2013 (II) ILR - CUT- 695

C. NAGAPPAN, CJ & I. MAHANTY, J.

W.P.(C) NO.12084 OF 2013 (Dt.30.07.2013)

BISWANATH SINGH & ORS. ……..Petitioners

.*Vrs.*

STATE OF ODISHA & ORS. …….Opp.Parties

P.I.L. – Petitioners challenge construction of transmission line over the residential area of village Nisha – Ministry of power Government of India granted approval for construction of the transmission line – Public notice issued – No objection/representation received from the petitioners or any other person – Final approval given for such construction as there was no breach of any statutory provision – Draft lay out plan shows that habitation is situated at a safe distance from the proposed alignment of the transmission line, so the very foundation of the writ petition does not survive – The petitioners are not the land owners on whose property the towers are intended to set up and actual land owners have not challenged the construction of the transmission line over their land - No proof that the petitioners are the residents of village Nisha – Held, writ petition which has been filed in the guise of public Interest Litigation lacks bonafide and does not fulfill the requirements as prescribed under the Orissa High Court Public Interest Litigation Rules, 2010 – There being no merit in the writ petition the same is dismissed. (Paras 7,8,11)

Case laws Referred to:-

1.(2004)3 SCC 363 : (Dr. B. Singh-V- Union of India & Ors.)
2.(1999)1 SCC 492 : (Raunaq International Ltd.-V-I.V.R. Construction Ltd. & Ors.)

For Petitioners - M/s. B. Pujari, A.K. Baral & A.C. Nayak.
For Opp.Parties - Mr. R.K. Mohapatra, Govt. Advocate &
Mr. P.K. Muduli, Addl. Standing Counsel,
(for O.P. Nos. 1to 5)
Mr. S.D.Das, Asst. solicitor General
(for O.P.No.6).
Mr. Chetan Sharma, Sr. Adv. &
M/s. Satyajit Mohanty, D.P. Sahu & R.R.Swain
(for O.P. Nos.7 & 8)
M/s. Biplab Mohanty, T.K. Patnaik, A. Patnaik,

Sona Patnaik, R.P. Ray (for O.P.No.9)
Mr. Debi Prasad Sahoo (for O.P.No.10).

C. NAGAPPAN, C.J. Petitioners, seven in number, claiming to be the residents of village Nisha in the district of Angul have filed this writ petition by way of Public Interest Litigation averring that they have filed this writ petition in the interest of the residents of village Nisha. They have sought for a direction to opposite parties not to take any action to the detriment of the villagers of Nisha before complying with the rehabilitatory measures under the law.

2. The case of the petitioners is that M/s. Monnet Power Company Ltd.(MPCL)-O.P. No.7 has entered into a Memorandum of Understanding with the opposite party No.1-Government of Odisha to set up a Thermal Power Plant at Mallibrahmani in Angul district. Ministry of Power,Government of India-O.P. No.6 has also accorded approval for construction of transmission line from MPCL power plant to Power Grid Corporation of India Ltd. (PGCIL)'s pooling station at Angul by their letter dated 18.10.2011 as per Annexure-2 and the District Magistrate, Angul, namely, O.P. No.4 also accorded permission to carry out the construction activities of the transmission line vide order dated 23.04.2012. According to the petitioners, though most of the land have been acquired in the village, residential area of the said village has not been acquired and the O.P. No.7 is drawing high voltage transmission line above the residential area of village Nisha and that endangers the residents of the village. In this regard, villagers have raised their grievances before the Revenue/Administrative authorities by sending representations dated 7.2.2013 and 6.3.2013 highlighting the drawing of high voltage transmission line in the residential area of the village and for not providing rehabilitation measures to the residents as contemplated under law, but no action is taken. It is also averred by the petitioners that purchase of land by O.P. No.7 is illegal because the same has not been notified in accordance with law, namely, under Section 73(c) of the O.L.R. Act.

