C. No separate sentence was imposed for conviction under Section 309 of the I.P.C.

2. The case of the prosecution is that on 24.9.2001 the Grama Rakshi of Umadeipur beat, P.W.7, lodged a written report at Jharpokharia Police Station to the effect that at about 7.00 A.M. P.W.2 came to his house and informed that the appellant had killed his wife in the previous night. Thereafter, he went to the spot and found the deceased lying dead in a pool of blood and he also noticed cut injury on her face and neck. The appellant was found sitting on the verandah. When he asked the appellant regarding death of the deceased, the appellant remained silent. P.Ws.1, 4 and other villagers also asked the appellant and thereafter the appellant disclosed that in the previous night there was a tussle between him and the deceased for money and as the deceased did not obey him, he killed her by means of an axe. The villagers remained in guard and he went to the police station for lodging information. On the basis of such information, F.I.R. was registered for commission of offence under Section 302 of the I.P.C. On completion of investigation charge-sheet was submitted not only for commission of offence under Section 302 of the I.P.C. but also for commission of offence under Section 309 of the said code.

3. Prosecution in order to establish the charge, examined eight witnesses, but none was examined on behalf of the appellant. The appellant took a plea that on the day previous to the date of occurrence he had gone to Bangriposi and on his return he found his wife lying dead having cut injury.

4. Out of eight witnesses examined on behalf of the prosecution, P.W.1 is a post occurrence witness and was informed about the incident by P.W.2 who is the brother of the appellant. He also stated about the extra-judicial confession made by the appellant and also seizure of axe at the instance of the appellant in presence of the police. P.W.2 is the brother of the appellant and is also a post occurrence witness. He had informed the Grama Rakshi P.W.7 about the incident and he also stated about the extra-judicial confession. P.W.3 is the doctor who examined the appellant on police requisition. P.W.4 is also a post-occurrence witness who came to the spot

after being informed by P.W.2. This witness also stated about the extra-judicial confession. P.W.5 turned hostile. P.W.6 is the doctor who conducted post-mortem examination. P.W.7 is the Grama Rakshi, who lodged the F.I.R. and P.W.8 is the I.O.

5. The trial court relied upon the evidence relating to extra-judicial confession and found the appellant guilty of the charge of commission of offence under Section 302 of the I.P.C. Though there was no evidence supporting the charge of commission of offence under Section 309 of the I.P.C., the trial court on the basis of evidence of the I.O. found the appellant guilty of the said charge and convicted him thereunder.

6. Learned counsel for the appellant assails the impugned judgment on the grounds that the order of conviction is solely based on extra-judicial confession, but the said extra-judicial confession was not voluntary. It is also contended by the learned counsel for the appellant that the said extra-judicial confession alleged to have been made by the appellant was in presence of the police officials and, therefore, no reliance can be placed on such extra-judicial confession. So far as seizure of weapon of offence is concerned, it is contended by the learned counsel that it is only P.W.1, who states about such seizure at the instance of the appellant but other witnesses, who were present, have not corroborated the evidence of P.W.1 in this regard. Learned counsel for the appellant also submits that there is absolutely no material to support the charge of commission of offence under Section 309 of the I.P.C.

Learned counsel for the State placed much reliance on the extra-judicial confession alleged to have been made by the appellant before some witnesses and it is contended by the learned counsel for the State that the extra-judicial confession made by the appellant stands corroborated by evidence of P.W.6, who conducted post-mortem examination and therefore conviction of appellant under Section 302 of the I.P.C. is justified.

7. On a careful scrutiny of the evidence of all the eight witnesses we find that there is no direct evidence to support the charge. The prosecution relied on circumstantial evidence, such as, the extra-judicial confession, recovery of weapon of offence at the instance of the appellant and blood stain found on the weapon of offence, which matches with that of the blood group of the deceased. P.W.1 came to the spot after being informed by P.W.2 about the incident and found the deceased lying dead. He said that the appellant told him that due to tussle for money he had killed his wife. Half an hour thereafter the police visited the spot and started investigation. The

appellant confessed before the police to have killed his wife and produced the axe which was seized in his presence. In cross-examination he stated that the occurrence took place in the night and information was lodged at the police station on the next day morning at about 9.00 A.M. Police reached the spot half an hour after receiving the information and he alongwith many villagers were present at the spot. P.W.2 is the brother of the appellant. He is also a post occurrence witness and stated about the extra-judicial confession made by the appellant. In cross-examination he stated that he did not know when the actual occurrence took place in the night. On his information ten to fifteen villagers came to the spot and it was about 7.00 A.M. The then Sarpanch and Ward Member also came to the spot. On their arrival he asked the villagers to remain in guard of the appellant. The villagers tied the appellant and persuaded him to confess the guilt. He went alongwith P.W.7 to lodge information in the police station. The police came to the spot at about 12 noon to 1 P.M. and after arrival of the police the appellant was untied. Police asked the appellant to bring the weapon of offence and recovered the weapon of offence by entering into his house. P.W.3 is the doctor, who examined the appellant on police requisition and found one bruise linear circular mark around the neck of the appellant. Evidence of P.W.3 will be relevant for the purpose of charge under Section 309 of I.P.C. P.W.4 is another post-occurrence witness who stated about the extra-judicial confession. He, in his cross-examination, stated that before his arrival at the spot fifty to sixty persons were already present. P.W.5 turned hostile. P.W.7 is also a witness to the extra-judicial confession made by the appellant.

On analysis of evidence of all these witnesses, we find that as per the version of P.W.2, immediately after the occurrence, he had informed ten to fifteen villagers who came to the spot at about 7.00 A.M. The Sarpanch and the Ward Member were also present. The villagers tied the appellant and also persuaded the appellant to confess the guilt. All the witnesses examined in this regard were present at the spot as per their respective version. It is, therefore, clear that when such extra-judicial confession was made before the villagers and out of them some have been examined. The appellant had been tied and was persuaded to confess his guilt. Therefore, the said extra-judicial confession cannot be accepted.

The only other evidence is with regard to recovery of weapon of offence at the instance of the appellant. Though P.W.1 stated that after half an hour police visited the spot and started investigation and that during investigation the appellant confessed before the police to have killed his wife and produced the axe, rest of the witnesses who were also present have not

stated anything supporting such statement of P.W.1. On the other hand, P.W.2 in cross-examination stated that after arrival the police asked the appellant to bring the weapon of offence and recovered the same from the house of the appellant. P.W.2 was completely silent about any disclosure statement made by the appellant before the police. Therefore, this aspect of the prosecution case is not supported by cogent evidence. There is no other circumstantial evidence available on record to support the charge. Availability of human blood on the weapon of offence by itself cannot prove the charge under Section 302 of the I.P.C. in absence of any supporting evidence to show that the appellant was in any way connected with the alleged crime. We are, therefore, of the view that the prosecution has miserably failed to prove the charge under Section 302 of the I.P.C. against the appellant.

So far as charge under Section 309 of the I.P.C. is concerned, undisputedly none of the witnesses examined by the prosecution has stated that the appellant attempted to commit suicide. This fact is also admitted by P.W.8, the I.O. We fail to understand as to how the trial court found the appellant guilty of the charge in absence of any evidence whatsoever. Therefore, his conviction under Section 309 of the I.P.C. is liable to be set aside.

8. For the reasons stated above, we allow the appeal and set aside the judgment and order of conviction and sentence dated 28.5.20003 passed by learned Ad hoc Additional Sessions Judge (Fast Track Court), Baripada in Sessions Trial Case No.18/32 of 2002 convicting the appellant for commission of offences under Sections 302/309 of the I.P.C. and sentencing him to undergo imprisonment for life and to pay a fine of Rs.2,000/- and, in default, to undergo R.I. for six months. The appellant is acquitted of the charge.

From the record it appears that the appellant-Naga @ Nageswar Bindhani is in custody. He be set at liberty forthwith, unless his detention is required in any other case.

Appeal allowed.

2012 (II) ILR - CUT- 790

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

JCLRA NO. 80 OF 2003 (Dt. 07.05.2012)

GUJEL ASANTULU ……..Appellant.

.*Vrs.*

STATE OF ORISSA ……Respondent.

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

Benefit U/s. 84 I.P.C. – Whether the accused has developed insanity can be assessed from his conduct immediately prior and after the incident.

In this case the appellant was behaving madly prior to the incident and he had been taken to hospital at Andhra Pradesh for his treatment – P.W.1 stated that in the night of occurrence at about 3 A.M. the deceased woke up him and informed that the appellant was behaving like a mad person and he was asked to inform the same to the elder brother of the appellant – P.W.2 stated that after the incident the appellant climbed the roof of the house and trying to break the titles by means of a lathi – Held, the appellant entitled benefit U/s.84 I.P.C. – Impugned judgment and order of conviction set aside.

(Para 8, 9,10)

For Appellant - Mr. G.K.Behera.
For Respondent - Mr. Sangram Das,
Addl. Standing Counsel.

L. MOHAPATRA, J. This appeal is directed against the judgment and order of learned Ad hoc Additional Sessions Judge, Jeypore in Criminal Trial No.39 of 2001(C.T. No.52 of 2002 of the Additional Sessions Judge & S.C. No.322 of 2001 of the Sessions Judge, Jeypore) convicting the appellant under Section 302, I.P.C. and sentencing him to imprisonment for life as well as pay fine of Rs.1,000/- (Rupees one thousand), in default, to undergo further imprisonment for one month.

2. The case of the prosecution, as revealed from the evidence, is that the appellant had married the deceased ten years prior to the occurrence. On 19.5.2001 the parents of the deceased were going to the house of the appellant to see their daughter, but on the way near village Loudi they were

informed by one Rama Rao that the deceased has been killed by appellant by means of a stone. Thereafter, they rushed to the house of the appellant and found their daughter lying dead with bleeding injury on her head. Her legs and hands were tied with a rope. Their grandson (P.W.1) informed that the appellant had killed the deceased at about 4.00 A.M. in the night by assaulting her with a grinding stone. Thereafter, P.W.6, the father of the deceased made an oral report before the O.I.C., Pottangi P.S., which was reduced to writing and investigation was taken up. On completion of investigation, charge-sheet was submitted against the appellant for commission of offence punishable under Section 302, I.P.C.

3. The prosecution, in order to establish the charge, examined ten witnesses. Out of ten witnesses examined on behalf of the prosecution, P.W.1 is the son of the appellant, P.W.2 is the brother of the appellant, P.W.3 is a co-villager, P.W.4 is the Nayak of the village, P.W.5 is a witness to the inquest, P.W.6 is the father of the deceased and is also the informant. P.W.7 is the doctor, who conducted post mortem examination, P.W.8 is the mother of the deceased, who is a post occurrence witness. P.W.9 is the constable, who handed over the wearing apparels of the deceased after postmortem examination and P.W.10 is the I.O.

4. The plea of defence was not only denial of the prosecution case but also insanity. In order to prove such plea, one witness was examined on behalf of the defence.

5. The trial court placed reliance on the evidence of P.Ws.1, 2, 3, 4, 6 and 8 as well as the medical evidence to find the appellant guilty of the charge and convicted him thereunder.

6. Mr. Behera, learned counsel for the appellant drew attention of he Court to the evidence of the witnesses and submitted that not only prior to he occurrence but also on the date of occurrence itself the appellant had developed insanity and, therefore, protection under Section 84 of the Indian Penal Code should have been extended to the appellant.

7. Learned counsel for the State supported the findings of the trial court on the ground that the witnesses are consistent in their evidence and nothing had been brought out in the cross-examination to discard their testimony. Except oral evidence, no documentary evidence had been admitted before the trial court to establish the defence plea. Therefore, the trial court did not grant protection under Section 84 of the Indian Penal Code o the appellant.

8. We have carefully examined the evidence of all the ten witnesses. P.W.1 is the son of the appellant and deceased is his step-mother. He deposed that in the night of occurrence when he was sleeping in the house, the deceased woke up him at about 3.00 A.M. and informed that the appellant is behaving like a mad person and he was asked to call his elder father, who was staying at village Padampur. P.W.1 went to village Padampur to call his elder father, and when both of them reached the village at about 6.30 A.M., they saw the deceased lying dead. In cross-examination he stated that the appellant had developed madness three years prior to the incident and was taken to Salur for treatment by his grandfather. Before the incident the appellant had not quarrelled with the mother, but from the previous day he was behaving like a mad man.

P.W.2 is the elder brother of the appellant. He deposed that in the night of occurrence he was informed by P.W.1 that the appellant was behaving like a mad person. He immediately rushed to the house of the appellant and found the door closed from outside. The appellant was braking the tiles of the roof by a lathi by climbing over the roof. They called the appellant to the ground and tied him. Thereafter, the Ward Member, Sarpanch and other villagers gathered at the spot and when the door was opened, they found the eceased lying dead inside the room. A stone was lying by her side. Her legs had been tied by means of a rope. This witness in the cross-examination has also stated that the appellant was behaving madly prior to the incident and he had been taken to hospital at Andhra Pradesh for his treatment. P.W.3 is a co-villager, who has corroborated the evidence of P.W.2. This witness has also stated in cross-examination that the appellant was, at times, behaving like a mad man and at the time of madness the appellant was unable to know the act he was doing. P.W.4 is the Nayak of the village, who came to the spot after the occurrence and in cross-examination he has also stated that at times the appellant was behaving normally and during his madness he was unable to know the consequence of his own act. P.W.6 is the father of the deceased. He is a post-occurrence witness. Much reliance is placed by learned counsel for the appellant on the evidence of this witness to dis-prove the plea of insanity. But we find from the evidence of the said witness that, he and his wife were not staying in the same village and he was coming to see the deceased once in a year. Similarly the evidence of P.W.8, who is the mother of the deceased and wife of P.W.6 has also not helped the prosecution to counter the evidence of other witnesses, who have specifically deposed about the madness of the appellant. P.W.7 is the doctor, who conducted the post mortem examination and found injury on the scalp on the right parietal bone of the deceased with a comminuted fracture. He was of the opinion that the

injury was ante-mortem in nature and death was also due to crush injury to the brain matter. He also opined that the said injury can be caused by M.O.-I, which had been seized in course of investigation.

9. On analysis of the evidence of all other witnesses, it is clear that three ears prior to the incident the appellant was behaving like a mad person and had been given treatment in the State of Andhra Pradesh. The question to be decided is as to whether immediately prior to and after the incident the appellant was behaving like a mad person. From the evidence of P.W.1, it is clear that in the night of occurrence at about 3.00 A.M. the deceased woke-up P.W.1 and informed that the appellant was behaving like a mad person and the said witness was first to inform the elder brother of the appellant, who was staying at village Padampur. In cross-examination, this witness has also stated that from the previous day of the incident the appellant was behaving like a mad man. P.W.2, who is the elder brother of the appellant, has also stated that the appellant was behaving like a mad person prior to the incident. Both P.Ws. 3 and 4 have stated that the appellant was behaving like a mad person and was unable to know the consequence of his own act. Apart from such evidence, it also appears from the evidence of P.W.2 that after causing death, the appellant had climbed to the roof of the house and was trying to break the tiles by means of a lathi. This conduct of the appellant, immediately after the occurrence, also lends corroboration to the evidence of the above four witnesses with regard to madness of the appellant.

10. Section 84 of the Indian Penal Code prescribes that nothing is an offence which is done by a person, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The requirements of this provision are fully satisfied from the evidence of P.Ws.1, 2 and 3. We, therefore, of the view that though the prosecution has been able to prove that the appellant killed his wife by means of a stone, the benefit of Section 84 of the Indian Penal Code has to be extended to the appellant considering the nature of the evidence adduced before the trial court.

11. For the reasons stated above, we allow the appeal and set aside the impugned judgment and order of conviction and sentence dated 19.07.2003 passed by learned Ad hoc Additional Sessions Judge, Jeypore in Criminal Trial No.39 of 2001 (C.T. No.52 of 2002 of the Additional Sessions Judge & S.C. No.322 of 2001 of the Sessions Judge, Jeypore) under Section 302 of the I.P.C.

12. It is stated at the Bar that appellant Gujel Asantulu is in custody. If that be so, the appellant be set at liberty forthwith, if his detention is not required in any other case.

Appeal allowed.

2012 (II) ILR - CUT- 795

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

JCRLA NO. 81 OF 2003 (Dt.19.04.2012)

SOMANATH PATIKA .....Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

A. PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.304-PART-II.

Dissension between the appellant and the deceased as the appellant did not return the axe taken from the deceased – Quarrel preceded by the overt act of the deceased in assaulting the appellant – Thereafter the appellant went to his house and brought the knife and gave one blow to the deceased and left the spot – Had the appellant the intention to kill he would have come to the spot with the weapon – Occurrence happened under the heat of passion upon a sudden quarrel – Appellant having inflicted one blow in knife acted with the knowledge that his act is likely to cause death – The alleged act of the appellant becomes culpable U/s.304 Part-II I.P.C. – Held, conviction U/s.302 is modified to one U/s.304 Part-II I.P.C.

(Para 9,10,11)

B. CRIMINAL TRIAL – Possibility of identification in darkness – P.W.6 specifically testified that though it was dark face to face was visible – This Court cannot lose sight of uncanny ability of villagers to identify a known person even in little light – P.W.3 stated to have witnessed the occurrence from very close quarter so also P.Ws. 6 & 8 – There is no denying of fact that the appellant was very well known to the witnesses, he being a Co-villager and brother of the appellant by village courtesy – Held, this Court finds no merit in the contention that there might have been impossibility of identification of the real assailant in view of the darkness. (Para 7)

For Appellant - Mr. B.K.Nayak-3.
For Respondent - Mr. Sangram Das,
Add. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment of conviction and order of sentence dated 19.07.2003 passed by learned Ad- hoc

Additional Sessions Judge, Gunupur in Criminal Trial No.24 of 2002 convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. The occurrence happened at about 11.00 P.M. on 25.06.2001 in front of the house of the deceased. The appellant and the deceased are brothers by village courtesy. Some days back the appellant had taken an axe from the deceased, which he (the appellant) did not return. For that reason, the appellant was frequently passing caustic comments against the appellant saying that he is a thief. At the relevant time of occurrence, the appellant came near the house of the deceased; challenged the deceased regarding the caustic comment he used to pass against him and all of a sudden assaulted the deceased with a knife causing his death. On the basis of the F.I.R. lodged by P.W.3, investigation was taken up and after completion of investigation, charge-sheet was filed implicating the appellant in offence under Section 302, I.P.C.

3. The prosecution examined nine witnesses to prove the charge. P.Ws.3, 6 and 8 are the eye witnesses to the occurrence. P.W.5 is a witness to the extra judicial confession made by the appellant but he has turned hostile on this aspect. P.W.7 along with P.W.5 are witnesses to seizure of the knife (M.O.-I) at the instance of the appellant. P.W.1 is the Medical Officer, who conducted autopsy on the dead body of the deceased. P.W.2 is the Medical Officer, who collected the nail clippings etc. of the appellant. P.Ws. 4 and the Investigating Officers.

4. The defence plea is one of complete denial but none was examined by the defence.

5. Learned trial court on the basis of the evidence of P.Ws. 3, 6 and 8 and other corroborative evidence found the appellant guilty of offence under Section 302, I.P.C. and convicted him thereunder.

6. Learned counsel for the appellant submits that there being prevaricative evidence on the point of presence of light at the spot and there being major discrepancies in the evidence of the eye witnesses, i.e., P.Ws.3, 6 and 8, conviction as recorded by the learned trial court is not sustainable in the eye of law. It is alternatively contended by learned counsel for the appellant that P.W.6 having testified about the quarrel between the deceased and the appellant preceding the incident of assault by the appellant and the appellant having not taken any undue advantage of the

situation, the conviction of the appellant should be modified to one under Section 304, Part- II, I.P.C.

Learned Additional Standing Counsel on the other hand supports the impugned judgment and order of sentence.