3. A detailed counter affidavit has been filed on behalf of O.P. Nos. 7 & 8 stating that the entire writ petition is premised on an alleged breach of the Orissa Resettlement and Rehabilitation Policy, 2006 in construction of the transmission line and since the construction of the transmission line in question does not contemplate any acquisition of land, the said policy is completely inapplicable. The acquisition of land for the power plant or any alleged displacement there from is not the subject matter of the present writ petition. It is also stated that the total projected requirement is 825.10 acres of land, out of which 386.09 acres are of Government Land and 439.01 acres are private land. According to O.P. Nos. 7 & 8, the residential area of

village Nisha neither falls within the land already acquired nor within the proposed acquisition. It is also specifically averred in the counter that the land acquisition has been carried out by M/s. Industrial Development Corporation of Orissa Ltd. (IDCOL)-O.P. No.9 strictly in accordance with law and complying with the policies and the petitioners have not sought for any relief in that respect and their only grievance is with regard to construction of the transmission line. It is further averred in the counter that though the transmission line is passing within the revenue village of Nisha, it would not be laid over any inhabited area and a draft lay out plan under Annexure-B/7 would indicate that the habitation is situated at a safe distance from the proposed alignment of the transmission line, hence the very foundation of the writ petition does not survive. It is also averred that the land owners, on whose property the towers are intended to be set up have not challenged the construction of transmission line on their land and they are not the petitioners in the present writ petition and the present petition has been instituted for extraneous reasons.

4. According to opposite party Nos. 7 & 8, they have made a substantial investment of Rs. 3,700 crores in the project and it is almost ready to evacuate the power from its plant. Further, though the petitioners are claiming to be the residents of village Nisha, no proof of residence has been annexed in the writ petition and nothing is there on record to substantiate their claim regarding residence. It is also averred that though one Himansu Ranjan Singh has affirmed the averments in the writ petition, there are no documents indicating the authorization given to him by the other petitioners to swear this affidavit. It is also stated in the counter that by letter dated 18.10.2011 under Annexure-I/7, the Ministry of Power, Government of India granted approval to the opposite party No.7 for construction of the dedicated transmission line from its power plant to Angul Pooling Station and on 20.10.2011, the Ministry of Power prescribed a modified procedure for obtaining authorization under Section 164 of the Electricity Act, 2003 and as per the said procedure, opposite party No.7 advertised the proposed transmission scheme in two daily local newspapers dated 02.07.2011 and 03.07.2011 and further a notice was published in the Official Gazette on 04/10.02.2012 as per Annexure-K/7 series calling for objection if any. However, no representation/objection was received from the general public in respect of placing of transmission lines and thereafter on 01.06.2012 under Annexure-L/7, the Ministry of Power granted approval under Section 164 of the Act to the opposite party No.7. By order dated 23.04.2012 the District Magistrate-O.P. No.4, in exercise of powers under Section 16 of the Indian Telegraph Act, 1885, authorized the opposite party No.7 to carry out construction of 400 KV transmission line from the premises of MPCL to the

PGCIL's Pooling Station and construction has been permitted over both Government and the private land as per Section 10(d) of the Indian Telegraph Act, including at village Nisha, Tahasil Chhendipada in the district of Angul. It is stated that O.P. Nos. 7 & 8 have already paid compensation equal to Rs.1.15 lakhs to 4 land owners in the villages who would be affected by the construction of the line and they are also in the process of negotiating with other village residents on whose land the towers are proposed to be established.

5. Mr. Pujari, learned counsel for the petitioners submitted that drawing of transmission line over the residential area of village Nisha endangers the lives of the residents and non providing of rehabilitation measures, prescribed under the 2006 Policy, to the villagers/residents of Nisha is unjust and illegal.

6. Per contra Mr. Chetan Sharma, learned Sr. Counsel on behalf of O.P. Nos. 7 & 8 submitted that the construction of transmission line in question does not contemplate any acquisition of land and hence the said 2006 Policy is inapplicable and the averments made in the writ petition regarding non-compliance of the Policy are vague and lack in material particulars and there is no specific averment as to which provision of the Policy has been breached. It is his further submission that the transmission line, though passing through the village area of Nisha, it would not be laid over any inhabited area as evident from the draft layout plan and the habitation is situated at a safe distance from the proposed alignment. It is also contended by Mr. Sharma that the person on whose land the towers to be set up have not filed the writ petition and the present writ petition is mala fide.