7. P.W.3, who is the informant and son of the deceased was very much present in the house when the occurrence happened. Hearing commotion outside the house, he came out and saw from a close quarter the appellant stabbing his father with a knife. P.W.6 who is a neighbour of the deceased also came out of the house being attracted by the commotion and he saw the appellant stabbing the deceased. P.W.8 is another son of the deceased. He is living separately. He also came out on being attracted by the commotion and saw the appellant stabbing the deceased. All the three eyewitnesses have specifically testified that they saw the appellant stabbing the deceased. P.W.3 on the point of presence of light has testified that at the relevant time of occurrence there was no electric bulb on the 'Pinda' of their house but there was light burning in the house of Ratna. Admittedly it was a night in the no moon fortnight. P.W.8 has also stated about presence of light in the street though he has not specifically stated as to where such light was burning. P.W.6 has testified that though there was no electric light in the house and it was dark but face to face was visible. It is further stated by him that after the incident of stabbing 'Dibiri' was lighted and by that time they found that the deceased had already died. If the evidence of all the aforesaid three witnesses are taken into consideration on the point of presence of light, it is found that all of them have positively testified about the possibility of identification in the little light that was there and P.W.6 has specifically testified that though it was dark, face to face was visible. While appreciating their evidence on the aspect of possibility of identification, this Court cannot lose sight of uncanny ability of villagers to identify a known person even in little light. P.W.3 is stated to have witnessed the occurrence from very close quarter so also P.Ws.6 and 8. There is no denying of fact that the appellant was very well-known to the witnesses, he being a co-villager and brother of the appellant by village courtesy. In view of such fact and in view of the evidence on record we do not find any merit in the contention that there might have been impossibility of identification of the real assailant in view of the darkness

8. Another aspect of discrepancy as pointed by learned counsel for the appellant is that P.W.8 might have arrived at the spot of the occurrence after the occurrence was over. P.W.8 in his cross-examination has testified that on hearing 'Patitunda' he came out and saw the occurrence; a lamp was

burning on the 'Pinda' in the house of his father and besides that the 'Pinda' was covered by the focus of the electric light. If such evidence of P.W.8 is read in conjunction with evidence of P.W.6, it is found that P.W.6 has estified about burning of the 'Dibiri' after the incident of assault. If P.W.6, who is an independent witness is believed then P.W.8 must have arrived at the spot after the incident of assault was over and a 'Dibiri' (wicker lamp) was lighted there after. From the point of his arrival, therefore, P.W.8 may be held to be a post-occurrence witness, who arrived at the spot immediately after the occurrence. Even if P.W.8 is held to be a post-occurrence witness, evidence of P.Ws. 3 and 6 on the point of implication of the appellant is not weakened rather P.W.8 corroborates P.Ws. 3 and 6 on such aspect and also on the point of presence of light at the spot. In view of the above, we do not find any infirmity so far as the conclusion arrived at by learned trial court on the question of guilt of the appellant is concerned.

9. Coming to the alternative contention of the learned counsel for the appellant, there is evidence to show that some days prior to the occurrence there arose some dissension between the appellant and the deceased as the appellant did not return the axe taken by him from the deceased. For such act of the appellant, the deceased was frequently passing caustic and insulting comments against him even labeling him as a thief. At the relevant time of occurrence, according to P.W.6 who is an independent witness, there was altercation between the deceased and the appellant just before the occurrence and the deceased assaulted the appellant and thereafter the appellant went to his house, brought the knife and gave only one blow and left the spot. So far as this aspect of the prosecution case is concerned, P.Ws.3 and 8 are designedly silent. P.W.6 being an independent witness, he is to be believed so far as the genesis of the occurrence is concerned. If, the quarrel that preceded, the overt act of the deceased in assaulting the appellant before the assault by the appellant and conduct of the appellant is giving one blow only, are taken into consideration, the act of the appellant may be one which can be brought under exception 4 to Section 300, I.P.C. Such facts show that the action of the appellant is not premeditated. Had he the intention to kill, he would have come to the spot with the weapon. Further it shows, the occurrence happened in a sudden fight in the heat of passion upon a sudden quarrel. The appellant having inflicted only a single blow in such a situation, he cannot be held to have taken undue advantage or acted in a cruel manner.

10. The appellant himself being the victim of the aforesaid situation inflicted a single blow and fled away. Had he intended a particular result, his conduct would have been different. But the appellant, for his act cannot

escape from the conclusion that he having mounted the assault with a knife, he acted with the knowledge that his act is likely to cause death of the deceased. The alleged act of the appellant becomes therefore, culpable under Section 304, Part-II, I.P.C.

11. In the result the appeal is allowed in part. The conviction of the appellant is modified to one under Section 304, Part-II, I.P.C. The sentence is confined to seven years rigorous imprisonment under Section 304, Part-II, I.P.C. The appellant is stated to be still in custody and the sentence awarded is stated to have been undergone by him in the meantime. The appellant therefore be set at liberty forthwith, if his detention is not required in any other case.

Appeal allowed in part.

2012 (II) ILR - CUT- 800

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

JCRLA NO. 91 OF 2003 (Dt.21.08.2012)

SAMIRA DEHURY ……Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.300.

Murder – Exception-4 – Application of – Sudden quarrel without premeditation is not sufficient to invoke Exception-4 to Section 300 I.P.C. – It must further be shown that the offender had not taken undue advantage or acted in a cruel or unusual manner while committing the offence – In all cases of death by single injury caused in course of a tussle, etc. can not be set as a test to apply Exception-4 – Each case is to be adjudged on the basis of facts peculiar to that case.

In this case there is nothing to show that the appellant was provoked by the deceased in any manner – Held, the appellant having taken undue advantage of the situation and having acted in a cruel and unusual manner he cannot be extended with the benefit of Exception-4 to Section 300 I.P.C. – Conviction U/s 302 is confirmed.

(Para 9,10,11)

Case laws Referred to:-

1.AIR 2006 SC 1920 : (Surendra Singh @ Bittu-V- State of Uttaranchal)
2.AIR 2003 SC 1620 : (Ghapoo Yadav & Ors.-V- State of M.P.).

For Appellant - Mr. G.K.Behera, Advocate
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment and order of sentence dated 14.08.2003 passed by learned Ad hoc Additional Sessions Judge (II), Dhenkanal in Sessions Trial Case No.3 of 2003 / Sessions Trial Case No.1 of 2003 convicting the sole appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. The occurrence happened in the afternoon of 20.05.2000 on the land near Chhakadia Bila of village Barapada under Dhenkanal Sadar P.S.

Deceased Nirmala Ram @ Hagara by alleged overt act of the sole appellant died of gun shot injury caused by (M.O.-I). Informant (P.W.11), who happens to be the uncle of the deceased, lodged the F.I.R., on the basis of which investigation was taken up. On completion of investigation, the Investigating Officer (P.W.14) submitted charge-sheet against the present appellant Samira Dehury implicating him in offence under Section 302, I.P.C. read with Section 25(i) –B/ 27(3) of the Arms Act and one Kailash Dehury (since acquitted) implicating him in offence under Section 25(i)-B/27(3) of the Arms Act.

3. Prosecution has examined fourteen witnesses to prove the charge. Out of whom P.Ws.1, 2 and 3 are the eye witnesses; P.Ws.5 and 6 are the seizure witnesses; P.W.13 is the Medical Officer, who conducted the post-mortem examination; P.W.12 is the younger brother of the deceased and P.W.14 is the Investigating Officer. Some witnesses to peripheral facts like seizure, etc. are P.Ws.4, 8, 9 and 10.

4. The defence plea is one of complete denial and the present appellant got examined himself as D.W.1 to prove the defence plea to the effect that four years back the informant (P.W.11) had approached him in his village for his engagement as field servant ('Halia') but on denial by him (appellant) he (P.W.11) had threatened him to see. D.W.1 has taken the plea of alibi by deposing that he had never seen or gone to the spot village, i.e. Barapada at any point of time.

5. Learned Trial Court, on consideration of the materials on record and especially evidence of P.Ws.1, 2 and 3, who are eye witnesses to the occurrence, held the appellant guilty of offence under Section 302, I.P.C. and convicted and sentenced him thereunder. Learned Trial Court, however, on consideration of the evidence on record, acquitted the appellant and another Kailash Dehury of the charge under Section 25(i)-B/27(3) of the Arms Act.

6. Learned counsel for the appellant sounds feeble in his submission so far as the eye witness account of P.Ws.1, 2 and 3 is concerned. It is submitted by him that the occurrence having happened after hot exchange of words between the appellant and the deceased following a tussle and yielding of gun by the appellant to cause only a single injury on the chest of the deceased, the appellant may be found guilty of offence under Section 304, Part-II, I.P.C. and his conviction under Section 302, I.P.C. is bad in law.

Learned Addl. Standing Counsel, on the other hand, supports the impugned judgment.

7. There is no denying of fact that P.Ws. 1, 2 and 3 have been examined as eye witnesses to the occurrence. Learned counsel for the appellant relies on the cross-examination of P.W.1 and persuades us to take the evidence of P.W.1 as touchstone to disbelieve the presence of P.Ws. 2 and 3 at the spot at the time of occurrence and also disbelieve their version on the manner they are deposed to have witnessed the occurrence. P.W. 1 in his cross-examination has stated thus :-

> "…….I along with Abhaya and Gopal heard the sound of a gun at the deceased. We three have already reached our respective houses. We came to the spot after hearing the sound of the gun and found the deceased with gun shot injuries on his person……"

Relying on the aforesaid piece of evidence, learned counsel for the appellant submits that if P.W.1 is believed on the aforesaid aspect, then it is to be held that by the time he heard the gun shot sound, Gopal (P.W.2), Abhaya (P.W.3) and he himself (P.W.1) had already reached their respective houses and from there they came to the spot hearing the gun shot sound. Such a fact, however, has not been elicited from P.Ws.2 and 3 in their cross-examination. P.Ws. 2 and 3 are consistent so far as the injury by gun shot on the deceased as caused by the appellant is concerned. P.W.3 even has identified the gun used by the appellant as (M.O.-I). P.W.2 could not identify the gun when confronted to him but he stated before the court that the appellant had used a gun of the type that was confronted to him. P.Ws. 2 and 3 are corroborated in material particulars by P.W.1 if he is even disbelieved as eye witnesses in as much as P.W.1 is the witness to the facts attending the occurrence and the facts that followed after the occurrence though in view of the afore quoted evidence in his cross-examination he cannot be held to be an eye witness to the occurrence. Further P.Ws. 2 and 3 are corroborated by the Medical Officer (P.W.13), who had conducted the post-mortem examination and specifically opined that the injury caused to the deceased is caused by gun shot. Taking into consideration all the aforesaid facts, we do not find any justification to disbelieve P.Ws. 2 and 3 on the touchstone of what P.W.1 testified in his cross-examination.

8. Coming to the next question regarding the nature of offence committed by the appellant, learned counsel for the appellant relies on the case of **Surendra Singh alias Bittu *v.* State of Uttaranchal**, A.I.R. 2006 S.C. 1920 to drive his submission home to the effect that in the fact and circumstances of the present case *Exception* 4 to Section 300, I.P.C. is to be invoked and the appellant is to be held guilty of offence under Section 304, Part-II, I.P.C.

9. It is well settled in law (*see* **Ghapoo Yadav and others *v.* State of M.P.**, A.I.R. 2003 S.C. 1620) that sudden quarrel without premeditation is not sufficient to invoke *Exception* 4 to Section 300, I.P.C. Along with the aforesaid ingredient it must further be shown that the offender had not taken undue advantage or acted in a cruel or unusual manner while committing the offence.

10. In the present case, all the witnesses, i.e., P.Ws. 1, 2 and 3 are in unison so far as the fact attending the occurrence is concerned. All of them have testified that there was some sort of enmity between the deceased and the appellant prior to the occurrence, as the appellant had taken forcibly one lathi of the deceased. The genesis of the occurrence shows that there was initial quarrel between the appellant and Abhaya (P.W.3) when the appellant begged for 'Tadi' (date-palm juice) from Abhaya, but Abhaya denied as he had no stock. Being enraged, the appellant broke the earthen pots used for collection of 'Tadi' to which the deceased protested. There was hot exchange of words followed by tussles and all of a sudden the appellant fired at the deceased causing the gun shot injury on his chest which according to the Medical Officer (P.W.13) had involved internal organs like diaphragm, 5th and 6th rib of the right side, lungs and liver. The injury, no doubt, as described by the Medical Officer (P.W.13) is sufficient in ordinary course of nature to cause death and it is opined to have been caused from close proximity. There is nothing on record to show that except the deceased other witnesses like P.Ws.1, 2 and 3 had intervened or any of them was armed at the relevant time. There is also nothing to show that the appellant was provoked by the deceased in any manner. The deceased objected to the action of the appellant when he broke the earthen pots used for collection of 'Tadi' and the appellant aggressed upon him resulting in hot exchange of words followed by tussles. In such a situation the appellant having yielded the gun to cause the gun shot injury which ultimately caused instantaneous death of the deceased, we do not think, facts and principles decided in the case of **Surendra Singh alias Bittu** (supra) can be applied to the present case. Had the appellant intended, he could have caused more injuries than caused can never be made the test to apply *Exception* 4 to Section 300, I.P.C., nor in all cases of death by single injury caused in course of a tussle, etc. can be set as a test to apply *Exception* 4. Each case is to be adjudged on the basis of facts peculiar to that case.

11. The appellant having taken undue advantage of the situation and he having acted in a cruel and unusual manner, he cannot be extended with the benefit of *Exception* 4 to Section 300, I.P.C.

12. In the result, we do not find any merit in the appeal. The appeal is accordingly dismissed.

Appeal dismissed.

2012 (II) ILR - CUT- 805

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

W.P.(C) NO.9613 OF 2011 (Dt.01.08.2012)

SURYA NARAYAN ACHARYA ……..Petitioner

.Vrs.

STATE OF ORISSA ……Opp.Party

A. ORISSA CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1962, - RULE 18.

Dismissal of Government Servant – Distinction between dismissal for misconduct and dismissal for conviction – Petitioner dismissed due to his conviction – Conviction on a Criminal charge does not automatically entail dismissal, removal or reduction in rank – The word "consider" connotes that there should be active application of mind by the disciplinary authority – Nothing on record to show that the penalty imposed after consideration of the circumstances of the case – Order challenged before the Tribunal – Tribunal dismissed the case without assigning any reason – Reasons being the soul of an order the order of the Tribunal is illegal – Held, impugned order passed by the Tribunal as well as the order of the disciplinary authority are quashed. (Para 13,14)

B. CONSTITUTION OF INDIA, 1950 – ART.311 (2) r/w Rule 18 of the Orissa CCA Rules, 1962.

Dismissal of Government Servant for conviction – Art.311 (2) does not confer a mandatory duly on the disciplinary authority to impose major penalties like dismissal, removal or reduction in rank, the moment an employee is convicted – The disciplinary authority has to hold an inquiry and hear the delinquent officer as provided under Art.311 (2) of the constitution – When inquiry could not be conducted the disciplinary authority should record its reasons for its satisfaction that it was not reasonably practicable to hold inquiry – If such reason is not recorded in writing the order dispensing with the inquiry and the order of penalty following there upon would both be void and unconstitutional – The recording of reasons in writing for dispensing with the inquiry must precede the order imposing the penalty – Since the petitioner in this case was dismissed due to his conviction the

disciplinary authority need to peruse the judgment and consider whether the conduct of the employee which led to his conviction warrants imposition of such penalty – No material on record to show that the penalty imposed after consideration of the conduct of the employee which led to his conviction – Held, impugned order passed by the Tribunal and the order passed by the disciplinary authority are quashed. (Para 9 & 14)

Case law Relied on:-

(1985)3 SCC 398 : (Union of India & Anr.-V-Tulsiram Patel).

Case laws Referred to:-

1.(2010)13 SCC 427 : (Oryx Fisheries Pvt. Ltd.-V- Union of India & Ors.)
2.(2010) 9 SCC 496 : (Kranti Associates Pvt. Ltd.-V- Masood Ahmed Khan & Ors.)
3.(2010) 7 SCC 678 : (East Coast Railway & Anr.-V-Mahadev Appa Rao & Ors.)
4.(2010)4 SCC 785 : (Assistant Commissioner, Commercial Tax Deptt. Works Contract & Leasing, Kota-V- Shula & brothers.)
5.(2001)4 SCC 355 : (Smt.Akhtari Bi-V- State of Madhya Pradesh)
6.(1995)3 SCC 377 : (Deputy Director of Collegiate Education-V- S.Nagoor Meera).
7.AIR 1975 SC 2216 : (Divisional Personnel Officer, Southern Railway & Anr.-V- T.R. Challappan).

For Petitioner - M/s. Rama Ch. Sarangi, M.K.Pattnaik, A.K.Mohanty, D.Bhatta,Advocates.
For Opp.Party - Mr. Trilochan Rath, Addl. Standing Counsel.

B.K.MISRA, J. The petitioner who was a Junior Grade Diarist, Industries Department being dismissed from Government service as per the provisions of Rule 18 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (hereinafter referred to C.C.A. Rules, 1962) vide Government Office Order No. VIII-OE-106/2005. 2909/I dated 26.2.2007 (Annexure-4) approached the Orissa Administrative Tribunal, Bhubaneswar Bench by filing Original Application No. 385 of 2010 praying therein for quashing the order of the Government at Annexure-4 or in the alternate to quash Annexure-1 with consequential relief for a direction to the respondent No.1 for payment of compensatory pension so also for regular pension to him. The Tribunal by the impugned order at Annexure-1 dismissed the

Original Application filed by the petitioner and did not interfere with the order of dismissal passed by the Government. Being aggrieved with the order of the Tribunal at Annexure-1, the present petitioner has approached this Court under Articles 226 and 227 of the Constitution of India praying therein to quash the impugned order at Annexure-1 and to direct the opposite parties to pay the service benefits to the petitioner.

2. The petitioner's case is that while he was working as a Junior Grade Diarist in Industries Department, Government of Orissa was involved in a case of dowry death and torture of his daughter-in-law and faced trial in the court of the Ad hoc Addl. Sessions Judge, Fast Track Court No. IV, Bhubaneswar vide S.T. No. 164-62 of 2005 arising out of G.R. Case No. 4150 of 2004, having been charged under Sections 304-B and 498-A read with Section 34 of the Indian Penal Code as well as under Section 4 of the Dowry Prohibition Act. The petitioner was found guilty of the offences under Section 304-B and under Section 498-A of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years for the offence under Section 304-B of the Indian Penal Code. He was further convicted under Section 498-A of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.2,000/-. After such conviction the present petitioner two days prior to his attaining the age of normal superannuation was dismissed from service as per the order of the Government dated 26.2.2007. The aforesaid order of the Government was challenged by the petitioner before the Orissa Administrative Tribunal, Bhubaneswar, but the same was dismissed vide Annexure-1.

3. The petitioner challenges the order of the Tribunal mainly on the ground that the impugned order at Annexure-1 is a non-speaking one and such order has been passed without application of judicial mind and conscience and the Tribunal did not thought it proper to look into the illegalities committed by the Administrative Department in passing the order of dismissal without recording the reasons for its satisfaction that it was not reasonably practicable to hold the enquiry as contemplated by Article 311(2). It is also the case of the petitioner that when the Administrative Department namely the disciplinary authority violated the constitutional obligation and when the order of penalty is void and unconstitutional one it is most unfortunate that the Tribunal being a quasi judicial authority while acting in exercise of its statutory power failed to discharge its duty fairly with an open mind. Accordingly, the petitioner has approached this Court for quashing the impugned order at Annexure-1 as well as the order of dismissal at Annexure-4.

4. The Opposite Parties have filed their counter wherein while praying for dismissal of the writ petition, it is their stand that taking into account the conduct of the petitioner that he was involved in a case of dowry torture and death of his daughter-in-law he was convicted by a Sessions Court in S.T. No.164-62 of 2005 and accordingly the order of dismissal was rightly issued by invoking power under Rule 18 of the C.C.A. Rules, 1962. Besides that it is also the case of the opposite parties that the prayer of the petitioner for sanction of compassionate allowance was also considered by the Department in terms of Rule-46 of the Orissa Civil Service (Pension) Rules, 1992, but was disallowed on merit and for that no motive can be attributed.

5. We have heard learned counsel appearing for the parties extensively and also perused the concerned file produced by the Opposite Parties relating to the dismissal of the petitioner.

6. The main thrust of the argument of the learned counsel for the petitioner by placing reliance on various decisions of the Apex Court is that the reasons in support of the decision must be cogent, clear and succinct. The pretence of reasons or rubber-stamp reasons is not to be equated with a valid decision making process. Accordingly, it was contended that since the order of dismissal has been passed in absence of reasons that cannot be sustained and consequently the order of the Tribunal at Annexure-1 also cannot be sustained. The Apex Court in plethora of judicial pronouncement have opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the “inscrutable face of a sphinx”, (2010) 13 SCC 427, ***Oryx Fisheries Private Limited V. Union of India and others***, (2010) 9 SCC 496, ***Kranti Associates Private Limited V. Masood Ahmed Khan and others***, (2010) 7 SCC 678 ***East Coast Railway and another V. Mahadev Appa Rao and others*** and (2010) 4 SCC 785 ***Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota V. Shula and brothers***.

7. Learned Addl. Standing Counsel appearing for the opposite parties contended that after the amendment of Clause-(2) of Article 311 of the Constitution (42) Amendment Act, 1976 and the provisions contained in Rule, 18 of the CCA Rules, 1962 when the petitioner was held guilty of serious criminal offences like dowry death and dowry torture of his daughter-in-law and when he was convicted by a competent court of law the disciplinary authority has rightly dismissed the petitioner from service by dispensing with issuance of any show cause notice and also the procedure prescribed in Rules 15, 16 and 17 of the CCA Rules, 1962. It was very

strenuously urged by learned Addl. Standing Counsel that in the criminal trial the present petitioner was afforded full and complete opportunity to contest the allegation against him and to make out his defence. In the criminal trial charges were framed to give clear notice regarding the allegations made against the accused, witnesses were examined and cross-examined in presence of the accused and the accused was also given full opportunity to produce his defence and it is only after hearing the argument the Court passed the final order of conviction. In the instant case in view of the fact that the petitioner has been convicted after a full dressed hearing in a criminal trial, holding of departmental enquiry if not would have been dispensed with there would have been unnecessary wastage of time and expense. Accordingly, it was contended that since the founders of the Constitution thought that where once a delinquent employee have been convicted of a criminal offence that should be treated to be sufficient proof of misconduct and the disciplinary authority has the discretion to impose the penalties referred to in Article 311(2) of the Constitution of India. Accordingly, it was urged by the learned Addl. Standing Counsel that the writ petition should be dismissed with exemplary cost.