Mr. Sharma, learned Sr. Counsel further contended that on 18.10.2011 the Ministry of Power, Government of India granted approval for construction of the transmission line and as per the prescribed modified procedure dated 20.10.2011, opposite party No.7/licensee effected the newspaper publications and Gazette publication inviting objections. However, no objection/representation was received from any person and thereafter on 01.06.2012 final approval under Section 164 of the Electricity Act was given for construction of the transmission line and also on 23.04.2012 the District Magistrate, in exercise of powers under Section 16 of the Indian Telegraph Act, 1885, permitted the O.P. No.7 to carry out construction of transmission line over both Government and the private land and since all necessary approval and clearances have been obtained, there is no breach of any statutory provisions.

7. His last submission is that none of the petitioners has ever made any objection or representation pursuant to the public notice and they should not be permitted to challenge the alignment of transmission line and the writ petition is motivated and has been filed with a mala fide intention to obstruct the construction of the transmission line. Further, the petitioners have not satisfied the Orissa High Court Public Interest Litigation Rules, 2010, more particularly, Rules 3 to 5 therein and hence, this writ petition is liable to be rejected. In this regard, Mr. Sharma, placed reliance on the decision of the Hon'ble Supreme Court in the cases of Dr. B. Singh Vs. Union of India & Ors., (2004) 3 SCC 363; Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors, (1999) 1 SCC 492; and Networking of Rivers, In Re., (2012) 4 SCC 51.

8. Opposite party No.7 is establishing a Power Generation Plant at Mallibrahmani in the district of Angul in Odisha on an area of 508.47 acres. The total projected requirement is 825.10 acres of land (386.09 acres of Government land and 439.01 acres of private land) and mostly the land acquisition has been carried out by M/s. IDCOL, Bhubaneswar. Opposite party Nos. 7 & 8 have categorically stated that none of the land which has been acquired or proposed to be acquired is homestead land and more particularly, the residential area of village Nisha neither falls within the land already acquired nor within the proposed acquisition. It is further stated by them that all persons, whose lands have been acquired, have been paid cash compensation and also provided with jobs as per the obligation under 2006 Policy. The petitioners have not challenged the acquisition of land for the power plant or any alleged displacement there from, in this writ petition. The only prayer of the petitioners relates to the construction of transmission line over the residential area of Nisha village.The petitioners, though claimed to be the residents of village Nisha they have not adduced any proof regarding the same. The draft layout plan under Annexure-B/7 shows that the habitation is situated at a safe distance from the proposed alignment of the transmission line and it is not being laid over any inhabited area of village Nisha. In fact the approximate distance of the proposed towers from the village habitation in meters is mentioned in the table found in paragraph 2 (F) of the counter affidavit and for better appreciation it is extracted below:

Sl.No.	**Tower Point No.**	**Approximate distance from village habitation in Mtrs.**
1.	44/0	1480

2.	44/1	1240
3.	44/2	960
4.	45/0	640
5.	46/0	370
6.	47/0	360
7.	48/0	600

The above detail indicates that the minimum approximate distance of the tower from village habitation is 360 meters and maximum is 1480 meters. Further, the petitioners are not the land owners on whose property the towers are intended to be set up and the actual land owners have not challenged the construction of the transmission line over their land.

9. The construction of the transmission line in question does not contemplate any acquisition of land and hence the 2006 Policy is completely inapplicable. The averments in the writ petition regarding non-compliance of 2006 Policy are vague and there is no specific averment as to which provision of the Policy has been breached. More over 2006 Policy has provided a Grievance Redressal Mechanism and in the event of non-compliance of the Policy, if any, the petitioners have to approach the said mechanism for redressal of their grievance.

10. As per Annexure-I/7, the Ministry of Power, Government of India granted approval on 18.10.2011 for construction of the transmission line from MTPS to Angul Pooling Station. Further, as per the prescribed modified procedure dated 20.10.2011, the opposite party No.7 advertised the proposed transmission line in local newspapers dated 2.7.2011 and 3.7.2011 and also published the notice in the Official Gazette on 04/10.02.2012, copies of the publication are found under Annexure-K/7 series. However, petitioners have not made any objection/representation in respect of placing of transmission line and since no objection was received, as per Annexure-L/7 the Ministry of Power granted final approval under Section 164 of the Electricity Act for construction of the transmission line. The District Magistrate-O.P. No.4, in exercise of power under Section 16 of the Indian Telegraph Act, 1885, by order dated 23.04.2012 has also authorized the opposite party No.7 to carry out the construction of transmission line. O.P. Nos. 7 & 8 have already paid the compensation