8. It is an admitted fact that after the present petitioner was convicted in S.T. No. 164-62 of 2005 by the Ad hoc Addl. Sessions Judge, (Fast Track Court No. IV), Bhubaneswar, appeal has been preferred by the appellant and he has been released on bail. There is no dispute that the appeal being a statutory right, trial Court's verdict does not attain finality during pendency of the appeal and for that purpose the trial is deemed to be continuing despite conviction, ***(Smt. Akhtari Bi V. State of Madhya Pradesh), (2001)4 SCC 355***. At this juncture we are not at all concerned with the provisions contained in Section 389(1) of the Code of Criminal Procedure nor we are concerned with the position that on the event the petitioner would be acquitted in the appeal or other proceeding, the impugned order of dismissal can always revised and the petitioner would be entitled to all the service benefits to which he would have been entitled to, had he continued in service, ***(Deputy Director of Collegiate Education V. S.Nagoor Meera), (1995) 3 SCC 377***.

9. What has been stressed upon in the instant case is that the impugned order of dismissal has been passed by the concerned department of the Government i.e. the disciplinary authority without application of mind and without considering the entire circumstances of the case. But it has been passed only on the ground of conviction of the petitioner in a criminal trial. Rule 18 of the Orissa Civil Services (CCA Rules, 1962) reads as follows:-

"18. Special Procedure in certain cases- Notwithstanding anything contained in Rules 15, 16 and 17-

(i) where a penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) where the disciplinary authority is satisfied for reasons to be recorded in writing by that authority that it is not reasonably practicable to follow the procedure prescribed in the said rules; or

(iii) where the Governor is satisfied that in the interest of the security of the State it is not expedient to follow such procedure. The disciplinary authority may consider the circumstances of the case and pass such orders thereon as it deems fit:

Provided that the Commission shall be consulted before passing such orders in any case in which consultation is necessary."

Thus, on a plain reading of the aforesaid provisions, it is seen that a duty has been cast on the disciplinary authority to consider the circumstances of the case and pass such orders as it deems fit. Similarly Article 311(2) of the Constitution of India gives the discretionary power to the disciplinary authority to impose the penalties referred to under Article 311(2) namely, dismissal, removal or reduction in rank. Proviso (a) to Article 311(2) is an enabling provision and it does not enjoin or confer a mandatory duty on the disciplinary authority to pass an order of dismissal, removal or reduction in rank the moment an employee is convicted. The disciplinary authority has to consider the circumstance of the case and pass such orders as it deems fit. The word consider connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge, ***(AIR 1975 S.C. 2216, Divisional Personnel Officer, Southern Railway & another V. T.R. Challappan)***. Similarly a constitution Bench of the Apex Court in the case reported in ***(1985) 3 SCC 398, Union of India and another V. Tulsiram Patel*** have categorically observed as follows:-

" Where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that

penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. **However, a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant and therefore, it is it is not mandatory to impose any of these major penalties**. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order."

The constitution Bench of the Apex Court has categorically observed that:-

" the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional. The recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty."

10. In the instant case the impugned order of dismissal at Annexure-4 reads as follows:-

" Whereas consequent upon conviction u/s 304-B/498-A read with 34 of IPC and Section 4 of Dowry Prohibition Act vide judgment dated 22.1.2007 of Hon'ble Adhoc Additional Sessions Judge Fast Track Court No. IV, Bhubaneswar in S.T. Case No. 164-62 of 2005 (Arising out of G.R. Case No. 4150 of 2004), Sri Surya Narayan Acharya, Junior Grade Diarist, Industries Department is dismissed from Government service with immediate effect as per the provisions of Rule 18 of O.C.S. (CC &A) Rules 1962."

11. There is nothing on record to show that the penalty was imposed after consideration of the circumstances of the case as required under Rule 18 of the CCA Rules. There is a clear distinction between dismissing a

Government servant for his misconduct and dismissing him for his conviction. The order in Annexure-4 quoted above shows that it was a dismissal flowing from conviction. We perused the file produced by the learned Addl. Standing Counsel in Industries Department which shows that it is only on receipt of a note from the Deputy Secretary to Government in General Administration Department calling for a report from the Industries Department for reinstating the appellant after his conviction and why he was not dismissed taking recourse to the provisions of Rule 18 of the CCA Rules before the deemed date of retirement of the petitioner i.e. 28.2.2007, the order of dismissal at Annexure-4 was issued on 26.2.2007 and the administrative file is completely silent as to under what circumstances the Administrative Department i.e. the disciplinary authority passed the order of dismissal. The order of the Deputy Secretary to Government is quoted below:-

> "Consequent upon conviction of Sri Surya Narayan Acharya, Junior Grade Diarist for offences U/s 304-B/498-A r/w 34 IPC and Section 4 of the DP Act vide judgment dated 22.1.2007, the Administrative Department may immediately dismiss Sri Acharya from service by taking recourse to the provisions u/r 18 of the O.C.S. (CC&A) Rules, 1962 before the deemed date of his retirement i.e. 28.2.2007.
>
> The Administrative Department reinstated Sri Acharya in gross violation of instructions contained in G.A. Deptt. Circular No. 16570 dated 15.6.1992 and advice given by this Department. Such a decision of the Administrative Department indicates a gesture of undue leniency to a Government servant involved in a dowry death case. It is apprehended, this may amount to show of undue official favour. The Administrative Department are requested to furnish reason thereof for perusal of the Govt."

12. Admittedly Rule-13 of the CCA Rules enumerates the penalties which can be inflicted on a Government servant in a disciplinary proceeding. Dismissal from service is one of the penalties described in clause (ix) of the Rule. The procedure for imposing the penalties of dismissal which is a major penalty is laid down in Rule 15. In the instant case the order of dismissal was not passed in a disciplinary proceeding. Therefore, it is not a penalty imposed under Rule 15. Rule 18 provides a special procedure for imposition of penalties in certain cases. Since in the instant case dismissal of the petitioner by the order in Annexure-4 is not a penalty imposed under the CCA Rules, the provisions of Rule 12(4) are not attracted.

13. After giving our anxious hearing to the matter and keeping in mind the position of law and the CCA Rules, we are constrained to hold that the learned Tribunal failed to exercise its jurisdiction in the matter. The impugned order of the Tribunal smacks of application of judicial mind and conscience. It is to be remembered that the reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. The orders of the Court must reflect what weighed with the court in granting or declining the relief claimed by the petitioner.

14. Thus, in the present facts and circumstances of the case, we have no hesitation to quash the impugned order of the Tribunal at Annexure-1 with regard to the dismissal of the petitioner as well as the impugned order of dismissal of the petitioner passed by the Government in Industries Department at Annexure-4. Since the impugned order of dismissal of the petitioner from service is set aside and quashed, it would be open to the concerned authority to consider the facts of the case and pass such order of punishment as would be deemed fit and proper by following the procedures laid down in Rule 18 of the CCA Rules.

15. We direct the Government in Industries Department to complete the exercise within a month on receipt of this order as the petitioner has already been dismissed from service since 26.2.2007.

With the aforesaid observations, the writ petition stands disposed of.

Writ petition disposed of.

2012 (II) ILR - CUT- 814

M. M. DAS, J.

W.P.(C) NO. 3512 OF 2011 (Dt.17.02.2012)

G.B. DHYAN CHANDRA COLLEGE, HAJIPUR .....Petitioner.

.Vrs.

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

EDUCATION ACT, 1969 (ACT NO.15 OF 1969) – S.6(9).

Petitioner College established in 1992 – Permission granted after inspection by Govt. U/s.5 of the Act – College acquired sufficient land in its name and had been granted temporary recognition for more than seven years as prescribed U/s.6 (9) of the Act – Held, the temporary recognition granted after completion of seven years from the date of establishment should be taken to be a permanent recognition granted to the petitioner-College – Held, impugned orders passed by the prescribed authority as well as the appellate authority are quashed – Direction issued to the prescribed authority to pass a formal order granting permanent recognition to the petitioner-College from the session 2000-2001. (Para 9,10)

For Petitioner - M/s. B.Routray, D.K.Mohapatra, B.B.Routray, D.Routray, P.K.Sahoo & S.Das.
For Opp.Parties- Addl. Govt. Advocate.

M.M. DAS,J. The Governing Body of Dhyan Chandra College at Hajipur in the district of Jagatsingpur has filed the present writ petition with a prayer to issue a writ in the nature of mandamus or any other writ/direction directing the opp. Parties to grant recognition to the petitioner-college for the period from 2004-05 and 2005-06 and permanent recognition with effect from the session 1999-2000.

2. The brief facts of the case are that, Dhyan Chandra College was established in the year 1992 to cater to the educational need of the locality upon making an application for grant of permission and upon necessary inspection being conducted by the Government. Such permission has been annexed as Annexure-1 to the writ petition. After obtaining permission, the educational agency/Governing Body not only admitted students but also applied for grant of recognition as required under section 6 of the Orissa

Education Act, 1969 (hereinafter referred to as 'the Act'). Accordingly, temporary recognition was granted by the prescribed authority under section 6 (6) of the Act for the session 1992-93 by order dated 3.5.1995. Grant of such temporary recognition to the petitioner-college continued from the session 1992-93 till 2003-04 un- interruptedly, i.e., for 12 years. In the year 2004, even though an application was made by the Governing Body/Administrator, no recognition was granted for the sessions 2004-05 and 2005-06. But, surprisingly, under Annexure- 3 series, fresh temporary recognition was granted for the session 2006-07 till 2008-09. During the period 2006-07, the petitioner-college made an application for grant of permanent recognition in terms of section 6 of the Act, but the authorities in a mechanical manner without considering the materials available with them and without considering the statutory provisions rejected the proposal vide order dated 31.3.2007 for grant of permanent recognition mainly on the ground that the petitioner-college did not satisfy the basic requirement, i.e., the extent of land required for the college. The rejection letter dated 31.3.2007 has been annexed as Annexure-5 to the writ petition. Against the said order of rejection, the petitioner-college preferred an appeal before the Hon'ble Minister who rejected the said appeal. Being aggrieved by such rejection of the application for grant of permanent recognition, the petitioner has preferred the present writ petition for appropriate relief.

3. Mr. Routray, learned counsel appearing for the petitioner submitted that the scheme of the Act provides that permission for establishment of an educational institution is to be granted as per the provisions of section 5 of the Act. Conditions stipulated in section 5 of the Act having been fulfilled, the petitioner-college was granted such permission for establishment of the college. Recognition of educational institution is provided under section 6 of the Act. Section 6 (6) of the Act provides that the committee shall consider the application for recognition together with the report and the recommendation of the prescribed authority and may call for such additional information or may direct such further inspection as it deems necessary and the committee having considered all aspects shall make an order either granting recognition or temporary recognition with or without conditions or rejecting the application for reasons to be recorded. It is also provided that the prescribed authority shall communicate the order made by the committee in such manner and with such particulars, if any, as may be prescribed.

4. It is evident from the facts of the case that after obtaining permission to establish the college under section 5 of the Act, an application was made by the college in 1992-93 for grant of recognition upon consideration of which, the college was granted temporary recognition. Basing on such

temporary recognition, the Council of Higher Secondary Education also granted affiliation to the college and allowed the students to appear in the examination.

5. Examining the scheme of the Act, it appears that under section 6-A, the conditions for recognition are provided which stipulate that no educational institution shall be eligible for recognition under section 6 of the Act, unless it fulfills the conditions enumerated therein, one of which is, the institution is required to provide such extent of land as may be prescribed for the educational institution under a valid title and the institution is under lawful and valid possession of that land. Sub-section (9) of section 6 of the Act provides that if a private educational institution does not fulfil the conditions for recognition in regard to land, building and furniture, but the committee is satisfied that it has made reasonable adequate provisions for accommodation and imparting education, it may decide to grant temporary recognition for a period not exceeding one year at a time and not exceeding five years (amended to 7 years on 29.3.2001) in aggregate.

6. As admittedly, it is seen that the petitioner-college was repeatedly granted temporary recognition from the year 1993-94 till 2001-2002, i.e., for more than seven years and even thereafter, again temporary recognition has been granted from 2006-07 till 2008-09, though the application for permanent recognition made by the petitioner-college was rejected in the meeting dated 28.7.2004, which is clearly in contravention of the provisions of section 6 (9) of the Act, Mr. Routray submits that such recognition though nomenclatured as “temporary recognition” after seven years from grant of first temporary recognition should be presumed to be a “permanent recognition”. It is further found that the only requirement to be met by the petitioner-college was acquisition of land as per provision of section 6-A of the Act and the petitioner-college has already acquired more than Ac.5.00 acres of land as is evident from the documents annexed.

7. In the impugned order, the ground for rejection has been assigned that since the educational institution was required to be recognized permanently by 1997-98 for +2 Arts as it is seen that the institution has applied for permanent recognition on 29.11.2000, from the year 2000-01 and the institution has not acquired adequate land in its name, application for permanent recognition should have been rejected out-right. Quoting section 6 (9) of the Act, in the impugned order, it has been stated that as the institution has completed more than seven years by 29.3.2001, no permanent recognition can be granted. Copy of sale–deed dated 9.9.1992, by which the college has purchased land to an extent of Ac. 1. 44 decimals

and sale deed dated 15.5.2006 showing purchase of land to an extent of Ac. 2.33 decimals by the college has been annexed to the writ petition. No where in the rules, it has been stipulated as to what extent of land a college is required to acquire in its name for the purpose of section 6-A of the Act.

8. From the above admitted facts, it is clear that the prescribed authority without due application of mind continued to grant temporary recognition to the petitioner-college for, more than a decade, which he could not have done as per the provisions of section 6 (9) of the Act. The appellate authority in its order while confirming the impugned order of the prescribed authority, has only recorded two lines which is as follows:

"30.8.10.

> Heard the appellant. In view of the report of the prescribed authority and lack of documents retrospective permission for the gap period is rejected."

The above order of the appellate authority shows complete non-application of mind in dealing with the appeal filed by the petitioner-college.

9. This Court finds that since the petitioner-college has acquired sufficient land in its name and had been continuously granted temporary recognition much more than seven years as prescribed under section 6 (9) of the Act, the temporary recognition granted after completion of seven years from the date of establishment of the college, i.e., for the year 2000-2001, should be taken to be a permanent recognition to have been granted to the petitioner-college.

10. Hence, the impugned orders passed by the prescribed authority as well as the appellate authority stand quashed and the writ petition is disposed of directing the prescribed authority to pass a formal order granting permanent recognition to the petitioner – college from the session 2000-2001. The prescribed authority shall act on production of a certified copy of this judgment and issue such letter of permanent recognition within a period of fifteen days from the date of production of certified copy of this judgment before him by the petitioner.

Writ petition disposed of.

2012 (II) ILR - CUT- 818

M. M. DAS, J.

OJC. NO.17505 OF 1997 (Dt.04.07.2012)

INDIAN RARE EARTHS LTD. ……Petitioner

.Vrs.

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

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

Employer may pass an order of dismissal of the workman from service but at the same time he has to make an application U/s.33 (2) (b) proviso for approval of the action taken by him – If approval is not granted the order of dismissal becomes ineffective from the date it was passed and failure to make the application U/s.33(2) (b) proviso of the Act would render the order of dismissal inoperative.

In the present case management dismissed O.P.2 & 3 workmen from service and sought for approval of the action and the Tribunal having refused such approval it is deemed that both O.P.2 & 3 have not been dismissed from service but were continuing as such – Held, since O.P.3 retired in the meantime the management is liable to pay the wages of O.P.3 from the date of the order of dismissal till the date of his superannuation – For O.P.2 the order of dismissal is non est and the management shall allow him to continue to work and he shall be entitled to the wages for the period for which he has not been permitted to work. (Para 11,12)

Case laws Referred to:-

1.1975 STPL (LE) 7887 SC, AIR 1976 SC 98. : (Bharat Iron Works-V- Bhagubhai Balubhai Patel & Ors.)
2.AIR 1959 SC 529 : (Burn & Co. Ltd.-V- Their Workmen & Ors.)
3.(1998) 9 SCC 561 : (Shriji Vidyalaya-V- Patel Anil Kumar Lallubhai)
4.AIR 1963 SC 1756 : (P.H. Kalyani-V- M/s. AIR France, Calcutta)
5.AIR 2001 SC 2309 :(M.D.,Tamil Nadu State Transport Corpn.-V- Neethivilangan Kumbakonam)
6.AIR 2002 SC 643 : (Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd.-V- Shri Ram Gopal Sharma & Ors.)

7,1987(54) FLR : (Suresh Sakharam Patil-V- Mahindra & Mahindra Ltd.)
8.1989(58) FLR 28 : (M/s. I.D.L. Chemicals Ltd.-V-S.R.Tamma & Anr.)

For Petitioner - M/s. S.B.Nanda, S.K.Mishra, P.K.Mishra, D.P.Nanda, U.N.Nayak, J.K.Nanda & P.K.Mohapatra.

For Opp.Parties - M/s. S.S. Rao, B.K.Mohanty, N.Pattnaik & S.Patra. (for O.P.No.2)
M/s. R.K.Mohanty, N.Behuria, D.K. Mohanty, A.P.Bose, S.N.Biswal, S.K.Mohanty & M.R.Das . (for O.P.No.3)
Addl. Govt. Advocate.

M. M.DAS, J. The management of the Indian Rare Earths Limited has challenged the order dated 25.11.1997 passed by the Industrial Tribunal, Orissa, Bhubaneswar on an application filed by the petitioner-management under Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'The Act').

2. From the facts, it is revealed that the management, on charges being framed against the opp.parties 2 and 3 (workmen) called upon them to show cause. The workmen denied all the charges levied against them and pleaded that they being the President and General Secretary respectively of the recognized Trade Union have been singled out for being victimized from out of a number of workmen. The domestic enquiry held by the management culminated in orders of dismissal of the said workmen, which were passed on 22.4.1991. Since industrial disputes were pending before the Tribunal in which both the workmen were concerned, the management filed an application under Section 33(2)(b) of the Act for approval of the orders of dismissal passed by it on 22.4.1991. The said application was registered as I.D. Case No.1 of 1991 (C). Both the workmen i.e. opp.parties 2 and 3 filed a joint reply to the show cause notice. The petitioner-management examined two witnesses who are the Enquiry Officer and the Deputy General Manager (P & A). In defence the workmen examined themselves. 35 documents were marked as exhibits. The Tribunal after hearing the I.D. case expressed its disapproval of the dismissal order passed by the management on the ground that the workmen have been victimized.

3. Mr. Nanda, learned counsel for the petitioner contended that the Tribunal has disapproved the order of dismissal on three grounds, which are (i) when 30 persons were said to have entered into the administrative

building of CMD, there is no explanation from the management as to why they were not charge-sheeted though they were also similarly placed as the two opp.parties-workmen, this implies that the opp.parties-workmen have been victimized for their union activities being the President and the General Secretary of the Trade Union. (ii) their past records had not been taken into consideration and/or there was no past bad record against the opp.party no.3 while three warnings were issued against the opp.party no.2 which were for unauthorized absence and not for any assault or misbehaviour against any superior officer and (iii) for the first charge-sheet dated 18.5.1990, they had not been suspended from which the Tribunal assumed that those misconducts were not alarming in nature. He further contended that all the three reasons which the Tribunal has assigned for disapproval to the order of dismissal passed by the Disciplinary Authority are perverse on both facts and in law. In order to support his contention, Mr. Nanda has attempted to take this Court into the various materials produced before the Tribunal and the evidence adduced and also relied upon a number of case laws to support his contention, such as, the decisions in the case of Bharat Iron Works –v- Bhagubhai Balubhai Patel and others, 1975 STPL (LE) 7887 SC, AIR 1976 SC 98, Burn & Co. Limited-v- Their workmen and others, AIR 1959 SC 529, Shriji Vidyalaya –v- Patel Anil Kumar Lallubhai, (1998) 9 SCC 561 and other decisions.

4. Learned counsel for the workman-opp. party no.3 submitted that two questions arise for consideration in the present writ petition, which are (a) the propriety of the impugned order under Annexure-1 (b) what is the effect of such disapproval on the claim of the workman-opp. party no.3 till such disapproval is set aside by any court of law. He brought to the notice of this Court that had the opp.party no.3 been in service he would retired in October, 2010 for which he presses the second question raised as quoted above.

5. By order dated 24.12.1997 passed in the writ petition, this Court stayed the impugned order and on appearance of both sides, the said order was modified by order dated 30.3.1999, which is quoted hereunder:

> "The present writ petition is at the instance of Indian Rare Earths Ltd. They have challenged the order of Industrial Tribunal, Bhubaneswar in rejecting the application under section 33 (2) (b) of the Industrial Dispute Act, 1947 where the proposed approval of the dismissal of the workmen, namely, Raj Kumar Panda and Ajay Kumar Choudhury were sought for. The impugned order is dated 25th

November, 1997. By order dated 24.12.1997, the said order remain stayed. The workmen-opp.parties asked for payment in the meantime as they are not being allowed to join nor they are being any financial benefit although there is dismissal of proposed recommendation disposed of by the Tribunal.

It is submitted on behalf of the petitioner-management that the opp.parties are not entitled to financial benefit as envisaged under Section 17-B of the Industrial Disputes Act. We do not appreciate the steps taken by the petitioner-management. If the petitioner-management has passed the impugned order of dismissal unless the same is approved by the Tribunal, the workmen cannot be dismissed. If there is any relief available against the dismissal, it was open for the management to approach the Tribunal in setting aside the same in accordance with law. In the eye of law, the workmen have not been dismissed, but they are deprived of any financial benefit.

Mr. Nanda, for the petitioner-management submitted that the entire matter may be fixed for early disposal. It is to be seen how the workmen who are not dismissed and deprived of their financial benefit. In a pragmatic way, we modify the order dated 24.12.1997 to the extent that the workmen who are not being paid for years together and who are suffering from hungry and penury may be paid Rs.10,000/- immediately within a month from the date. This matter may be fixed for final disposal six weeks from the date, namely, on 3rd May, 1999 before the Bench presided over by Hon'ble Mr. Justice R.K. Patra. Liberty to mention before the Bench for giving priority in disposal as the business of the said Bench would permit."

6. Relying upon the aforesaid order passed by this Court, learned counsel for the opp.party no.3 contended that in view of the above order or even the stay order passed earlier, the order of dismissal of the workmen did not take effect as under law, such a dismissal order is non est in the eye of law till statutory approval under Section 33(2) (b) of the Act is accorded by the competent court. He further contended that the management-petitioner is bound under law to take back the workman-opp. party no.3 to service and/or pay all his wages till statutory approval is granted. He also relied upon various case laws in support of his contention that the legislative intention behind the provision of Section 33 (2)(b) of the Act is clear that it is intended to provide the workmen with a cloak of statutory protection of being immuned to any disciplinary action during pendency of any proceeding under the Act

so as to obliterate any possibility of victimization. Therefore, till an approval is given by any competent court as prescribed under the Act, the order of dismissal will be invalid and inoperative in law and the management-petitioner has been vested with no authority to withhold the wages of the workmen in the interregnum.

7. With regard to the question of propriety of the impugned order of disapproval as raised by the petitioner-management, learned counsel for the workman-opp.party no.3 contended that the order cannot be faulted with as in a writ of certiorari, the Court is not required to go into the disputed questions of fact before the Tribunal inasmuch the impugned order of disapproval has been passed on the basis of a finding of fact that the workman-opp.party no.3 has been subjected to victimization and discrimination, inasmuch as he is a protected workman. It is further submitted by him that the findings in paragraphs-5 and 6 of the impugned order are pure findings of fact and therefore, they are not liable to be interfered with while exercising of writ jurisdiction under Article 226 of the Constitution. In support of his above contention, he relied upon the decision in the case of ***P.H. Kalyani –v- M/s. AIR France, Calcutta***, AIR 1963 SC 1756. Countering the contention of the petitioner, he also submitted that it is not correct on the part of the management to contend that the workmen never pleaded regarding victimization. Referring to the reply of the workmen exhibited in the case, he submitted that the said documents clearly disclose that a specific plea was taken by the workmen regarding victimization. The other question raised by him was with regard to violation of principles of natural justice by the Enquiry Officer during course of disciplinary proceeding in support of which he contended that the enquiry against the workman-opp.party no.3 was ex parte and it is an admitted case that on the date the workman-opp.party no.3 was required to appear before the Enquiry Officer, the C.B.I. had directed him to appear before them for interrogation. The said letter was marked as Ext.M before the Tribunal. From the above letter, it could be concluded that the opp.party no.3 was not afforded with reasonable opportunity of hearing thereby resulting in gross violation of natural justice. A question was also raised with regard to furnishing a copy of the enquiry report to the workmen. According to the learned counsel for the workmen, the impugned order of non-approval of dismissal of the workmen is also not prejudicial to the management-petitioner inasmuch as the said order is now the subject matter of I.D. Case No.60 of 1997 (C) renumbered as I.D. Case No.126 of 2001 upon a reference made at the behest of the management-petitioner under Section 10 of the Act. In the impugned order, the Tribunal has also taken note of this fact and the petitioner-management has also reserved such a right. Learned counsel for the workman-opp.party no.3 has

supported the impugned judgment and contended that factually, findings given in the impugned judgment are amply proved and punishment of dismissal is clearly disproportionate to the allegations made.

8. Law is well settled that when an application under Section 33 of the Act whether for approval or for permission is made before the Tribunal, the Tribunal initially has a limited jurisdiction only to see whether a prima facie case is made out in respect of the misconduct charged.

9. Learned counsel for the workman-opp.party no.2 relying upon the counter affidavit filed by him contended that the finding of the learned Presiding Officer that Ext.8, the enquiry report, clearly spells out that the incidents which allegedly occurred on 19.5.1990 and 20.5.1990 are similar to that of the incident on 18.5.1990 and not separate. According to the learned counsel, the management in the present writ petition has attempted to change its stand by contending that they are different causes of action. If that be so, on the own showing of the management, the writ petition must fail because the enquiry report does not give a separate finding with regard to the incidents on 19.5.1990 and 20.5.1990. It has been further averred in the affidavit that the allegation made on behalf of the management that the workmen did not plead victimization is absolutely incorrect. It was submitted that as a matter of fact, in his reply, the opp.party no.2-workman, before the Tribunal categorically, stated that the charges leveled against him were fabricated, only to victimize him and he bring a protected workman, such victimization has been caused without following the privileges available to him. It has been further contended that the domestic enquiry was abruptly concluded by setting the opp.party no.2 ex parte thereby there is violation of principles of natural justice and such action was intended to harass him only because he was involved in bonafide Trade Union activities. Learned counsel also argued on facts which, according to him, have been clearly disclosed from the documents exhibited before the Tribunal, and more specifically contended that the opp.party no.2 has been singled out from the alleged mob which according to the management entered into the office premises and committed the occurrence on the relevant dates which clearly amounts to victimization as has been held by the Tribunal. A bare perusal of the impugned order passed by the Tribunal would go to show that the Tribunal arrived at a categorically finding that there is no evidence explaining as to why 30 persons who were said to have entered into the administrative building of the CMD have not been charge-sheeted even though they were similarly placed like the opp.parties-workmen and in the absence of any explanation furnished by the management, the action taken only against the two workmen clearly shows a pick and choose method adopted by the

management and such method indicates victimization. Such discrimination made in respect of the opp.parties-workmen cannot be further cured by analyzing the merit or otherwise of the domestic enquiry. The Tribunal by assigning cogent reasons has concluded that the issue of suspension order on 21.5.1990 is suggestive of the fact that the incident of 18.5.1990 was not at all alarming for which the delinquents were allowed to perform duties for another span of two to three days and all these materials were discussed by the Tribunal leading to the irresistible conclusion that the opp.parties-workmen have suffered the consequences of victimization.

10. In the case of Bharat Earth Irons (supra), the Supreme Court on the facts of the said case found that the conclusion of the Tribunal that the plea of victimization has been justified was unsustainable as the Tribunal wrongly held that no prima facie case was established against the workmen and thus fail into an error. The Supreme Court in the facts of the said case found that the Tribunal made two serious errors, firstly by holding that the offence was not established prima facie, and secondly by allowing it to be influenced by an extraneous finding with regard to the lay off. In such contingency, the Supreme Court allowed the appeal of the management setting aside the order passed by the High Court as well as the Tribunal. The facts of the present case being totally different, the ratio of the said decision cannot be made applicable to the present case. In the case of Burn and Co. Limited (supra), the Supreme Court was considering a question with regard to applicability of Section 28k of the Trade Union Act, 1926. It was not a case under Section 33 of the I.D. Act. In the case of Shriji Vidyalaya (supra), the Supreme Court was considering the order passed in an appeal filed by the workmen against the order of the Tribunal constituted under Gujurat Secondly Education Act, 1972 on different set of facts which is distinctly different from the facts of the present case. Hence, the ratio of the said decisions can not come to the aid of the petitioner-management.

11. In the case of ***M.D., Tamil Nadu State Transport Corporation –v- Neethivilangan Kumbakonam,*** AIR 2001 SC 2309, the Supreme Court categorically held that the action taken under Section 33(2) of the Act will become effective only if 'approval' is granted. If the 'approval' is refused, the order of dismissal will be invalid and in operative in law. In other words, the order of dismissal has to be treated as non est and the workman will be taken never to have been dismissed. Interpreting Section 33(2)(b) of the Act, the Supreme Court in the case of ***Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd.-v- Shri Ram Gopal Sharma and others,*** AIR 2002 SC 643 held that it is clear from the proviso to Section 33(2)(b) of the Act that the employer may pass an order of dismissal or discharge a nd at the same time make an

application for approval of the action taken by him. If the approval is not granted under Section 33(2)(b) of the Act, the order of dismissal becomes ineffective from the date it was passed and failure to make application under Section 33(2)(b) of the Act would render the order of dismissal inoperative. Similar is the view in the case of ***Suresh Sakharam Patil –v- Mahindra & Mahindra Ltd.***, 1987 (54) FLR, Bombay High Court. A Division Bench of this court with regard to payment of wages under Section 17B of the Act in the case of *M/**s.I.D.L., Chemicals Ltd. –v- S.R. Tamma and another***, 1989 (58) FLR 28, Orissa High Court held that even if Section 17B of the Act did not have application, when an order under Section 33 is challenged before this Court, the Court is not denuded of discretion which it had prior to its incorporation. The enactment of Section 17B strengthened the case in favour of court possessing such discretion. Therefore, even if Section 17B does not apply, the Court can in its discretion while granting stay of operation of the order passed under Section 33(2)(b) of the Act, in appropriate cases, direct payment of wages. So far as the consequences are concerned, the order passed under Section 33(2)(b) of the Act Stands on par with an award directing reinstatement of a workman. Hence, even though having regard to the language in Section 17B, the provision did not apply to an order passed under Section 33(2)(b), its beneficial spirit shall apply to an order passed under the said Section.

12. Keeping the above principles of law enunciated in various decisions cited by the respective parties in view and on perusing the impugned order passed by the Tribunal, this Court finds that the contention raised by the management is in the realm of disputed questions of fact which cannot be entered into or adjudicated while exercising writ jurisdiction under Article 226 of the Constitution of India. If further appears that the approval as sought for by the management of the dismissal orders passed against the opp.parties 2 and 3 having been refused by the Tribunal, it would be deemed that both opp. parties 2 and 3 have not been dismissed from service and were continuing as such. Since the opp.party no.3 has retired in the meantime, the management is liable to pay the wages of the said opp.party no.3-workman from the date of the order of dismissal till the date of his superannuation. So far as the opp.party no.2 is concerned, it should be treated under law that the order of dismissal is non est and he is continuing as such. In the event the opp.party no.2 has not been permitted to be reinstated and discharged his duty, the management shall allow him to continue to work under it and he shall also be entitled to the wages for the period for which he has not been permitted to work. However, since it is stated that an industrial dispute is still pending, the management is directed to pay such arrear wages to the workmen-opp.parties 2 and 3 within a period of three months hence which

shall be subject to the final decision of the industrial dispute said to be pending, if not already disposed of in the meantime.

This writ petition is, therefore, disposed of with the aforesaid directions, but without any interference with the impugned order.

Writ petition disposed of.

2012 (II) ILR - CUT- 827

M. M. DAS, J.

W.P.(C) NO. 1517 OF 2012 (Dt.14.08.2012)

ANJANA PARIDA & ORS. …….Petitioners

.Vrs.

SANMATI SINGH & ORS. ……Opp.Parties

A. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.151.

Inherent power of Courts – Extent of – Where the provisions of the code do not provide for passing of an order in a particular contingency and such an order is felt essential for the ends of justice, which is not specifically barred by any of the provisions of the code, it is always open for a Court to exercise its inherent power U/s.151 of the code to meet the requirements of justice. (Para 14)

B. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.151.

Inherent power of Courts – Extent of – Court can issue injunction by exercising its inherent jurisdiction.

In the present case plaintiff filed suit for permanent injunction and for other reliefs – Suit dismissed for default – Application for restoration of the suit is pending – At that stage plaintiff filed an application Under Order 39 Rule 1 & 2 read with Section 151 C.P.C. for interim injunction – Trial Court directed parties to maintain status quo in respect of the disputed property – Order challenged – Held, although Order 39, Rule 1 cannot be invoked as there is no suit pending, the Court can grant interim injunction U/s.151 C.P.C. in the interest of justice. (Para 14)

Case laws Referred to:-

1.2011(I) OLR 684 : (Gelhei Mallick & Ors.-V- Dibakar Mallik & Ors.)
2.AIR 1986 Madras 284 : (T.Panneerselvam-V- A. Baylis)
3.AIR 1962 SC 527 : (Manohar Lal Chopra-V-Rai Bahadur Rao Raja Seth Hiralal).

For Petitioner - M/s. S.K. Dwivedy, R.K.Sahu & R.C.Ray.
For Opp.Parties- M/s. Bijan Ray, Sr.Advocate,

B.Moharana, B.Mohanty, S.Mohanty, D.Chhotray.

Heard Mr. Dwibedi, learned counsel for the petitioners and Mr. Bijan Ray, learned senior counsel appearing for the opposite party No.1 – plaintiff.

2. Facts reveal that C.S. No.25 of 2005 was filed by the opposite party No.1 seeking a decree for declaration of right, title, interest and for permanent injunction and other consequential reliefs. In the said suit, an application for amendment of the plaint was filed by the plaintiff, which was rejected by order dated 18.07.2011. The plaintiff – opposite party No.1 preferred W.P. (C) No.21261 of 2011 challenging the order of rejection of prayer for amendment. When the said writ application was pending, the suit was dismissed on 06.08.2011 for default of the plaintiff.

3. However, in the writ application filed by the opposite party No.1, an order was passed on 09.08.2011 staying further proceedings of the suit, which shows that the suit was already dismissed when the said stay order was passed. On 10.08.2011, the plaintiff – opposite party No.1 filed an application under Order – 9, Rule – 9 C.P.C., which was registered as CMA No.103 of 2011. In the said Misc. Case for restoration of the suit, the plaintiff also filed CMA No.110 of 2011 purportedly under Order – 39, Rules 1 and 2 C.P.C. read with Section 151 C.P.C.

4. The learned court below refused to pass an order of injunction on the said application on the ground that the High Court has stayed further proceedings of the suit. The said writ application has been disposed of today by this Court being dismissed as not pressed and the interim order of stay passed earlier in the said writ application has been vacated.

5. On 01.10.2011, the learned trial court taking up the application of the plaintiff, wherein a prayer was made for injunction, i.e., CMA No.110 of 2011, passed the order under Section 151 CPC directing the parties to maintain status quo over the disputed property. The said order was not challenged by the petitioner, but, however, the petitioner filed an application on 15.10.2011 purportedly under Order – 39, Rule -4 CPC for vacation of the order of status quo. The said application was dismissed by the learned trial court on 24.11.2011. Being aggrieved by the said order of dismissal, the present writ application has been filed.

6. Mr. Dwibedi, learned counsel for the petitioners vehemently urges that since the suit was in a state of dismissal, the learned trial court could not have passed an order of status quo in the Misc. Case registered as

CMA No.110 of 2011 in view of the judgment of this Court in the case of ***Gelhei Mallick and six others v. Dibakar Mallik and seven others,*** 2011 (I) OLR 684 and submits that the order of status quo as prayed for in the writ application should be vacated.

7. Mr. Ray, learned senior counsel appearing for the opposite party No.1 – plaintiff, on the contrary, submits that in the case of Gelhei Mallick and six others (supra), this Court, considering the fact that the suit was in a state of dismissal, observed that since the suit is already dismissed, the provisions of Order – 39, Rules – 1 and 2 CPC could not have been made applicable. He further submits that though this Court framed a question as to whether the order of interim injunction directing to maintain status quo over the suit property can be passed by exercising the inherent power under Section 151 CPC, but the said question was not dealt with in the aforesaid judgment.

8. On perusal of the said judgment, it is found that the contention of Mr. Ray is correct. He further relies upon the decision in the case of ***T. Panneerselvam v. A. Baylis,*** AIR 1986 Madras 284***,*** where, under similar circumstances, the Madras High Court held that bereft of the power under Order – 39, Rules 1 and 2 CPC, the Court possesses the power under Section 151 CPC to grant interim injunction, if the case could not be brought within the four corners of Order – 39, Rules – 1 and 2, CPC, but in the interests of justice.

9. Perusal of the said judgment shows that in the said case also an application for injunction was filed in an application under Order – 9, Rule – 9 CPC. The Supreme Court, in the case of ***Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal,*** AIR 1962 SC 527 considered the scope of exercising inherent power under Section 151 CPC and observed as follows :-

> "Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Code to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code".

10. Similar view has also been expressed by the Allahabad High Court and Calcutta High Court with regard to exercise of power under Section 151 CPC for grant of injunction in the interest of justice.

11. Mr. Ray, learned senior counsel further contends that the order impugned in the present writ application having been passed on an application under Order – 39, Rule – 4 CPC, which is an appealable order, the writ application should not be entertained.

12. It is stated at the Bar that the Misc. Case filed under Order – 9, Rule – 9 CPC for restoration of the suit is still pending.

13. On analyzing the law as laid down by various High Courts as well as the Hon'ble Supreme Court, I find that the decisions of this Court in the case of Gelhei Mallick and six others (supra) cannot be taken to be the guiding factor to decide the present lis and in the said decision, this Court did not consider the scope of exercising power under Section 151 CPC in an application for restoration of the suit.

14. It is by now well settled that where the provisions of the Code do not provide for passing of an order in a particular contingency, if passing of such an order is felt essential, for the ends of justice, which is not specifically barred by any of the provisions of the Code, it is always open for a court to exercise its inherent power under section 151 of the Code to meet the requirements of justice.

15. I am, therefore, not inclined to interfere with the impugned order, but, however, direct that the learned trial court shall dispose of the application for restoration of the suit filed by the opposite party No.1 under Order – 9, Rule – 9 CPC by 15th December, 2012.

16. The writ application is accordingly disposed of.

In the event, the suit is restored, the same being of the year 2005, the learned trial court shall make all endeavour to dispose of the said suit finally by the end of February, 2013. While disposing of the suit, the learned trial court shall not be influenced by any observation made by this Court in any of the interim orders of this Court as well as the observations made in the present order.

Writ petition disposed of.

2012 (II) ILR - CUT- 831

M. M. DAS, J.

W.P. (C) NO.7562 OF 2012 (Dt.15.05.2012)

LINGARAJ SAHOO ……Petitioner

.Vrs.

LINGARAJ SENAPATI & ORS. …….Opp.Parties

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 6, RULE 17.

Amendment of plaint – Amendment sought cannot amount to a surprise to the defendants and the amendment does not change the nature and character of the suit – Amendment should be allowed.

In the present case plaintiff sought to insert the full name of his father in the cause title on the ground that in course of hearing he came to know that only the nick name of his father has been mentioned – Amendment was rejected as it was sought after commencement of trial of the suit – Hence the writ petition – Held, learned trial Court should not have refused prayer for amendment.

Case law Referred to:-

AIR 2008 SC 2234 : (Chander Kanta Bansal-V-Rajinder Singh Anand).

For Petitioner - S.K.Nayak-2
For Opp.Parties - None

The opp.parties have entered appearance though their learned counsel, Mr. Biswajit Mohapatra.

Heard learned counsel for the parties.

This writ petition has been filed against an order rejecting the application for amendment of the plaint. A suit was filed by the petitioner and the proforma opp.party no.2 for permanent injunction. During course of hearing of the suit, the petitioner alleged that for the first time, he came to know that only the nick name of his father has been mentioned in the cause title page of the plaint and his full name has not been mentioned. He filed an application for amendment of the cause title page of the plaint by mentioning the name of his father as “Late Gajendra @ Jogendra Sahoo” instead of only “Late Gajendra Sahoo”. The court below rejected the said application on the ground that the application for amendment has been filed after

commencement of the trial of the suit, which is not permissible under the proviso to Order 6 Rule 17 C.P.C. and the plaintiff no.2 (opp.party no.2 herein) has admitted in his evidence that he does not know any person named as Lingaraj Sahoo (petitioner) to be the son of late Gajendra. By now, Order 6 Rule 17 C.P.C. after its amendment and introduction of the proviso has been interpreted in various decisions, both of this Court as well as the Apex Court.

The ***Supreme Court in the case of Chander Kanta Bansal-v-Rajinder Singh Anand***, AIR 2008 SC 2234, on analyzing the provision of Order 6 Rule 17 C.P.C. held that the said provision was omitted from the Code by the amending Act 46 of 1999. Rule 17 of Order 6 was in the statute for ages and there was hardly a suit or proceeding where this provision had not been used. This was the reason which led to much controversy leading to protest all over the country when the provision was omitted from the Code, Rule 17 of Order 6 was, therefore, restored in its original form by the amending Act 22 of 2002 with a rider in shape of the proviso. The proviso limits the scope of amendment to pleadings to some extent, but, still it vests enough powers in courts to deal with the situations which were unforeseen before commencement of trial of the suit. The Supreme Court, therefore, laid down that the entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore it is not a complete bar nor shuts out entertaining of any later application. (Emphasis supplied).