equal to Rs.1.15 lakhs to 4 land owners who would be affected by the construction of towers and they are also in the process of negotiating with other land owners on whose land towers are proposed to be established. The said details are found in the documents under Annexure-M/7 series. The above documents show that necessary permissions under Section 164 of the Electricity Act as well as under the Indian Telegraph Act have been obtained. The petitioners have neither challenged the approval granted under Section 164 of the Electricity Act for construction of transmission line nor the decision making process therein. Factually also, as already seen, the proposed transmission line is not passing over any inhabited area of village Nisha. Therefore, the contention of the petitioners is devoid of any merit.

11. The last contention of the learned Sr. Counsel on behalf of opposite party Nos. 7 & 8 that the writ petition which has been filed in the guise of Public Interest Litigation lacks bona fide and does not fulfill the requirements as prescribed under the Orissa High Court Public Interest Litigation Rules, 2010 is to be countenanced. There is no doubt about the legal preposition laid down in the decisions of the Hon'ble apex Court upon which reliance has been placed by him in this regard. We find absolutely no merit in the writ petition and the same is liable to be dismissed.

In the result, the writ petition is dismissed. The interim order dated 05.06.2013 stands vacated. No costs.

Writ petition dismissed.

2013 (II) ILR - CUT- 701

C.NAGAPPAN, CJ & I.MAHANTY, J

W.P.(C) NO. 25297 OF 2012 (Dt.24.07.2013)

SK. TAJMUDDIN .....Petitioner

.Vrs.

ODISHA FOREST DEVELOPMENT CORPORATION LTD. & ORS. .....Opp. Parties

TENDER – Auction of cashew plantation Lot No. 07/13 – Since the bid was below the minimum acceptable price for the said Lot the tender was cancelled and E.M.D. of the tenderer was duly returned – Action challenged by the petitioner in writ petition.

In this case Lot No. 07/13 was once again put to auction by subsequent tender notice wherein Opp. party No. 4 has been declared as the successful bidder – The present petitioner participated in the second tender but not for the above Lot and the second tender was never the subject matter of challenge in this writ petition – Petitioner is guilty of suppression of material facts that there was second tender and he participated therein – Held, no justification to entertain the present writ petition. (Paras 4)

For Petitioner - M/s. Sangram Nayak, K.B.Kar & D.K.Pattanik

For Opp. Parties 1 to 3 - M/s. Santosh Ku. Pattnaik, U.C.Mahanty, P.K.Pattanaik, D.Pattanaik, S.P.Das, & S.P.Satapathy

For Opp. Party No. 4 - Mr. Benudhar Patra

I. MAHANTY, J. The present writ application has been filed by the petitioner-Sk. Tajmuddin being aggrieved upon the action of the opposite parties 1, 2 and 3 declaring him as an unsuccessful bidder in respect of Cashew Plantation Lot No.07/13 which relates to Kunjari DPF 'B' under Tangi Sub-Division of Bhubaneswar (C) Division pursuant to the tender held on 31.10.2012 under Annexure-2 to the writ application and declaring opposite party no.4-Nilamani Pradhan as successful bidder.

2. Learned counsel for the petitioner asserts that the petitioner has submitted his tender for Rs.7,55,000/- and though he claims to have been the highest bidder, the E.M.D. of the petitioner was refunded under cover of a letter dated 20th November, 2012.

3. The O.F.D.C. (opposite parties 1, 2 and 3) filed their counter affidavit, inter alia, contending that since the bids pursuant to the aforesaid tender call notice was below the minimum acceptable price for the said Lot, the tender was cancelled for the said Lot and E.M.D. of the tenderer was duly returned. Thereafter Lot No.07/13 was once again put to auction by a subsequent tender notice dated 27.12.2012 where an offer of Rs.13,84,653/- was

received. The result of the second tender was duly published on 8.1.2013 but before the interim order dated 3.1.2013 was received by the opposite party, for which reason, though opposite party no.4 has been declared as the successful bidder in the 2nd tender yet, opposite party no.4 has not been permitted to sign the agreement with the opposite party no.1 till date.