In the present case, the amendment as sought for cannot amount to a surprise to the defendants. However, the plaintiff had shown that he came across the mistake during trial of the suit. It is further seen that such amendment does not change the nature and character of the suit. In such circumstances, the trial court should not have refused the prayer for amendment. Accordingly, the impugned order is set aside and the petitioner-plaintiff is permitted to amend the plaint as sought for. He shall file a consolidated copy of the plaint by mentioning the correct name of his father in the cause title page of the plaint, by 20.6.2012. The trial court shall proceed to dispose of the suit expeditiously. This writ petition is accordingly disposed of.

Writ petition disposed of.

2012 (II) ILR - CUT- 833

INDRAJIT MAHANTY, J.

CRLA NO. 409 OF 2011 (Dt.03.07.2012)

ARUNODAYA SWAIN ……..Appellant

.Vrs.

STATE OF ODISHA ……..Respondent

A. ORISSA SPECIAL COURTS ACT, 2006 (ACT NO.9 OF 2007) – S.17.

Appeal – Maintainability – The term "any order of the authorized officer" appearing in Section 17 must be given the widest amplitude so that every aggrieved person must be allowed an opportunity for redressal of his grievance – Held, right of appeal cannot be restricted only to final order of confiscation passed u/s.15. of the Act. (Para 13)

B. ORISSA SPECIAL COURTS RULES 2007– RULE 2(1) (e).

Person holding high public office – Amendment of Rule 2 inserting the words "including officers of All India Services working under Government of Orissa" w.e.f. 27.11.2010 – The matter was no longer res integra having been decided in the judgment of a Division Bench of this Court in the case of Dibyadarshi Biswal and others-V- State of Orissa reported in (2011)49 OCR. 1 – Held, since the Division Bench of this Court found no merit on the contentions of the appellant regarding non-applicability of the Special Courts Act to I.A.S. Officers, this Court rejects the prayer made in the present appeal to set aside the impugned order on merits. (Para 15)

Case laws Referred to:-

1.(2011) 49 OCR-1 : (Dibyadarshi Biswal & Ors.-V-State of Orissa)

2.(2002)2 SCC 318 : (State of Maharashtra-V- Marwanjee F.Desai & Ors.)

For Appellant - M/s.B.K.Behura (Sr. Advocate)
Santosh Ku. Mund, H.K.Mund,
A.K.Dei & J.Sahu.

For Respondent- Mr. Suraj Mohanty, Standing Counsel (Vig.).

I.MAHANTY, J. In the present appeal under Section 17 of the Orissa Special Courts Act, 2006, the appellant has prayed to quash the order dated 24.06.2011 passed by the Authorised Officer, Bhubaneswar in Confiscation Case No.4 of 2008, rejecting the application filed by him to drop the confiscation proceeding.

2. Mr.Behura, learned Senior Advocate appearing for the appellant contends that the proceeding under the Special Courts Act, 2006 against the appellant who is a member of the Indian Administrative Service since in the year 1996, has been initiated prior to the amendment, which was published in the Orissa Gazette vide Notification dated 27th November, 2010, amending Rule-2 of the Orissa Special Courts Rules, 2007 and inserting the followings words:

"including Officers of All India Services working under Government of Orissa"

It is asserted on behalf of the appellant that the words "Officers of All India Services working under Government of Orissa" came to be included under the definition of "Person holding high public office" which has been defined in Clause (e) of Sub-Rule (1) of Rule 2 of the Orissa Special Courts Rules, 2007 with effect from the date of notification.

3. Mr. Behura, learned Senior Advocate submits that the appellant was promoted from the rank of Orissa Administrative Service to the Indian Administrative Service in the year 1996 and the proceeding against the appellant was for the check period from 17.06.1970 to 15.05.1997, i.e. for a period after the appellant joined the Indian Administrative Services (IAS).

4. It is submitted that the F.I.R., in question was lodged on 3.6.1997 and by the said date, the appellant was already in the services of the All India Services (IAS). Apart from the above, it is asserted by Mr.Behura, learned Senior Advocate for the appellant that, prior to the amendment being brought into force by Gazette Notification dated 27th November, 2010, Rule-2(1)(e) applied only to "public servants" belonging to Grade-A Services of Central and State Government. In this respect, Mr.Behura placed reliance on Swamy's Compilation of C.C.A. Rules and in particular, the Schedule thereof, where Indian Administrative Services, is not indicated in any central services of Group-A. He therefore, asserts that the appellant belongs to the Indian Administrative Services whose services were not categorized under Group-A of the Schedule appended to the classification of Central Civil Services of the Government of India. Therefore, it is to be construed that

until the date of amendment i.e., 27th November, 2010, the officers belonging to the Indian Administrative Services, could not come under the definition of persons holding "high public office" as defined under the Special Courts Rules.

5. Mr.Suraj Mohanty, learned Standing Counsel (Vigilance), on the other hand, contends that the issue raised by the appellant is no more *res integra* and has already been decided by the Division Bench of this Court presided over by Hon'ble the Chief Justice in the case of Dibyadarshi Biswal and others v. State of Orissa, reported in (2011) 49 OCR-1 and in particular, Para-26 which is quoted hereinbelow:

"26. Further it is contended that the petitioner in W.P.(C) No.390 of 2008 who is an IAS Officer belong to a category other than Officers of 'Group A' service in the definition in the Rules is to be read in the context of categorization of the Government Officers by the State Government on the basis of their "pay scales" into Groups A, B, C and D vide resolution dated 7th June, 1999 and, therefore, he belongs to Group A category in accordance with the said Government resolution and comes under the purview of the Orissa Special Courts Act, 2006."

Apart from the above, it is asserted that the present appeal under Section 17 of the Orissa Special Courts Act, 2006 is not maintainable since no final order under Section 15 of the Special Courts Act has yet been passed and the judgment, though ready for pronouncement, has not been delivered on account of the interim order passed in the present proceeding. He states that the appellant can have no grievance if the trial court delivers its judgment and, it may be open for him to raise all such contentions in appeal, if it becomes necessary.

6. In response to the aforesaid contentions raised by the learned Standing Counsel (Vigilance), Sri Behura, learned Senior Advocate asserts that, the language of Section 17 of the Special Courts Act nowhere limits the scope of appeal and specifically emphasizes that the language incorporated in Section 17 itself permits "any person aggrieved by any order of the authorized officer" to file an appeal to the High Court. Referring to the words "any order", he asserts that the legislative intent behind it, is wide and the Court should give the word "any" the widest interpretation possible. Hence, it is submitted that the contention of the learned Standing Counsel (Vigilance) regarding maintainability ought not to be accepted, since, acceptance of the same would tantamount to limiting the scope of appeal under Section 17 of the Orissa Special Courts Act only to order under Section 15, thereby,

frustrating the legislative intent. He further asserts that interpretation canvassed by the Department ought not to be accepted and since the present appeal, arises out of an order rejecting a petition filed by the present appellant, to drop the confiscation proceeding, the appellant is clearly a "person aggrieved" and, as such, is entitled in law to prefer an appeal under Section 17 of the Special Courts Act and hence, the present appeal is maintainable.

Insofar as, the other contentions raised by the learned Standing Counsel (Vigilance) is concerned, Mr.Behura, learned Senior Advocate asserts that, while, there cannot be any doubt that the Division Bench of this Court upheld the constitutional validity of Orissa Special Courts Act, 2006 in a batch of cases which has been decided together and reported in the case of Dibyadarshi Biswal and others v. State of Orissa, (2011) 49 OCR-1. It was further asserted that all such other contentions raised have not been considered in the said batch of cases and the Court, essentially limited its consideration to the constitutional validity of the said Act and Rules. Mr. Behura submits that only the case of Balaram Rout in W.P.(Crl.) No.390 of 2008 was discussed in Para-26 of the judgment in the case of Dibyadarshi (supra) and in Para-31 thereof, the Division Bench of this Court had framed question No.(6) to the following effect:

"(6). Whether the case of Balaram Rout does not fall within the purview of the Special Courts Act ?"

It is asserted that this question framed by the Division Bench of this Court was answered by the said Bench at Para-41 thereof, which is quoted here in below:

> "41. With regard to the plea of the petitioner in W.P.(Crl.) No.390 of 2008 he being an I.A.S. Officer belongs to a category other than Officers of Group A service and hence the declaration bringing the petitioner under the Act is illegal and without application of mind, the case of the opposite party No.1 is that by resolution No.17555/Gen. dated 7th June, 1999 (Annexure-D/2), the State Government abolished the erstwhile segmentation of Government Employees into 'Gazetted and Non-Gazetted Categories and classified the posts in Government Offices into four groups, namely, Group-A, Group-B, Group-C and Group-D according to the scale of pay. All posts in the pay-scales the maximum of which is not less than Rs.1,35,000.00 came under Group-A according to the aforesaid resolution. The petitioner being in the cadre of I.A.S. belongs to

> Group-A category in view of the aforesaid Government resolution and, therefore, comes under the purview of the impugned Act, is the justification given by the State Government. The petitioner has not been able to demonstrate that an I.A.S.Officer belongs to different category other than the four categories mentioned in the aforesaid resolution. No doubt an I.A.S. Officer comes under Group-A post and since the definition of "person holding high public office" includes a public servant belonging to Group A service and the petitioner being holder of a Group A post comes within the purview of the impugned Act. Therefore, this point is answered against the petitioner."

While drawing attention of the Court to the above, it is contended that it is only the case of Balaram Rout, which has been decided in the matter and not the case of the appellant. Therefore, the present case is maintainable and the appellant is entitled to get his other contentions to be decided on its own merit in the appeal.

7. After having heard the learned counsel for the respective parties and recording their respective submissions as noted hereinabove, I am of the considered view that the objection regarding the maintainability of the present appeal needs to be dealt with first.

8. Insofar as Section 17 of Special Courts Act is concerned, the same is quoted hereunder:

> "17. Appeal – (1) Any person aggrieved by any order of the authorized officer under this Chapter may appeal to the High Court within thirty days from the date on which the order appealed against was passed.
>
> (2) Upon any appeal preferred under this section the High Court may, after giving such parties, as it thinks proper, an opportunity of being heard, pass such order as it thinks fit.
>
> (3) An appeal preferred under Sub-section(1) shall be disposed of within a period of three months from the date it is preferred, and stay order, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal."

Chapter-III of the Special Courts Act begins from Section-13 and ends in Section-19. While Section-13 stipulate the requirements of an "application" for confiscation. Section 14 mandates for "issue of notice" for confiscation upon the person in respect of whom the application is made,

calling upon him, within such time as may be specified in the notice (which shall not be ordinarily less than thirty days) to indicate the source of his income, earnings or assets, out of which or by means of which he has acquired such money or property, the evidence on which he relies and other relevant information and particulars and most importantly, and "to show cause as to why all or any of such money or property or both, should not be declared to have been acquired by means of the offence and be confiscated to the State Government". Pursuant to such notice, a delinquent to whom such notice has been issued, has a right to give his "show cause" and to respond to the queries made for confiscation. On consideration of the show-cause reply, the proceeding under Section 15 of the Special Courts Act concludes by passing an order of confiscation. Section 17 thereof provides an "aggrieved person" a right to file an appeal against "any order passed by the authorized officer".

9. It is asserted by the learned Standing Counsel (Vigilance) that it is only the final order passed under Section 15 of the Special Courts Act which can be the subject matter of an appeal under Section 17 thereof, but no other order passed by the Authorised Officer can be permitted to be the subject matter of an appeal.

10. On a reading of Section 17, it is clear therefrom that the mandate of Legislature is to vest the right to a "person aggrieved" to file an appeal before the High Court against "any order of the Authorized Officer".

11. In this respect, it would be apt to refer to the judgment of the Hon'ble Supreme Court in the case of ***State of Maharashtra v. Marwanjee F.Desai and others***, (2002) 2 SCC 318. In the said case, Hon'ble Supreme Court dealt with the scope and ambit of Section 7 (Appeals) of the Bombay Government Premises (Eviction) Act, 1955. For better appreciation of the matter, Section 7 of the said Act is quoted hereunder:

> "7. *Appeals.*-(1) An appeal shall lie from every order of the competent authority, made in respect of any government premises, under Section 4 or Section 5 to an appellate officer who shall be the District Judge of the district in which the government premises are situate, or such other judicial officer in that district, being a judicial officer of not less than ten years' standing, as the District Judge may designate in this behalf."

In the facts of the aforesaid case, it appears that various plots of land belonging to the State Government which were leased out to several

occupants since 1968 and since the Government wanted the plots for a public purpose, the leasees were issued show-cause notice under Section 4(2) of the Act. On receipt of show-cause reply, the competent authority directed dropping of the proceedings. The State Government being aggrieved thereby, preferred an appeal under Section 7 of the Act before the City Civil Court, Bombay. There a preliminary objection was raised by the leasee for maintainability of the appeal. Such objection was over-ruled by the City Civil Court, Bombay. The respondents moved to the High Court under Article 226 of the Constitution of India. The High Court allowed the writ petition holding as follows:

> "Neither under Section 7 of the Act nor under any other provisions of the enactment, a right to prefer an appeal against any of the decisions of the competent authority has been conferred on the State Government."

The aforesaid judgment of Bombay High Court was the subject matter of challenge before the Hon'ble Supreme Court. In Para-8 of the judgment, the following was concluded:

> "8. xx xx The language used as noticed above in Section 7 containing the provision of appeal has to be interpreted in its proper perspective and not in a manner restrictive. If the reasoning provided by the High Court is to be accepted then in that event the statute shall have to be given a go-by and to be rendered a complete otiose. The word "every", appearing in Section 7 immediately before the word "order", stands out to be extremely significant so as to offer an opportunity of appeal in the event of there being an order against the Government."

And in Para-11 of the judgment is as follows:

> "11. xx xx The legislature has deliberately used "every order" and if the restrictive meaning is attributed, as has been so done by the High Court, then the word "every" in any event becomes totally redundant but since the legislature avoids redundancy every word used in the particular provision shall have to be attributed a meaning and attribution of any meaning to the word "every" by itself would negate the interpretation as found favour with the High Court. The word "every" has been totally ignored, which is neither permissible nor warranted."

12. In the light of the aforesaid authoritative pronouncement of the Hon'ble Supreme Court if the aforesaid law laid down by the Hon'ble Supreme Court is applied to the facts of the present case and conclusion of Para-11 if re-written in the circumstances of the present case, would read as such:

The legislature has deliberately used the word "any order of the authorized officer" in Section 17 of the Special Courts Act and if any restrictive meaning is attributed (as canvassed on behalf of the Vigilance Department), then the word "any order" would become redundant and since the legislature avoids redundancy, every word used for the particular provision shall have to be attributed a meaning and the meaning to the word "any order of the authorized officer" to order passed under Section 6 of the Orissa Special Courts Act by itself would negate the legislative intent behind the aforesaid provision.

13. In the "Principles of Statutory Interpretation", (Tenth Edition 2006) of Justice Guru Prasanna Singh, Former Chief Justice of Madhya Pradesh High Court published by Wadhwa and Company Nagpur and in particular, Page-440 is as follows:

> "Construction of General Words - In a case relating to section 26 of the Factories Act, 1937, which enjoins occupiers of a factory to provide safe means of access to 'every place' at which any person has at any time to work, the House of Lords held that a point on a vessel, which was being repaired in a dockyard, where a work-man had to work was within the words 'every place' as occurring in the section. **Gardiner v. Admiralty Commrs***., (1964) 2 All ER 93 (HL)*. It was argued in this case that section 26 was to be found in fasciculus of sections dealing with a safety provision which were restricted to plant and premises of the factory, and therefore, the words 'every place' in section 26 should also be restricted to plant and premises of the factory thereby excluding any object which came for repairs in the factory. This argument was rejected and in that connection LORD GUEST observed: "There is no principle which would compel a Court to restrict general words to be found in one section by a limitation to be found in other surrounding sections dealing with different matters". ***(Ibid,p.96.)***

In the light of the judgments referred hereinabove as enunciated by the Hon'ble Supreme Court, the Court ought not to give a restrictive meaning to any word to found in Section 17 and, therefore, the contention

raised on behalf of the State by the learned counsel for the Vigilance Department regarding maintainability cannot be accepted.

It is well settled in law, by the Hon'ble Apex Court in various judgments referred hereinabove that while interpreting such a clause, the same has to be given the widest amplitude since every "aggrieved person" must be allowed an opportunity for redressal of his grievance. Any limited interpretation to Section 17 would in effect limit the legislative intent. Therefore, the term "any order passed by the Authorized Officer" cannot in any manner be restricted only to an order under Section 15. Hence, I am of the considered view that the objection raised by the Vigilance Department to the maintainability of the present appeal, is not well based and hence, the said objection is rejected and the Court concludes that the present appeal against the impugned order passed by the Authorized Officer, in the present case, is maintainable.

14. The next contention on which, the case depends is, as to whether the issue raised by the appellant is covered by the judgment of the Division Bench of this Court in the case of ***Dibyadarshi Biswal*** (supra). It has been noted in Para-26 the assertion made by Sri Balaram Rout (writ petitioner) in W.P.(Crl.) 390 of 2008 (which was tagged along with the batch of cases and disposed of by a common order) has been rejected. Balaram Rout's contention was noted in Para-26 of the judgment of ***Dibyadarshi Biswal*** (supra) passed by the Division Bench of this Court, the question was framed in Para-31 and answered in Para-41 thereof, I am of the considered view that this Court is bound by the judgment of the Division Bench. This Court is informed that the judgment in the batch of cases in the case of ***Dibyadarshi Biswal*** (supra) is under challenge before the Supreme Court in Criminal Appeal No.365 of 2011 which remains pending adjudication by the Apex Court. It is also relevant to point out that the present appellant had filed in W.P.(Crl.) 663 of 2008 before this Court and had raised the same contention as raised herein and raised by Balaram Rout in Para-90 thereof. The appellant's writ petition was disposed of by the common judgment of this Court in the case of ***Dibyadarshi Biswal*** (supra), hence, the same must also be held to have been rejected by the Division Bench.

15. Therefore, this Court is of the view that since the Division Bench of this Court found no merit on the contentions of the appellant regarding non-applicability of the Special Courts Act to IAS officers, this Court rejects the prayer made in the present appeal to set aside the impugned order on merits.

Accordingly, the CRLA stands dismissed and interim order dated 05.09.2011 passed in Misc. Case No.1069 of 2011 stands vacated but in the circumstances without cost. The Authorized Officer is at liberty to pronounce the judgment.

Appeal dismissed.

2012 (II) ILR - CUT- 843

INDRAJIT MAHANTY, J.

CRLMC. NO.1484 OF 2004 (Dt.17.07.2012)

PRABIR KUMAR PRADHAN ……..Petitioner

.Vrs.

STATE OF ORISSA ……Opp.Party

PREVENTION OF CORRUPTION ACT, 1988 (ACT NO.49 OF 1988) – S.19(1).

Sanction for prosecution of a public servant – Sanction has to be granted with respect to a specific accused and only after sanction has been granted the Court gets competence to take cognizance of an offence.

In this case learned Special Judge (Vigilance) Bhuabeneswar took cognizance on 31.07.2002 although no previous sanction obtained by the prosecution by that date – However the prosecution obtained sanction order from the competent authority on 18.03.2004 – Whether "Post facto sanction" can cure the defect in the filing of the charge sheet and passing of the order of cognizance – Held, order of cognizance Dt.31.07.02 suffers from gross miscarriage of justice as no sanction had been obtained by the prosecution for prosecuting the present petitioner on the date of the order of cognizance was passed – Since the order of cognizance was ex-facie without jurisdiction, the post facto sanction received thereafter cannot cure such inherent defect – Impugned order of cognizance Dt.31.07.2002 against the petitioner is quashed.

Case law Relied on :-

(2005)12 SCC 709 : (Dilawar Singh-V- Parvinder Singh @ Iqbal Singh & Anr.).

Case laws Referred to:-

1.2005(II) OLR 714 : (Surendra Nath Swain-V-State of Orissa & 7 Ors.)
2.(2009)44 OCR(SC)606 : (State through Central Bureau of Investigation-V- Parmeshwaran Subramani & Anr.)

3.(1998)9 SCC 268 : (State of T.N.-V- M.M.Rajendran)
4.AIR 2005 SC Vol.8,370 : (State of Karnataka through C.B.I. -V- C.Nagarajaswamy).

5.(1957) SCR 650 : (Baij Nath Prasad Tripathy-V-The State of Bhopal)
6.AIR 1966 SC 69 : (Mohammad Safi-V-The State of West Bengal).

For Petitioner - M/s. D.P.Dhal, S.K.Dash & P.K.Routray.
For Opp.Party - Addl. Standing Counsel(Vigilance Deptt.).

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the petitioner-Prabir Kumar Pradhan with a prayer to quash the order dated 31.07.2002 passed in T.R. Case No.76 of 2002, whereby, the learned Special Judge (Vigilance), Bhubaneswar has been pleased to take cognizance of the offence under Section 13(2) read with Section 13(1)(d) of P.C. Act & 120-B I.P.C. against him along with three others.

2. Mr. Dhal, learned counsel for the petitioner vehemently submits that as on the date of passing of the order of cognizance i.e. on 31.07.2002, the petitioner was working as Executive Engineer, Rural Works Division, Cuttack and as stipulated in Section 19 of the Prevention of Corruption Act, 1988 (In short 'P.C. Act'), the learned Special Judge (Vigilance), Bhubaneswar was not competent to take cognizance of the offence against the present petitioner purportedly on the ground that the mandatory sanction as required to take cognizance under Section 19 of the said Act for the proceeding had not been obtained.

Mr. Dhal further submits that, in fact, while the charge sheet was submitted on 8.7.2002, the impugned order of cognizance was passed on 31.07.2002 and no sanction had been obtained by the prosecution by the said date. He further submits that the petitioner who was admittedly a public servant was sought to be prosecuted in the present proceeding, the court of the learned Special Judge (Vigilance), Bhubaneswar ought not to have passed the order of cognizance on 31.07.2002, since, no previous sanction had been obtained by the prosecution nor was any order of sanction produced before the court by the said date, as stipulated in Section 19 of the P.C. Act, 1988.

3. Learned counsel for the petitioner in support of his contentions placed reliance on the following three judgments i.e. (1) **Surendra Nath Swain v. State of Orissa and 7 others,** 2005(II) OLR 714, (2) **Dilawar Singh v. Parvinder Singh Alias Iqbal Singh and Another,** (2005) 12 S.C.C. 709, (3) **State through Central Bureau of Investigation v. Parmeshwaran Subramani & Anr.,** (2009) 44 OCR (SC) 606.

4. Mr. P.K. Pani, learned Additional Standing Counsel for the Vigilance Department, fairly submits that, in fact, on the date of passing of the impugned order of cognizance i.e. on 31.07.2002, no sanction had been obtained by the prosecution by the said date. He further fairly submits that no sanction whatsoever was produced before the court on the date the order of cognizance was passed. It was further submitted that from amongst the four accused persons, only the present petitioner was continuing as the Government servant as on the date of the prosecution and prior sanction as contemplated under Section 19 of the P.C. Act, 1988 was mandatory for a court to take cognizance of such offence. But while making the submissions as noted hereinabove, Mr. Pani, placed reliance on the judgments of the Hon'ble Supreme Court in the case of **State of T.N. V. M.M. Rajendran,** (1998) 9 SCC 268 as well as in the case of **State of Karnataka through C.B.I. v. C. Nagarajaswamy,** A.I.R. 2005 S.C. Vol-8, 370.

Considering the submissions advanced, it would be useful here to quote Section 19(1) of the Prevention of Corruption Act, 1988.

> "19. *Previous sanction necessary for prosecution.*-(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-
>
> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
>
> (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office."

5. There is no dispute at the bar about the mandatory requirement of "prior sanction" for the purpose of passing of the order of cognizance by the competent court. Admittedly, at the time, the impugned order was passed i.e. on 31.07.2002, no sanction had been obtained by the prosecution for prosecuting the present petitioner. It is also a further fact that, the prosecution did obtain sanction order from the competent authority but only on 18.03.2004. Therefore, in the light of the limited facts which are noted here in, the issue that arises for consideration in the proceeding is, as to

whether "post facto sanction" can be given and whether such post facto sanction, can cure the defect in the filing of the charge sheet and passing the impugned order of cognizance. The aforesaid issue was framed by this Court vide its order dated 12.08.2004 and the said issue is no longer res integra, in view of the decision cited at the bar.

In the Case of **Dilawar Singh v. Parvinder Singh Alias Iqbal Singh and Another,** (2005) 12 S.C.C. 709, the Hon'ble Supreme Court came to hold in paragraphs-4 & 7 that:

> "**4.** In our opinion, the contention raised by the learned counsel for the appellant is well founded. Sub-section(1) of Section 19 of the Act, which is relevant for the controversy in dispute, reads as under:
>
> "19. *Previous sanction necessary for prosecution.*-(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-
>
> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
>
> (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office."
>
> This section creates a complete bar on the power of the court to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction of the competent authority enumerated in clauses (a) to (c) of this sub-section. If the sub-section is read as a whole, it will clearly show that the sanction for prosecution has to be granted with respect to a specific accused and only after sanction has been granted that the court gets the competence to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by such public servant. It is not possible to read the section in the manner suggested by the learned counsel for the respondent that if sanction for prosecution has been granted quo one accused, any

other public servant for whose prosecution no sanction has been granted, can also be summoned to face prosecution.

7. In **State of Goa v. Babu Thomas** decided by this Bench on 29.09.2005, it was held that in the absence of a valid sanction on the date when the Special Judge took cognizance of the offence, the taking of cognizance was without jurisdiction and wholly invalid. This being the settled position of law, the impugned order of the High Court directing summoning of the appellant and proceeding against him along with Jasbir Singh, ASI is clearly erroneous in law."

6. Apart from the aforesaid judgment which has been relied upon by the petitioner, it would also be necessary to refer to the citation relied upon by the prosecution, in the case of **State of T.N. v. M.M. Rajendran,** (1998) 9 S.C.C. 268. In the said case, the Hon'ble Supreme Court came to conclude that, if the High Court came to a finding that necessary prior sanction had not been obtained in a prosecution on an allegation under the Prevention of Corruption Act, 1988, the High Court need not have made the finding on merits of the case and hence concluded that "Therefore, the High Court need not have made the finding on merits about the prosecution case. We make it clear that finding made by the courts on the merits of the case will stand expunged and will not be taken into consideration in future. In our view, the High Court should have passed the appropriate order by dropping the proceeding and not entering into the question of merits after it had come to the finding that the proceeding was not maintainable for want of sanction."

Reliance was also made on the case of **State of Karnataka through C.B.I. v. C. Nagarajaswamy,** A.I.R. 2005 S.C. Vol-8, 370. In the facts and circumstances of the said case, the Hon'ble Supreme Court was dealing with two judgments passed in two separate criminal appeals and the relevant portion of which is noted hereunder:

Criminal Appeal No.1279:

The Respondent herein was working as a Junior Telecom Officer in Shankarapuram Telecom Exchange. One R. Veera Prathap made a complaint that he had demanded an illegal gratification for showing official favour whereupon a case in Crime No.R.C.34A/1994 was registered. A charge sheet was filed therein and the Special Judge for CBI cases, Bangalore by an order dated 16.07.1999 took cognizance of an offence under Section 7 of the Prevention of Corruption Act, 1988 (for short "the Act"). In the trial, 12 witnesses

were examined. The statement of Respondent under Section 313 of the Code was also recorded.

The learned Special Judge formulated two points for his determination:

"1. Whether the prosecution has proved that the sanction accorded for the prosecution of the accused in this case is a valid sanction?

2. Whether the prosecution has further proved beyond any reasonable doubt that the accused has committed the offences punishable under S.7 and under S.13(1)(d) R/w. S 13(2) of the Prevention of Corruption Act, 1988?

In regard to point No.1, the learned Special Judge was of the opinion that the sanction for prosecution accorded by P.W.11 was illegal and in that view of the matter, the same was determined in favour of the Respondent. In view of his findings as regard point No.1, the learned Special Judge did not record any finding on point No.2 and directed as under:

"Accused C. Nagarajaswamy is hereby discharged from the proceedings and his bail bonds stand cancelled."

A fresh charge sheet was filed after obtaining an order of sanction which came to be challenged before the High Court by the Respondent in an application filed under Section 482 of the Code.

The Hon'ble Supreme Court in the aforesaid case placed reliance on the earlier judgments rendered by it in **Baij Nath Prasad Tripahty vs. The State of Bhopal**, (1957) SCR 650 and in the case of **Mohammad Safi Vs. The State of West Bengal**, AIR 1966 SC 69 and accepted the contentions on behalf of the petitioner that in a case where an appropriate order of sanction was not passed, the court will have no jurisdiction to take cognizance thereof and as such the judgment passed therein shall be illegal and of no effect, but a subsequent trial with proper sanction is not barred.

7. Having heard learned counsel for the respective parties, taking note of the submission made by them and by referring to the various judgments relied upon by both the parties, this Court is of the considered view that the impugned order of cognizance dated 31.07.2002, passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.76 of 2002 suffers from gross miscarriage of justice, inasmuch as, the learned Special Judge,

Vigilance ought not to have taken cognizance on 31.7.2002 against the present petitioner, since, admittedly, no sanction had been obtained by the prosecution for prosecuting the present petitioner on the date the order of cognizance was passed. Further, since the order of cognizance was ex-facie without jurisdiction, the sanction received thereafter cannot cure such inherent defect.

8. Apart from the above, on reading of the impugned order, it appears that the said order has been passed mechanically without applying judicial mind to the facts and circumstances of the case and while the learned Special Judge (Vigilance), Bhubaneswar in the impugned order has noted that he "perused the sanction order", it is a sad to take note of the fact that admittedly, no such "sanction order" itself existed on the date of the order of cognizance i.e. on 31.07.2002. This Court is compelled to express its dissatisfaction in this regard.

9. In view of the aforesaid conclusions/findings arrived at in the case, the CRLMC is allowed and the order of cognizance dated 31.07.2002 against the present petitioner-Prabir Kumar Pradhan, passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.76 of 2002 is hereby quashed.

Application allowed.

2012 (II) ILR - CUT- 850

SANJU PANDA, J.

MACA NOS. 831/2010 & 220/2011 (Dt.20.07.2012)

D.M., ORIENTAL INSURANCE CO.LTD. ……..Appellant

.*Vrs.*

RABI DAS & ANR. …… Respondents

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – Ss.2(34), 147(1)(b)(ii).

Public place – Meaning of – Place where public have a right of access – Held, private place used with permission or without permission would amount to be a public place – Public place does not necessarily mean that it must be a public property.

In this case the accident took place inside the Rourkela Steel Plant area – Since the steel plant is a public limited company, the public have a right of access to it – Held, steel plant premises is a public place – The finding of the Tribunal in this score is set aside and the Insurance Company is liable to pay the compensation.

(Para 10,11)

Case laws Referred to:-

1.AIR 1976 Orissa 21 : (Life Insurance Corporation of India-V-Karthyani & Ors.)
2.AIR 1991 Orissa 173 : (Oriental Fire & General Insurance Co.Ltd.-V- Raghunath Muduli & Ors.)
3.AIR 1984 A.P. 32 : (Lanka Sarmma-V- Rajendra Singh)
4.(1987)1 TAC 364 : (Narsingh-V- Balkishan)
5.AIR 1988 Bombay 248(FB) : (Pandurang Chimaji Agale-V- New India Life Insurance Co. Ltd.)

For Appellant - Dr. A.K.Rath & A.K.Nath.
For Respondents- Rashmi Narayan Patnaik, (For Res. No.1)
For Appellant - R.N.Patnaik.
For Respondents- Dr. A.K.Rath & A.K.Nath (for Res.No.2)

SANJU PANDA,J. Since both the appeals arise out of a common award dated 20th September, 2010 passed by the learned Additional District Judge-cum- 3rd Motor Accident Claims Tribunal, Rourkela in MACT Case No.157/75 of 1992-97, they are heard together and disposed of by this common judgment.

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

The claimant filed an application before the Motor Accident Claims Tribunal on the ground that on 19.2.1992 at 2.30 P.M. while he along with his friend was proceeding on a Motor Cycle bearing registration No.OAU-3799 inside Rourkela Steel Plant area, suddenly a truck bearing registration No.ORO-2380 came in a high speed in rash and negligent manner and caused the accident, as a result of which he sustained multiple injuries on his person and was shifted to Ispat General Hospital, Rourkela for treatment. He was under treatment there as an indoor patient from 19th to 28th February, 1992. After being discharged from the said hospital, he was also under treatment and his treatment continued till filing of the claim application. As he lost income due to sufferings, he filed the claim application claiming compensation towards his treatment and sufferings.

3. The owner of the vehicle contested the claim case. In the show cause, he has taken the stand that the claimant has to prove that the accident took place due to negligence on the part of the driver of the offending vehicle and the accident took place in a public place and in absence of strict proof of the same, the claim application is liable to be dismissed.

4. The appellant-Insurance Company, on the other hand, contested the claim case reiterating the fact that since the accident took place inside the Steel Plant area is not a public place and in absence of proof of negligence of the driver of the offending vehicle, the Insurance Company is not liable to pay compensation.

5. On the above pleadings of the parties, the claimant has examined himself as P.W.1 and also exhibited documents which were marked as Exts. 1 to 10 i.e. discharge certificates, cash receipts, certified copy of the F.I.R., certified copies of the charge sheets, pay slip etc. The owner as well as the Insurance Company did not prefer to examine any witness nor did they file any document in support of their respective pleas.

6. On analyzing the evidence on record, the Tribunal came to the finding that the accident took place in the private premises of Rourkela Steel Plant. The Insurance Company in view of the said finding cannot be directed to indemnify the compensation amount as the accident took place inside the private area. Due to the accident, the left leg of the injured was amputed and he became totally disable. Even though the Insurance Company is not liable, the liability of the owner can not be ignored and

therefore the owner is liable to pay the compensation to the injured. The Tribunal has assessed the compensation amount at Rs.1,75,500/-. The Tribunal directed the Insurance Company to pay the aforesaid amount to the claimant with right of recovery of the same from the owner of the vehicle by following due process of law.

7. Learned counsel for the appellant submits that since the Tribunal recorded a finding that the accident took place in the private place, the Insurance Company is not liable to pay the compensation, as such the impugned award is liable to be set aside. In support of his contention, he relied on the decision in the case of ***Life Insurance Corporation of India v. Karthyani and others,*** AIR 1976 Orissa 21.

8. Learned counsel appearing for the respondent-claimant submitted that the claimant has filed a separate appeal bearing MACA No.220 of 2011 in which he has prayed for enhancement of the compensation amount, since the he has suffered a lot due to amputation of his left leg and became totally disable and lost his earning capacity claiming cost of treatment and for his sustenance**.** Learned counsel for the claimant further submitted that Rourkela Steel Plant being a Public Undertaking Company, the road inside the said Company premises is a public place and the entry is permissible. In support of his contention he relied on the decision in the case of ***Oriental Fire and General Insurance Co. Ltd. v. Raghunath Muduli and others,*** AIR 1991 Orissa 173.

9. Considering the rival submissions of the parties, it is to be decided whether the road inside the Rourkela Steel Plant at Rourkela can be said to be a "Public place" so as to fasten the liability on the insurer of the offending vehicle as per the provision of the Motor Vehicles Act (hereinafter referred to as "the Act"). As per the provision of the Act, the requirement of policy and limit of liability arose only after a bodily injury to any person or damage to any property of a third party if the same is caused by or arising out of the use of the insured vehicle in a public place. The public place has been defined under the Act means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access and includes any place or stand at which passengers are picked up or set down by a stage carriage. The said question was earlier before this Court in the case of *Life Insurance Corporation of India* (supra), where this Court held that the place where members of the public have admission as of right, that is, where they can go without any hindrance or without being required to take any permission from anybody. If members of the public do not, as of right, have access to a particular place that place cannot be said to be a public place

and on that basis it was further held that the factory premises of Hindustan Steel Limited at Rourkela which is not allowed to the members of the public to go in unless there is permission from the authority concerned the premises cannot be held to be a public place and as such the insurer will not be liable. However, the said decision was considered again by this Court in the case of *Oriental Fire and General Insurance Co. Ltd*. (Supra) and on analyzing the evidence on record and pleas of the parties it was held that the place, where the accident occurred, is whether a public place or private place is to be determined as defined under the Act, whether the public have a right of access. Taking into consideration the Stroud's Judicial Dictionary, the meaning of the words "public access to a place" has been given to be a place open to all the public whether by right or permission and also according to K.J.Aiyer's Judicial Dictionary, the test of public place is whether it is open to the members of the public or not even though there may be certain conditions attached to the entry or the use thereof. What is required is that such a place must be open for entry by indeterminate number of members of the public or a determinate number etc. The reasons assigned in the decision of *Oriental Fire and General Insurance Co. Ltd*. are correct position of law.

10. The same view was also expressed in the cases of **Lanka Sarmma** v. **Rajendra Singh**, AIR 1984 Andhra Pradesh 32 **Narsingh** v. **Balkishan** (1987)1 TAC 364 and **Pandurang Chimaji Agale** v. **New India Life Insurance Company Ltd**., AIR 1988 Bombay 248 (FB) where it was held as follows

> "The right of access may be permissive, limited, restricted or regulated by oral or written permission by tickets, passes and badges or on payment of fee. The use may be restricted generally or to particular purpose or purposes. What is necessary is that the place must be accessible to the members of the public and be available for their use, enjoyment, avocation and other purpose. The learned Judges have further observed that the expression "a right of access" is not the same thing as "access as of right' and in the decisions referred to earlier the different High Courts have taken the view lying emphasis on the question whether public have access as of right."

In another decision reported in A.I.R.2007 Madhya Pradesh 134 (Smt.Hira Bai And Ors. vs. Pratap Singh And Anr.), it was also held that the definition of 'public place' is very wide. A perusal of the same reveals that public at large has a right to access though that right is regulated or

restricted. It is also seen that this Act is beneficial legislation, so also the law of interpretation has to be construed in the benefit of public. In the overall legal position and the fact that if the language is simple and unambiguous, it has to be construed in the benefit of the public. We are of the view that the word 'public place', wherever used as a right or controlled in any manner whatsoever, would attract Section 2(24) of the Act. Private place used with permission or without permission would amount to be a 'public place'. The 'public place' does not necessarily mean that it must be the public property.

11. In view of the aforesaid position of law as pronounced and applying the same ratio to the present case and since the Steel Plant is a public Limited Company, the public have a right of access to it, as such Steel Plant premises is a public place. Accordingly, the finding of the Tribunal on the said score is set aside and this Court held that the Insurance Company is liable to pay the compensation. However, taking into consideration the fact and circumstances of the case, this Court feels that the compensation determined by the Tribunal is just and fair and as such this Court is not inclined to interfere with the same. The said compensation will carry interest at the rate of 6% per annum from the date of filing of the claim application.

13. Accordingly, the appeals filed by the Insurance Company as well as the claimant are allowed in part. No cost.

Appeals allowed in part.

2012 (II) ILR - CUT- 855

SANJU PANDA, J.

W.P.(C) NO. 10202 OF 2012 (Dt.17.08.2012)

TANMAY JENA ……Petitioner

.Vrs.

MEMBER SECRETARY-CUM-CONTROLLER OF EXAMINATIONS, ORISSA STATE BOARD OF PHARMACY & ORS. ……Opp.Parties

EDUCATION - Petitioner completed Diploma in Pharmacy – He secured good marks in all subjects but in Drugs store and Business management subject he secured 37 marks, though the qualifying mark is 40.

In case any candidate passed in all subjects and failed in one subject having shortfall of three marks, the other examination bodies i.e. Board/University/ Council of Higher Secondary Education conducting the examination are generally awarding grace mark to pass the examination – Held, if such principle is available the O.P.1 may by adopting that principle award grace mark to the petitioner to enable him to go on for higher study. (Para 9)

For Petitioner - M/s. P.R.Dash, J.Sahu, K.Raj, S.Mohapatra & P.Das.
For Opp.Parties- M/s. V.Narasingha, S.K.Senapati & S.Das, (for O.P.1)

S. PANDA, J. The petitioner, who is a student of IMT Pharmacy College, Puri, challenges the action of the opposite parties in improperly evaluating the marks in respect of question Nos.1 (d), 3(b), and 8(A) & (B) in the subject of Drugs Store & Business Management.

2. It appears from the assertions made in the writ petition that the petitioner has completed Diploma in Pharmacy and has secured more than 70% of marks in 1st year and also secured good marks in 2nd year in other subjects of the said course. However, in Drugs Store & Business Management subject irregular procedure has been adopted by the opposite parties in awarding marks and evaluating the answer scripts. He has

obtained the xerox copy of the answer script of the aforesaid subject under R.T.I. Act and he has appeared the examination in the said subject as back paper, the result of which has been published on 23.3.2012. In the said subject, he had secured 18 marks only whereas in the College internal assessment examination he has secured 19 marks, which was sent by the college and in toto, he secured 37 marks, though qualifying mark is 40.

3. Learned counsel appearing for the petitioner submitted that some of the questions set up in the said subject are out of course and syllabus and he specifically has raised his objection, particularly with regard to question Nos.1(d), 2(b) and 8 (A) & (B) as ambiguous and in view of that, the petitioner was entitled to more marks. He further submitted that If correct marks would have been awarded to the questions he has attempted, as per the principle and practice followed by the Council of Secondary Education and other Bodies regarding evaluation of answer papers, the petitioner would not have awarded '0' mark and thus such action of the opposite parties is illegal, arbitrary and liable to be interfered with. He has also further submitted that due to the negligence on the part of the authorities in not awarding proper marks by adopting improper evaluation procedure, the petitioner has been deprived of taking admission in B.Pharma Course (lateral entry) though he has qualified and got rank in the Entrance Examination, 2011-2012.