4. Pursuant to the direction of this Court dated 7.5.2013 (Order No.8) Sri S.K.Pattnaik, learned counsel for O.F.D.C. produced the relevant documents in a sealed cover. On perusal of the same, it is clear therefrom that the present petitioner had also participated in the second tender, though not for the present disputed Lot. The second tender was also never the subject matter of challenge in this writ application and suppressing the fact that the second tender has been called and that the petitioner had participated therein, the present writ petition was presented. We are of the considered view that we need not enter into any further adjudication since the second tender, held on 27.12.2012, is not the subject matter of challenge and the petitioner himself having participated in the second tender (though for other Lots), is guilty on suppression of material facts.

5. Therefore, we find no justification whatsoever to entertain the present writ application and accordingly, the writ application stands dismissed. The interim order dated 03.01.2013 passed in Misc. Case No.21680 of 2012 stands vacated and the opposite parties 1, 2 and 3 are free to proceed in the matter in accordance with law.

Writ petition dismissed.

2013 (II) ILR - CUT- 703

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

JCRLA NO.123 OF 2003 (Dt.13.09.2012)

RAJ KUMAR PATEL ……..Appellant

.*Vrs.*

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – Ss.300–EXCEPTION 4, 302 & 304-PART II

Murder – Applicability of Exception 4 of Section 300 I.P.C. – Act was committed without premeditation in the heat of passion upon a sudden quarrel – Act squarely attracts Exception-4 to Section 300 I.P.C. – Held, conviction of the appellant U/s.302 I.P.C. is converted to one U/s.304-II I.P.C. (Paras 10,12)

Case laws Referred to:-

1.(2006)4 SCC 653 : (Sandhya Jadhav (Smt.)-V- State of Maharashtra)
2.(2011)48 OCR 808 : (Mangulu Behera-V- State of Orissa).

For Appellant - Mr. Umesh Chandra Mohapatra.
For Respondent - Mr. Sk. Zafarulla,
A ddl. Standing Counsel.

P. MOHANTY, J. This criminal appeal is directed against the judgment and order dated 20.10.2003 passed by the learned Additional Sessions Judge, Nuapada in S.C. No.115/15 of 2002-2003 convicting the appellant under Sections 302/324, IPC and sentencing him to undergo imprisonment for life for the offence under Section 302, IPC and rigorous imprisonment for one year for the offence under Section 324, IPC, which are to run concurrently.

2. The prosecution case in brief is that on 03.06.2002 at about 9.30 P.M. the deceased had been to Boden bus-stand. At that time, by means of a knife accused assaulted to the deceased, as a result of which the deceased died sustaining injuries on his chest and hands. Getting such information from P.W.2, the informant P.W.1, who is the mother of the deceased, proceeded to the spot and found the deceased lying dead on the road near Boden bus-stand having injuries on his chest and hands. Then, P.W.1 went to Boden police station and lodged the FIR (Ext.1) getting it scribed by P.W.4. On receipt of Ext.1, the OIC, Boden P.S. (P.W.14) registered the case and took up investigation. During investigation, he visited the spot, examined the informant and other witnesses, held inquest over the dead body of the deceased, seized sample earth and bloodstained earth under seizure list Ext.2 and sent the dead body for postmortem examination. He also seized wearing apparels of the deceased, arrested the accused, seized the weapon of offence after disclosure statement made by the accused while in custody. He sent the accused for medical examination, seized his wearing apparels and forwarded him to the court. He handed over the charge of investigation to P.W.15, who despatched the exhibits to

R.F.S.L., Berhampur and after receipt of the chemical examination report handed over the charge of investigation to P.W.9, who placed charge sheet against the accused.

3. The plea of the appellant is one of complete denial and false implication. His specific plea is that while he was chopping potatoes inside Gupta hotel, the deceased came and told him to open the door. But, he did not open the door, for which the deceased broke open the door, entered inside the hotel and caught hold of his neck. He freed himself from the deceased and ran away to his owner.

4. The prosecution, in order to prove the charge, examined as many as 15 witnesses including the I.O. and the doctor and exhibited 22 documents. The accused in support of his plea examined himself as D.W.1.

5. The learned Additional Sessions Judge, who tried the case, on assessment of the evidence on record convicted the appellant under Sections 302/324, IPC and sentenced him to undergo imprisonment for life for the offence under Section 302, IPC and to undergo rigorous imprisonment for one year for the offence under Section 324, IPC basing upon the evidence of P.Ws.2, 3 and 11.

6. Mr. Mohapatra, learned counsel for the appellant assails the impugned judgment on the following grounds:

(i) There are major discrepancies in the evidence of P.Ws.2, 3, and 11, basing on whose evidence the order of conviction appears to have been passed.

(ii) The deceased was the aggressor. He entered into the hotel forcibly by breaking upon the door and caught hold of the accused. Therefore, the case would come under the purview of Section 300, IPC.

7. Mr. Sk. Zafarulla, learned Additional Standing Counsel vehemently contends that the evidence of P.Ws.2, 3 and 11 is very clear, cogent and trustworthy and does not suffer from any discrepancy. From the evidence of P.Ws.6 and 7 as well as the I.O. (P.W.14) it is clear that the appellant while in custody made disclosure and led them to the place of concealment and gave recovery of the weapon of offence, i.e., knife (M.O.X). P.W.2 the injured eyewitness, who at the time of stabbing tried to separate the appellant from the deceased, has categorically narrated the incident. Furthermore, the wearing apparels of appellant were found by the chemical

analyst to be stained with human blood and to that effect no explanation has been given by the appellant. The discrepancies and contradictions appearing in the evidence of P.Ws.2, 3 and 11 are minor in nature which do not go to the substratum of the prosecution case and in that view of the matter the testimony of P.Ws.2, 3 and 11 cannot be discarded. Therefore, the impugned judgment of conviction and sentence does not call for interference by this Court.

8. Perused the LCR. P.W.1 informant is the mother of the deceased. She stated that getting information from P.W.2 that her son (deceased) has been murdered by the appellant she immediately proceeded to the Boden bus stand and found him (deceased) lying dead on the road near one Gupta hotel. As per her instruction P.W.4 scribed a written report and read over and explained the contents thereof to her. She on being satisfied put her L.T.I. on the written report and on the next day morning lodged the same at the P.S. In cross-examination nothing has been elicited by the defence to demolish her evidence. P.W.2 is an injured ocular witness. In his examination-in-chief he gave out that on 03.06.2002 at about 9.30 P.M. the incident took place near Mama Hotel of Boden bus stand. The deceased disclosed before him that the appellant accusing him for having illicit relationship with the wife of one Jagannath Pandey. On the request of the deceased he accompanied him to the bus stand for asking the appellant about the allegation. The deceased entered into Mama Hotel and asked the appellant regarding the above allegation. There was a tussle between the appellant and the deceased during the course of which the appellant stabbed the deceased by means of a knife on his chest, right hand and other parts of the body causing bleeding injuries. Due to such assault the deceased fell down on the road and succumbed to the injuries. He further stated that when he tried to separate them, the appellant stabbed on his left upper arm by means of the said knife causing bleeding injuries. In cross-examination he admitted that the deceased called the appellant to open the door of the hotel as it was closed, but the appellant did not open. The deceased forcibly entered into the hotel and tussled with the appellant. He also admitted that P.W.3 was also present at the time of occurrence. He once again admitted that the appellant was cleaning potatoes when the deceased told the appellant to open the door. As the appellant did not open the door, the deceased forcibly entered inside the hotel. There was power failure while the deceased forcibly entered inside the hotel and tussled with the appellant, but the power supply was immediately restored. P.W.3, who is an ocular witness, corroborated the evidence of P.W.2 in material particulars. He specifically stated in his examination-in-chief that on the incident night he had been to Mama Hotel to take his meal and after getting