4. A counter affidavit has been filed by the opposite party no.1 denying the averments made by the petitioner in the writ petition in which it has been stated that question No.1(d) was not out of course, rather the said question belongs to Chapter 'Inventory Control', which is within the syllabus of Drug Store and Business Management subject. Similarly, question No. 3 (b) comes under the subject 'Cash Book', which was also prescribed in the syllabus and question No.8 (a) and 8 (b) are evaluated by qualified and experienced examiner. So, there is no question of incorrect evaluation of the answer scripts, rather the petitioner's answers were not found to be satisfactory. An additional counter affidavit has also been filed by the opposite party no.1 on 8.8.2012 in which it has been stated that in question No.1(d) i.e. "lead time" as stated comes under "Inventory Control". It is part of the syllabus "Drug Store and Business Management". Question No.3 (b) of "Bank Reconciliation Statement and its Utility", is integrally connected with "Cash Book".

5. A rejoinder affidavit has been filed by the petitioner after the additional affidavit was filed by the opposite party no.1. In course of argument, learned counsel for the petitioner has only confined his

submission to question No.3 (b), i.e. Bank Reconciliation Statement and its Utility and submitted that the said question was out of syllabus and a candidate, who appeared the examination is not supposed to answer that question, as he/she has to define regarding Bank Reconciliation Statement and its Utility.

6. Learned counsel appearing for the opposite party no.1 filed further affidavit on 14th August, 2012 in Court to clarify the position. It was stated that Pharmacy Council of India in exercise of its power in terms of Education Regulation, 1991 prescribes the courses of studies of D.Pharma course. The syllabus prescribed for "Drug Store and Business Management" is divided into two parts i.e. Part-I which deals with Commerce and Part-II deals with Accountancy. Teaching hours has been prescribed for Commerce and Accountancy as 50 and 25 hours respectively. Question No.1(d) "Lead Time' and Question No.3(b) 'Bank Reconciliation Statement and its Utility' are within the prescribed syllabus. Drug Store and Business Management deals with Accountancy and while dealing with Accountancy, the books referred to are those which, are usually prescribed at +2 Commerce level. However, the Pharmacy Council of India has not prescribed any particular text book for the purpose.

7. Learned counsel for the opposite parties also submitted that the text book which are followed in +2 Commerce level, namely, "Double Entry Book Keeping" by T.S.Grewal reveals that Bank Reconciliation Statement is integrally connected with Cash Book.

8. Considering the rival submissions of the parties and after going through the "Double Entry Book Keeping", this Court feels that the questions are not out of course and within the prescribed syllabus rather, it may be a difficult one.

9. It appears that in case any candidate has passed in all subjects and failed in one subject having three marks shortfall from the pass mark, then in such a situation the other examination bodies i.e. Board/University/Council of Higher Secondary Education conducting the examination are generally awarding grace mark to the candidate to pass the examination. If such a principle is available, the opposite party no.1 may, by adopting that principle, award grace mark to the petitioner to enable him to go on for higher study.

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

Writ petition disposed of.

2012 (II) ILR - CUT- 858

B. K. PATEL, J.

RFA NO. 246 OF 2009 (Dt.25.06.2012)

M/S. MODERN ZIPFASTO (PVT.) LTD. … ….Appellant.

.Vrs.

ORISSA STATE FINANCIAL CORPN. & ORS. …….Respondents

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – O. 41, RULE 23.

Remand – Conclusions of the trial Court are not in consonance with the findings recorded in favour of the plaintiff – Held, it is appropriate to remit the matter back by way of remand to the trial Court for complete adjudication of issue Nos.(iv) and (vi) by passing judgment afresh on the basis of the evidence available on record.

(Para 16)

For Appellant - M/s. Shyamananda Mohapatra, B. Rout & P.K.Panda.
For Respondents - M/s. P.K.Routray, B.G.Mishra, A.Routray & J.Bhuyan.

B.K. PATEL, J. This appeal is directed against judgment and decree dated 19.8.2009 passed by the learned Civil Judge (Senior Division) First Court, Cuttack in C.S.(III) No. 138 of 2008.

2. Appellant, a company registered under the Indian Companies Act, is the plaintiff and respondents, the Orissa State Financial Corporation and its functionaries, were defendants in the suit.

3. Plaintiff filed the suit for realization of a sum of Rs.2.43 lakhs and also for declaration that One Time Settlement (for short 'OTS') proposal dated 8.9.2008 of the defendants suffers from severe infirmity and is not sustainable in the eye of law. The suit having been partly allowed and partly dismissed, plaintiff has preferred this appeal. Operative part of the impugned judgment reads:

> "The suit be and the same is partly decreed and partly dismissed on contest against the defendants. While refusing the prayer of the

> plaintiff-company for refund of a sum of Rs.2.43 lakhs and to declare the OTS scheme under challenge as illegal and void, I direct that the defendant-corporation is to reconsider the sale price of suit unit so also settlement under the OTS scheme taking into account the claim of the plaintiff as regards to shortage of land and machinery, arrear dues of the previous owner, cost of the demolished civil construction and machinery and the charge of conversion of the disputed land to industrial land within 2(two) months henceforth. xx xx xx xx"

4. Dispute in the suit is with regard to auction purchase of an industrial unit in the name and style of M/s. Sri Ram Extraction Private Limited (hereinafter referred to as 'the suit unit') by the plaintiff from the defendants in the year 1995-1996. Consideration price of the suit unit was determined at Rs.39.11 lakhs out of which the plaintiff was to pay of Rs.5.11 lakhs as down payment. Upon execution of required documents and deposit of down payment amount, the suit unit was handed over to the plaintiff. While taking over possession of the suit unit, it was noticed that there was shortage of Ac.0.40 decimals of land which had been acquired by National Highway Authority on payment of compensation to the defendants. Also, there was shortage of machineries. These facts are not in dispute.

5. Plaintiff's case is that apart from shortage of land and machineries, it was also found that some of the civil constructions and machineries of the suit unit had been demolished and damaged by the National Highway Authority. The land on which the suit unit is situated was not converted to industrial land. Also, there were arrear demands of Rs.17.5 lakhs towards sales tax and Rs.5.31 lakhs towards electricity consumption against the suit unit. Plaintiff was denied fresh electricity connection and sales tax registration certificate. Despite several representations, defendants did not take any step to mitigate the plaintiff's predicaments for which the plaintiff could not make commercial use of the suit unit. In order to maintain the idle suit unit, plaintiff had to spend huge amount for watch and ward purpose. Despite payment of Rs.10.30 lakhs to the defendants, plaintiff sustained huge loss. In such circumstances, plaintiff approached the defendants for grant of OTS benefit. Plaintiff also made representation claiming waiver of interest on unpaid consideration amount till electricity connection and sales tax registration. Defendants, without considering the grievances of the plaintiff simply reduced the original sale price from Rs.39.11 lakhs to Rs.37.35 lakhs on account of shortage of land. At paragraphs 21 and 22 of the plaint, plaintiff's claims have been calculated and pleaded as follows:

> "21. That due to the above reasons of uncertainty and mainly due to the refusal of grant of electricity connection and clearance by the

Sales Tax Department, the plaintiff was not able to start its industrial activities for the purpose of carrying on business and as such the plaintiff has suffered immensely both on account of business loss and damages. However as a definite head of expenses for watch and ward purpose the plaintiff has suffered a loss of Rs.7.30 lacs.

The above calculates on different heads as stated above are produced below for technical appreciation as per calculation.

1. Compensation for shortage of machineries as per agreement and physical delivery.	6.43
* Compensation of machinery short delivered as per agreement being 30% of the cost of total value of machinery.	5.43
2. Compensation for demolition and encroached land:	5.70
*Cost of A.0.40 dec. of land @ Rs.4000/- per dec.	1.60
*Cost of Civil Construction delomished.	2.02
* Cost of machineries demolished on the above encroached land being 15% of the total M/C.	2.72
Total cost of land, civil construction, Machines.	6.34
Less: Cost of scrap of above.	0.64
Net cost of short land and demolition.	5.70
3. Conversion of A.2.59 dec. of land into homestead land from agriculture land.	8.00
* Govt. Fee @ Rs.3000/- per dec. for Ac.2.59.	7.77
* Other misc. Expenses etc.	0.23
Total cost for conversion.	8.00
4.Compensation towards watch and ward of the unit.	7.30

* Net expenses towards salary etc. of watchmen from 1.07.1996 till 30.09.2008 i.e. for 12 years and 2 months Average. 7.30

Total receivable from OSFC 26.43

22. The total amount as stated above either having been spent or having been lost to the plaintiff comes to Rs.26.43 lacs besides the amount of Rs.10.30 lacs having been paid by the plaintiff to the OSFC makes a grand total of Rs.36.43 lacs. This is against the payment of OSFC as per agreement for Rs.34.00 lacs and therefore the plaintiff is entitled to a refund and in the alternative of recovery of Rs.2.43 lacs as an excess amount. However this besides the amount that this Hon'ble Court may determine towards business loss and other damages actually suffered by the plaintiff and award such compensation and upon such determination the plaintiff is ready and willing to deposit the short court fee as may be direct."

6. Defendants filed written statement denying and disputing plaintiff's claim. It was pleaded that the terms and conditions of auction sale provided that the sale would be on "As is where basis" and the defendants would not be liable for any statutory dues for the period prior to and after the sale. The plaintiff company having agreed to all such terms and conditions of sale, was not entitled to any relief.

7. Considering the rival pleadings, the following issues were framed:

(i) Whether the suit is maintainable under law?

(ii) Whether there is any cause of action to bring the suit?

(iii) Whether the suit is barred by law of limitation?

(iv) Whether the plaintiff is entitled to realize a sum of Rs.2.43 lakhs from the Defendant-Corporation?

(v) Whether the OTS proposal dtd.8.9.2008 under challenge, suffers from serious infirmity and is not sustainable in the eye of law?

(vi) To what other reliefs, the plaintiff is entitled for?

8. In order to substantiate its case, plaintiff-company examined three witnesses and placed reliance on documents marked Exts. 1 to 21.

Defendants examined one witness D.W. 1 only but did not adduce any documentary evidence.

9. In adjudicating issue no. (iv), it was held by the learned trial court that the defendants or the previous owner of the suit unit, and not the plaintiff-company, are liable to pay arrear dues towards sales tax and electricity charges and that defendants are required to reduce the sale price towards shortage of land measuring Ac.0.40 decimals, towards shortage of machineries, towards civil constructions and machineries demolished and destroyed by the National Highway Authority and towards cost of conversion of land. However, it was held that the plaintiff was not entitled to any amount towards cost of watch and ward. In answering issue no. (v), it was held by the learned trial court that in view of non-consideration of plaintiff's grievances, the OTS scheme or proposal of the defendants cannot be said to be fair and reasonable and the defendants are required to reconsider the scheme taking into account the deficiencies, shortage and arrear dues with regard to the suit unit. Issue nos.(i), (ii) and (iii) were answered in favour of the plaintiff. In answering issue no.(vi) it was held by the trial court that the plaintiff is not entitled to any relief other than reconsideration of sale price of suit unit and reconsideration of the OTS proposal taking into account the claims of the plaintiff as regards the shortage of land, machineries, cost of demolition of civil constructions and the machineries and the cost for conversion of the suit land to industrial land.

10. It was submitted by the learned counsel for the appellant that on an appraisal of the pleadings and evidence adduced by the parties in adjudicating issue no.(v) the trial court categorically held that OTS proposal of the defendants cannot be said to be fair and reasonable for which it is required to be reconsidered. Also in answering issue no.(iv) the trial court upheld plaintiff's claims of arrear dues of the previous owner towards sales tax and electricity consumption, shortage of land to the extent of 0.40 decimals, shortage of machineries as per Ext.21, demolition of civil constructions and machineries of the suit unit demolished and damaged by National Highway Authority and cost of conversion of land on which the suit unit stand from agricultural to industrial land. Accordingly, the trial court directed deduction towards cost of land, civil constructions and machineries as well as arrear dues of the previous owner and land conversion charges from sale price. These findings of the trial court in favour of the plaintiff have not been assailed and have attained finality. Plaintiff adduced abundant of evidence including documentary evidence to quantify its claims on each of the heads of shortages, arrear dues of the previous owner, cost of demolition of civil constructions and machineries and the charges for

conversion of land. However, the trial court instead of appreciating the evidence on this score and quantifying the claims shifted its responsibility to the officers of Orissa State Financial Corporation to reconsider the OTS proposal. It was strenuously contended that plaintiff having approached the court for adjudication the dispute after having failed in its attempt to get the grievances mitigated by the defendants, the learned Civil Judge (Senior Division) should have quantified plaintiff's claims in order to ensure finality of adjudication instead of directing reconsideration of the OTS proposal.

11. It was further contended by the learned counsel for the appellant that due to handing over of an incomplete suit unit without electricity connection and sales tax certificate, plaintiff could not run the suit unit for any commercial purpose. Instead it had to employ persons for watch and ward purpose on payment of remuneration. It was also contended by the learned counsel for the appellant that the plaintiff specifically pleaded waiver of interest on the unpaid consideration amount and adduced evidence placing reliance on Ext.13. However, the trial court failed to consider plaintiff's claim on this score. Moreover, the trial court has erroneously held that the plaintiff was not entitled to any cost towards watch and ward purpose when the suit unit remained idle and defunct due to fault on the part of the defendants.

12. In reply, it was contended by the learned counsel for the respondents that the trial court did not quantify the claims of the plaintiff due to want of acceptable evidence. Calculations made by the plaintiff were unilateral. Therefore, the impugned judgment and decree directing reconsideration and quantification of sale price of the suit unit by the defendants in their OTS proposal cannot be faulted.

13. The trial court has answered issue no.(v) in favour of the plaintiff holding that the OTS proposal of the defendants cannot be said to be fair and reasonable. Accordingly, reconsideration of the proposal has been directed. The trial court also has come to the findings that (i) the plaintiff cannot be saddled with the liability of payment of arrear demands of Rs.17.5 lakhs by the sales tax authority and of Rs.5.31 lakhs by the State Electricity Board raised against the previous owner; (ii) there was shortage of 0.40 decimals of land for which the defendants have agreed to reduce the sale price of the suit unit; (iii) there was shortage of machineries in the suit unit when it was handed over to the plaintiff for which the defendants are bound to reduce the price of such machineries from the sale price; (iv) sale price of the suit unit has also to be reduced towards cost of civil constructions demolished by National Highway Authority; (v) plaintiff is entitled to deduction of cost of machineries damaged by National Highway Authority

from the sale price of the suit unit; and (vi) the defendants are to bear the cost of conversion of land on which the suit unit stands from agricultural to industrial land by deducting the amount from the sale price. These findings have not been assailed and attained finality. Plaintiff adduced both oral and documentary evidence to quantify the shortages, arrear dues and conversion charges. Defendants also adduced oral evidence and cross-examined the witnesses examined on behalf of the plaintiff. Specific issues were framed regarding plaintiff's claims to realise Rs.2.43 lakhs from the defendants as well as regarding any other relief which the plaintiff might be entitled to. The trial court, being the appropriate forum for adjudication of the facts in dispute between the parties, ought to have appreciated the evidence on record in answering the issues completely. However, the trial court appears to have shifted the responsibility by directing reconsideration of OTS proposal for quantification of plaintiff's claims.

14. Undoubtedly, the suit unit remained idle and defunct due to shortage of machineries as well as for want of electricity connection and sales tax certificate. Said situation arose due to breach of agreement by the defendants in delivering the suit unit which could be run as an industrial unit. The plaintiff was unnecessarily burdened with the responsibility of protecting and maintaining the suit unit without getting any return. Therefore, the trial court is not right in holding that plaintiff's claim towards cost for watch and ward purpose is not acceptable. Learned trial court ought to have accepted the claim and reasonably quantified the claim on this aspect also.

15. It is also found from the impugned judgment and decree that the trial court has not considered plaintiff's claim of waiver of interest on unpaid sale price till supply of electricity connection and sales tax registration. Such non-consideration in spite of full fledged trial in course of which evidence was adduced from both sides also renders the conclusions of the trial court vulnerable. It is worthwhile to note that in Ext. 13, the Minutes of the Meeting of Negotiation Committee dated 12.5.1995 it has been specifically provided that in case electricity connection and allotment of new sales tax registration number is delayed beyond 2 months from the date of release of the assets, the plaintiff should not pay interest on the deferred loan for the period beyond 2 months of release of the assets till the date of actual power connection/allotment of new sales tax number.

16. It is, therefore, evident that the conclusions of the trial court are not in consonance with the findings recorded in favour of the plaintiff. Plaintiff having approached the court after having failed in its attempt to get the grievances redressed by the defendants, the trial court should have

quantified plaintiff's claims to ensure final adjudication and determination of facts in dispute. In such circumstances, it is found appropriate to remit the matter back by way of remand to the trial court for complete adjudication of issue nos.(iv) and (vi) by passing judgment afresh on the basis of evidence available on record in the light of discussions made above.

17. Accordingly, the appeal is allowed. The matter is remanded to the learned Civil Judge (Senior Division), First Court, Cuttack to completely adjudicate issue nos.(iv) and (vi) in C.S. (III) No.138 of 2008 and pass judgment and decree afresh on the basis of evidence already adduced by the parties by considering appellant's claims towards waiver of interest and cost incurred for watch and ward purpose and to quantify in terms of money all the claims to which the plaintiff is held to be entitled. The entire exercise be completed within four weeks from the date of appearance of the parties before the trial court. Parties are directed to appear before the trial court on 2nd July,2012. Parties shall bear their own cost.

Appeal allowed.

2012 (II) ILR - CUT- 866

B. K. NAYAK, J.

CRLMC. NO.2363 OF 2004 (Dt.09.07.2012)

DANDAPANI PRADHAN & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA ……..Opp.Party

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.482.

Order taking cognizance – The impugned order does not disclose the prima facie satisfaction of the learned Special Judge regarding availability of materials about commission of the offence by the petitioners so as to take cognizance in the case – Held, impugned order taking cognizance of the offence U/s.13 (1) (c) & 13(2) of P.C. Act is quashed – Matter remitted back to the learned Special Judge (Vigilance), Berhampur to reconsider the question of cognizance after going through all the materials available on record.

Case laws Referred to:-

1.(2003) 26 OCR 730 : (Gundicha Behera & Anr.-V- State of Orissa)
2.2008(II) OLR 85 : (Saroj Kumar Mahapatra-V- State of Orissa).

For Petitioner - S.K.Padhi Sr. Advocate ,
D.Mohapatra, B.K.Mohapatra , G.Mishra
S.K.Mohapatra, B.K.Sahu
For Opp.Parties - Srimanta Das, (ASC Viglance)

Heard learned counsel for the petitioners and Mr. Pani, learned Additional Standing Counsel for the Vigilance Department.

Perused the case records.

The petitioners, in this application under Section 482 of the Code of Criminal Procedure, pray for quashing of the order dated 09.08.2004 passed by the learned Special Judge, (Vigilance), Berhampur in T.R. No.30 of 2004 arising out of G.R.Case No.25 of 2003 taking cognizance of the offence under section 13(2) read with Section 13(1) (c) of the Prevention of Corruption Act and directing for issuance of process against the petitioners.

It is submitted by the learned counsel for the petitioners that nowhere in the impugned order, the learned Special Judge has said that on going

through the records, he was satisfied prima facie about commission of the offences by the petitioners and therefore, the order of cognizance is bad as it suffers from complete non-application of mind by the learned Special Judge. In this connection, he places reliance on the decisions of this Court reported in ***(2003) 26 OCR 730; Gundicha Behera and another-v- State of Orissa and 2008 (II) OLR 85; Saroj Kumar Mohapatra-v-. State of Orissa. In the case of Gundicha Behera and another*** (supra), this Court quashed the order of cognizance on the ground that the magistrate has neither perused the material nor arrived at prima facie satisfaction about commission of the offences by the accused so as to take cognizance of the same. In absence of prima facie satisfaction, the order of cognizance becomes vulnerable.

In the case of ***Saroj Kumar Mahapatra*** (supra) where the cognizance order is almost similar to the order passed in the present case, it was held by this Court as follows:

> "8. Keeping in view the above principles with regard to the duty of the Magistrate in taking cognizance, it can be said that the impugned order does not disclose the prima facie satisfaction of the trial Court regarding availability of materials for taking cognizance against the petitioner, inasmuch as the subjective satisfaction of the trial Court with regard to the complicity of the petitioner in the alleged offence has not been disclosed while proceeding to take cognizance of the offence under section 13 (1) (d) read with section 13(2) of the P.C. Act."

In the instant case, the impugned order of cognizance runs as under :-

> "Sl. No. – Date of Order 9-8-03:-
>
> Case record is received on transfer from C.J.M., Berhampur and taken to my file. Register. Perused the same. F.I.R. C.D. and connected its papers. Cog. of offence U/s.13 (2) r/w 13(1) (c) of P.C. Act is taken against the accused persons.
>
> Issue summons to the accused persons fixing 06.10.04 for appearance."

The impugned order does not disclose the prima facie satisfaction of the learned Special Judge regarding availability of materials about commission of the offence by the petitioners so as to take cognizance of the same. The matter needs reconsideration by the learned Special Judge.

In the circumstances, I allow this CRLMC, quash the impugned order of cognizance passed in T.R.No.30 of 2004 arising out of G.R.Case No.25 of 2003 and the matter is remitted back to the learned Special Judge, (Vigilance), Berhampur to reconsider the question of cognizance after going through all the materials available on record and reaching prima facie satisfaction about the commission or otherwise of the offences by the petitioners.

Application allowed.

2012 (II) ILR - CUT- 869

S. K. MISHRA, J.

W.P.(C) NO.16411 OF 2011 (Dt.07.09.2012)

M/S. SHREE SHYAM ROLLER & FLOUR MILL (P) LTD. …….. Petitioner

.Vrs.

OMBUDSMAN-I & ORS. ……Opp.Parties

A. ORISSA ELECTRICITY REGULATORY COMMISSION DISTRIBUTION (CONDISTIONS OF SUPPLY) CODE, 1998 – CLAUSE 17.

Deemed termination of agreement – A responsible officer of the Opp.Party-Company intimated the petitioner that due to non-payment of arrear dues power supply was disconnected on 29.11.2003 and he was asked to take notice to immediately comply with the arrear outstanding against him failing which the agreement shall be terminated w.e.f. 28.02.2004 without further notice as per Clause 17 of the above Code – Once the Company has taken a view that the agreement has been terminated for non payment of outstanding dues it cannot later on claim that such communication was made under a bonafide erroneous impression and the petitioner is liable to pay Rs.12,32,000/- for the period he has not consumed electricity – In other words a person/authority who approbates cannot reprobate.

Held, impugned orders along with the letter Dt.11.02.2009 asking the petitioner to pay Rs.12,32,000/- are quashed – Direction issued to refund the security deposit of Rs.3,90,034/- to the petitioner within six weeks from the date of communication of the order to the Opp.Parties failing which it shall carry 6% interest from the date of termination of contract i.e. 28.02.2004. (Para 18)

B. ELECTRICITY ACT, 2003 (ACT NO.36 OF 2003) – S.56 (2).

Electricity dues – Default in payment – Recovery of – Licensee or the generating company has right to disrupt power supply U/s.56 (1) of the Act – Section 56 (2) only provides a limitation that the recourse to recovery by cutting of electricity supply is limited for a period of two years from the date when such sum became due – This is a special mechanism provided to enable the licensee or the generating company

to recover its dues expeditiously – Held, the argument advanced by the petitioner that the amount claimed by the licensee is barred by limitation U/s.56(2) of the Act is erroneous and it would not mean that no such amount can be recovered if period of two years has elapsed.

(Para 11)

Case law Relied on:-

AIR 2007 Bombay 52 : (Awadesh S. Pandey-V- Tata Power Co. Ltd. & Ors.)

Case laws Referred to:-

1.AIR 1990 SC 699 : (Bihar State Electricity Board, Patna & Ors.-V- M/s. Green Rubber Industries & Ors.)
2.2011(8) SCC 161 : (Indian Counsel for Enviro-Legal Action-V- Union of India)
3.2010 (10) SCC 165 : (Shyam Telelink-V- Union of India).
4.(2009)14 SCC 253 : (City Montessori School-V- State of Uttar Pradesh & Ors.)
5.1981(1) SCC 537 : (New Bihar Biri Leaves Co.-V- State of Bihar).

For Petitioner - M/s. Ruchi Rajgarhia, R.Agarwal & M. Agarwal.
For Opp.Party No.1 - M/s. B.K.Nayak.
For Opp.Party No.3 - M/s. D.K.Mohanty.

S.K.MISHRA,J. The petitioner, in this writ petition, assails the order dated 15.12.2010 passed by the learned Grievances Redressal Forum, CESU, Dhenkanal, in Consumer Complain Case No.116/2010, which has been confirmed by the learned OMBUDSMAN-I in Consumer Representation Case No.OM(I)-04 of 2011 on 21.4.2011 upholding the demand of the electricity company of Rs.15,07,307/- from the petitioner towards arrear electricity dues.

2. The petitioner set up a Flour Mill and for the purpose of running the same entered into an agreement with the opposite parties on 20.9.2001 for a contract demand of 250 KVA. For supply of such demand, the Executive Engineer (Electrical), Angul Electrical Division, CESU, Angul, opposite party no.3, prepared an estimate for 1.2 km 11 KV line with 250 KVA 11/0.4 KV transformer. The cost estimate of Rs.5,26,435/- was intimated to the petitioner, which was duly paid by the petitioner.

The petitioner also deposited a sum of Rs.1,05,268/- towards supervision charges and an amount of Rs.3,90,034/- towards security

deposit. Due to labour and capital problem, the petitioner's unit became sick and on 1.11.2003, it put forth its grievance requesting opposite party no.3 to consider its case under Section 109 of the Orissa Electricity Regulatory Commissioner Distribution (Conditions of Supply) Code, 1998 (for short "the Code, 1998") and allow its unit for 5 KW light load only.

3. In pursuance of the agreement executed on 20.9.2001, the opposite parties served a disconnection notice on 18.11.2003 and subsequently power supply was disconnected on 29.11.2003 for non-payment of dues. Opposite party no.3 vide letter no.610 dated 6.2.2004, intimated the above facts to the petitioner and further noticed to pay Rs.2,30,476/- up to the month of January, 2004, failing which, the petitioner was intimated that the agreement will be terminated on 28.2.2004 without further notice. In the meantime, the petitioner's unit became a sick one and was seized by the Orissa State Financial Corporation under Section 29 of the State Financial Corporation Act, 1951. Thereafter, on 20.8.2008 the petitioner's unit wrote a letter to opposite party no.3 for refund of the security deposit after adjusting the demanded amount of Rs.2,30,470/- upto January, 2004. In response to the petitioner's letter dated 20.8.2008, opposite party no.3 vide letter no.7640 dated 31.12.2008, sought for necessary instructions from the Sr. General Manager(Com.), CESU Headquarters, to refund the security deposit after adjustment of the arrear dues of Rs.2,30,476/- i.e. upto January, 2004. However, instead of refunding the aforesaid to the petitioner, opposite party no.3 on 11.2.2009 intimated to the petitioner to clear up the arrear dues of Rs.15,07,307/- in order to release the refund of security deposit.

4. The petitioner thereafter aggrieved by such a letter approached the Grievances Redressal Forum (GRF), CESU, Dhenkanal. But as per judgment dated 15.12.2010 the petitioner's complain was dismissed and it was directed to pay the amount immediately to the opposite parties.

Being aggrieved by such an order the petitioner filed an appeal before the OMBUDSMAN-I, Orissa Electricity Regulatory Commission (OERC), Bhubaneswar, and the same was also dismissed on 21.4.2011. Being aggrieved by both the orders of the OMBUDSMAN-I as well as the GRF and the action of opposite party no.3 in demanding Rs.15,07,307/-, the petitioner has filed this writ petition, *inter alia,* praying that the orders passed by the GRF and OMBUDSMAN-I be set aside, the letter demanding Rs.15,07,307/- be quashed and the opposite parties be directed to deposit the security amount deposited by it after adjusting the arrear dues as claimed by it along with interest.

5. Opposite party no.3 has filed counter affidavit, *inter alia,* pleading that the agreement, which was entered into between the parties, provides that it shall commence from the date of execution and shall continue in force until expiry of the five years from the date of supply and thereafter shall so continue until the same is determined by either party giving to the other two calendar months notice in writing indicating the intention to terminate the agreement.

6. In course of hearing, learned counsel for the petitioner raised two essential points.

The first point raised by learned counsel for the petitioner is that the agreement having been terminated by opposite party no.3 on dated 6.2.2004 (Annexure-1) it cannot latter on claim that it is contrary to law and claim arrear dues for electricity not supplied to the petitioner. Interpreting Regulation 17 of the 1998 Code, learned counsel for the petitioner argued that a proper interpretation of the clause only leads to the conclusion that within the agreement period, the contract can be terminated with a notice whereas after the initial period of contract, the same can be terminated without notice after the disconnection of electricity power. Therefore, it was contended that the orders passed by learned GRF and OMBUDSMAN-I are contrary to the basic tenet of law, and hence, requires interference.

The second point raised by learned counsel for the petitioner that in Section 56(2) of the Electricity Act, 2003 (for short "the Act") a limitation of two years have been prescribed and if Electricity Company is not showing any due/arrears as recoverable dues from the consumer continuously, then the same cannot be recovered. In other words, learned counsel for the petitioner submits that the limitation for recovery of money from the petitioner is prescribed under Section 56(2) of the Act and the same is two years. On the basis of such submission, learned counsel for the petitioner prayed that the writ petition be allowed and prayer of the petitioner be granted by the Court.

7. Learned counsel for the opposite parties, on the other hand, submits that the agreement is guided by Regulation 17 of the Code, 1998 and it provides that the agreement cannot be terminated by either party within the initial period. It is further contended that Section 56(2) of the Act does not provide for any limitation and, therefore, the writ petition is without merit and the same be dismissed.

8. On the basis of such argument advanced at the bar, the following two questions arise for determination in this case:-

(i) Whether Section 56(2) of the Act creates a bar by prescribing the limitation for recovery of money after two years from the date it became due ?

(ii) Whether the termination of the agreement, which was effected by opposite party no.3 is legally tenable and can form the basis of claim as made by the petitioner ?

9. Section 56 of the Act provides for disconnection of electricity supply in default for payment. For better appreciation, it is appropriate to take note of the exact words Parliament has enacted. Section 56 of the Act reads as follows:-

" 56. **disconnection of electricity supply in default for payment**.- (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no loner;

Provided that the supply of electricity shall not be cut off if such person deposits, under protest,-

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months,

whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this

section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

10. In interpreting this provision, a Division Bench of Bombay High Court in ***Awadesh S. Pandey v. Tata Power Co. Ltd and others,*** AIR 2007 Bombay 52, has held that the power to recover under Section 56 of the Act has been conferred. Section 56(1) is held to be a special provision, enabling the generating company or the licensee to cut off supply of electricity until such charges or sum as demanded under Section 56(1) is paid. The Division Bench, further, opined that Sub-Section (2) only provides for a limitation, that the recourse to recovery by cutting of electricity supply is limited for a period of two years from the date when such sum became due. As long as a sum is due, which is within two years of the demand and can be recovered, the licensee or the generating company can exercise its power of coercive process of recovery by cutting of electricity supply. This is a special mechanism provided to enable the licensee or the generating company to recover its dues expeditiously. The Bombay High Court, further, held that the Electricity Act has provided for mechanism for improvement of supply of electricity and to enable the licensee or the generating company to recover its dues. Apart from the above mechanism, independently it can make recovery by way of a suit.

11. A plain reading of the Section 56 of the Act as well as the aforesaid case of the Bombay High Court, it is clear that Sub-section (1) of Section 56 of the Act provides that whenever there is a default in payment of electricity charges, the licensee or the generating company has the right to disrupt electricity supply to the consumer, as a method of recovering the money due from the consumer. Sub-Section (2) of Section 56 of the Act is a limitation to sub-Section (1). In other words, Sub-Section (2) is rider to Sub-section (1). Notwithstanding the provision of Sub-section (1) any sum due from any consumer shall not be recoverable after a period of two years from the date when such sum became due unless such sum being shown continuously as recoverable, as arrear of charges for electricity supply and the licensee shall not cut off the supply of electricity. In other words, if any amount is due and the same is due within a period of two years, licensee or the generating company can resort to Sub-section (1). If it is beyond two years from the due date and only in case the sum has been shown continuously as recoverable amount from the consumer, the licensee can resort to Sub-section (1) otherwise not. Thus, in that view of the matter, the argument

advanced by the learned counsel for the petitioner that the amount claimed by the licensee is barred by limitation under Sub-section (2) of Section 56 is clearly erroneous and hence is not accepted. Accordingly, the first question formulated is answered against the petitioner.

12. As far as the termination of agreement is concerned, the learned counsel for the petitioner drew attention of the Court to Annexure-1, wherein the Manager, Angul Electrical Division of the opposite party-Company has intimated the petitioner that disconnection has been effected to his premises on 29.11.2003 in pursuance of the disconnection notice No.6117 issued on 18.11.2003. The consumer was, therefore, asked to take notice to immediately comply with the arrear outstanding against him up to Ist January, 2004 amounting to Rs.2,30,476/- only, failing which the agreement for power supply against the consumer shall be terminated w.e.f. 28.02.2004 without further notice as per clause-17 of the OERC, Distribution (Conditions of Supply) Code, 1998. This letter has been issued on 06.02.2004. It is hotly contested at the Bar that in view of such termination of contract/agreement the petitioner is not liable to pay any further energy dues to the licensee after January, 2004. However, it is contended by the learned counsel for the opposite parties that such a notice has been issued due to a bonafide mistake on the part of the officer of the company and by virtue of clause-17 of the OERC Distribution (Conditions of Supply) Code, 1998, the agreement cannot be terminated by the licensee, and therefore, it has to be held that the agreement remained in force for a period of five years.

Clause-17 of the OERC Distribution (Conditions of Supply) Code, 1998 reads as follows:-

> " **17. Deemed Termination of Agreement-** (1) If power supply to any consumer remains disconnected for a period of two months for non-payment of charges or dues or non-compliance of any direction issued under this Code, and no effective steps are taken by the consumer for removing the cause of disconnection and for restoration of power supply, the agreement of the licensee with the consumer for power supply shall be deemed to have been terminated on expiry of the said period of two months, without notice, provided the initial period of agreement is over."
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> (emphasis supplied)

The learned counsel for the petitioner argues that a plain reading of the clause provides that whenever the initial period of agreement is over and

there is a disconnection of electricity for non-payment or non-compliance of any direction, without notice, the licensee has the right to terminate the agreement. It is, therefore, contended by learned counsel for the petitioner that in case the initial period of agreement is not over, as is the situation of the present one, the termination can be effected only after a notice. The learned counsel for the opposite parties, on the other hand, submits that the termination can be effected only in case the initial period of agreement is over and no other situation the agreement can be terminated. Such rival contention required our attention and adjudication.

13. In support of that contention, the opposite parties have relied upon the case of ***Bihar State Electricity Board, Patna and others vs. M/s Green Rubber Industries and others,*** AIR 1990 SC 699, wherein it has been held that considered by the test of reasonableness the agreement to pay minimum guaranteed charges, irrespective of whether energy was consumed or not cannot be said unreasonable, inasmuch as, the supply of electricity to a consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the agreement comes to an end. The ratio decided in that case is not at all applicable to the present case, inasmuch as, the reasonableness of agreement is not under challenge. Rather, the question is whether there has been a determination of agreement or not is to be adjudicated. Secondly, it is undisputed case of the petitioner that the scheme of providing electricity to the petitioner was found to be non-remunerative. Hence, the consumer was asked to bear the portion of charges. As per Annexure-6, the consumer paid Rs.5,26,435/- along with Rs.1,05,268/- towards supervision charges. Therefore, the licensee has not incurred any expenses on overhead and hence, the ratio decided in the aforesaid case is not applicable to the present case.

14. Maxwell on Interpretation of Statutes at page-28 has written that the first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar. This is called the literal construction in interpretation of statutes. At page-33, it is further written that it is a corollary to the general rule of literal construction that nothing is to be added or taken from a statute unless there is adequate ground to justify the inference that the legislature intended something which it omitted to express. However, if the literal rule interpretation is applied in this case, then no meaning can be

derived in the sense that it neither helps the contention raised by the petitioner nor the words or expressions supplied by the opposite parties. Therefore, it requires a harmonious construction which in otherwise will lead to a just, reasonable and sensible conclusion, rather than something which may be presumed that the legislator would not have intended such a outcome.

If the clause interpreted as providing that total exclusion of termination of a contract by any of the party in whatsoever situation, then it will lead to absurdity. For example, when the contract becomes impossible to perform, then what should be the course of action available to the parties. For example in a case the property to which electricity is supplied is destroyed by natural calamity and the same is not repairable, then is it to be taken that the law framing authority wanted that in such cases also the agreement cannot be terminated and it shall be incumbent on the consumer to pay electricity charges even when it is impossible for him to consume electricity. So is the situation in this case. The consumer is in a position that it is impossible for him to consume electricity as the mill has been seized by the financier and later on it has been sold in auction. In such a situation, can it be held that law framed was intended the licensee to gain money from the consumer. Having given very anxious thought to the matter at hand, this Court is of the opinion that clause-17 of the OERC Code, 1998 lays down in case of disconnection of electricity for non-payment of charges or non-compliance of direction issued under the Code and when no effective steps has been taken by the consumer to remove the cause of disconnection for restoration of power supply, the licensee can terminate the contract by giving a notice of two months if the same is in the initial period of agreement. In case the initial period of agreement is over, it is not necessary even to issue notice of two months for termination of agreement to the consumer for non-payment/non-compliance. In that view of the matter, the contention raised by learned counsel for the opposite parties that the petitioner should continue to be saddled with electricity charges even after disconnection and termination of the agreement is not tenable.

15. Judging this problem from another aspect, the same conclusion can be reached. It is well settled that a person should not be allowed to unjustly enrich himself. In this connection, the Supreme Court has laid down the law in the case of ***Indian Counsel for Enviro-Legal Action Vs. Union of India,*** 2011 (8) SCC 161.

At paragraphs -151, 152 and 153 of the said case the Supreme Court has laid down as follows:-

151. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

152. Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A defendant may be liable even when the defendant retaining the benefit is not a wrongdoer and even though he may have received (it) honestly in the first instance.

153. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives as benefit which would be unconscionable to retain."

16. Thus, if we apply this unjust enrichment to the present case, the inevitable conclusion is that the licensee should not be allowed unjustly enriched himself by saddling the consumer with electricity charges, which were not used by the consumer.

17. In the case of ***Shyam Telelink vs. Union of India,*** 2010 (10) SCC 165, the Supreme Court has held that it is well accepted principle that a party cannot both approbate and reprobate. He cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage for which he could only be entitled on its footing that it is valid, and at another time say it is void for the purpose of securing further advantage. This view has been reiterated by the Supreme Court in ***City Montessori School vs. State of Uttar Pradesh and others,*** (2009) 14 SCC 253 and ***New Bihar Biri Leaves Co. vs. State of Bihar,*** 1981 (1) SCC 537. The Supreme Court has held that it is fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract, which provided advantageous to him and repudiate the other terms of the same contract, which might be disadvantageous to him. The maxim is "*qui approbate non reprobate*", one who approbates cannot reprobate.

18. In applying this principle to the case at hand, it is seen that a responsible officer of the opposite party-company on 06.02.2004 in categorical term demanded a sum of Rs. 2,30,476/- be paid towards electricity charges upto January, 2004, failing which the contract would be terminated w.e.f. 28.02.2004. It is, further, seen that the Manager, Angul Electrical Division, Angul has written to the Senior General Manager (Commercial) on 31.12.2008 that the petitioner has applied for refund of security deposit of amount of Rs. 3,90,034/- outstanding with the CESU. The said consumer has executed five years agreement on 20.09.2001 for power supply to 225 KW contract demand and power was given on 25.09.2001. It is, further, intimated that due to non-payment of arrear dues power supply was disconnected on 29.11.2003 and termination of agreement was w.e.f. 28.02.2004. The amount of Rs.2,30,470/- was lying outstanding upto Ist January, 2004. The Manager, further, wrote that accordingly the EC bill was claimed up to February, 2004, whose arrear amount shown as Rs.2,75,307/- upto 2/2004 and bills stopped from March, 2004. Thereafter, the Manager (Electrical) intimated that the OSFC, Angul has seized the unit and taking over the possession of the assets of the Mill under Section 29 of SFCS Act, 1951. Therefore, he called for necessary instructions for refund of security amount to the consumer after adjusting the arrear dues of Rs.2,30,476/- upto 1/2004. However, on 11.02.2009 the said Manager (Electrical), A.E.D., Angul intimated the consumer, as per Annexure-6, as follows:-

> " With reference to the cited above letter it is intimate you that the power supply agreement executed with CESU Angul Elect. Division Angul on dt. 20th Sept, 2001 and power supply given on 25.09.2001. Accordingly, your agreement is valid up to 24.09.2006 as per para-1 of agreement.
>
> Hence, you are requested to clear the arrear out standing dues till end of agreement period up to 24.09.2006 i.e. arrear up to 2/2004 of Rs.2,75,307/- along with demand charges from 3/2004 to 24.09.2006 of Rs.12,32,000/- i.e. (C.D. 80% 200KVA @ 200/- per KVA x 30 month 24 days). Total claimed amount of Rs.15,07,307/- (Rupees fifteen lakh seven thousand three hundred seven only) for release refund of S.D. amount out standing with CESU as per clause 85(2) of OERC Code-2004"

It is clear that the company has taken a view that the agreement has been terminated for non-payment of outstanding dues, and therefore, it cannot later on claim that such communication was made under a bonafide

erroneous impression and the petitioner is liable to pay a further sum of Rs. 12, 32,000/- for the period he has not consumed electricity. In other words, he cannot approbate and re-approbate.

In that view of the matter, the writ application needs to be allowed. Hence, the letter dated 11.02.2009 and orders directing petitioner to pay outstanding dues of Rs.12,32,000/- is hereby quashed along with the orders passed by the Grievance Redressal Forum, CESU, Dhenkanal and the order of the appellate authority i.e. Ombudsman-I, OERC, Bhubaneswar. It is, further, directed that the petitioner should be refunded with the security deposit of Rs. 3,90,034/- within six weeks from the date of communication of this order to the opposite parties, failing which it shall carry an interest @ 6% from the date of termination of contract, i.e. 28.02.2004.

Writ petition allowed.