meal while he was sleeping inside the hotel premises near the gate at that time the deceased came and called the appellant to open the door, but the appellant did not respond. The deceased gave kicks on the door, forcibly entered inside the hotel and caught hold of the neck of the appellant, for which there was a tussle between them. At that time, the appellant was armed with a knife and by means of the said knife stabbed on the chest and left upper arm of the deceased causing bleeding injuries, as a result of which the deceased succumbed to the injuries on the spot. He further stated that when P.W.2 tried to separate them, appellant assaulted on his upper arm by means of a knife. In cross-examination, he admitted that at that time the appellant was removing chaff from the potatoes. The deceased entered inside the hotel through the side door. There was a tussle between the deceased and the appellant. During the incident P.W.11 was also present inside the hotel. P.W.4 is the scribe of the FIR. P.W.5 is a witness to the seizure of bloodstained earth, etc. under Ext.2. P.Ws.6 & 7 are witnesses to the leading to discovery of the weapon of offence. They specifically stated that the appellant while in custody made a confessional statement (Ext.3) before police in their presence, led them to the place of concealment and gave recovery of the knife (M.O.X), which was seized by police under Ext.4. Both the witnesses have proved the disclosure statement (Ext.3) and also the seizure list (Ext.4). P.W.8 is the witness to the seizure of wearing apparels of the appellant under Ext.5 and proves his signature on it. P.W.9 is the I.O., who placed the charge-sheet. P.W.10 is a witness to the inquest and has proved the inquest report (Ext.6). P.W.11 is an independent witness. He was present at the time of occurrence. He corroborated the evidence of P.Ws.2 & 3 in material particulars. In cross-examination he admitted that at the relevant point of time the appellant was chopping potatoes. The doors of the hotel were closed and no electric bulb was burning inside the hotel. He further admitted that the appellant also stabbed P.W.2 while he tried to separate the appellant and the deceased.

P.W.12 is the doctor who made autopsy over the dead body of the deceased. He found the following external injuries.

"(1) One cut injury of size 2" length ½" breadth spindle shaped present over lower right lateral half of the sternum below the sternal notch.

(2) Cut wound of seize 1" x 1 cm x ½" present vertically 2" above the right nipple of chest region.

(3) Cut wound of size ½" x 1 cm x ½ cm just over the right sternoclavicular joint of chest region.

(4) Cut wound of size 4" x 2" x 2" present in front of right arm about 3" above the elbow joint present horizontally.

(5) Cut wound of size 4" x 1" x ½" present on the lateral boarder of right forearm 5" above the writ joint.

(6) Cut wound of size 2 cm x 1 cm x ¼ cm present on the back of hand in lateral side just above the wrist joint.

(7) Cut wound of size 1½" x 1 cm x 2 cm on the palm of right hand towards lateral side over thinner eminence."

On dissection he found one cut wound penetrating into pericardium over the right atrium of heart with depth of about 5 to 6 inches directed inward and downward.

He opined that the injuries were ante-mortem in nature. The cause of death was due to cardiac arrest and due to stab wound penetrating the heart. He further opined that injuries no.1 to 3 were on the vital parts of the body and the internal injury found by him was sufficient in ordinary course to cause death. To the query made by police, he had given his opinion that the injuries found on P.W.2 and that the external and internal injuries found on the dead body of the deceased could be possible by the weapon of offence (M.O.X) produced before him by the I.O.

P.W.12 also examined the appellant and found the following injuries.

"(1) One abrasion of size 1" x 1" just above the right malar prominence lateral to lateral angle of right eye.

(ii) Laceration of size ½" x ½" just above the middle portion of right clavicle in neck region."

He opined that both the injuries are simple in nature and might have been caused by blunt soft object.

P.W.13 is the A.S.I. of police, who at the relevant time was posted at Boden P.S. He stated to have collected nail clippings of the accused from the doctor (P.W.12) and produced the same before the O.I.C., Boden P.S (P.W.14) which were seized under Ext.12. He proved the seizure list (Ext.12) and his signature marked Ext.12/1. P.W.14 is the O.I.C. of Boden P.S who registered the case, visited the spot, examined the informant and other witnesses, held inquest over the dead body and seized the wearing

apparels of the deceased. He also arrested the accused and seized the weapon of offence on the basis of the disclosure statement made by the accused while in custody. He also seized wearing apparels of the accused and forwarded him to court. On his transfer, he handed over the charge of investigation to P.W.15. P.W.15 after taking over charge from P.W.14 despatched the incriminating seized articles to R.F.S.L., Berhampur vide Ext.20 and received the chemical examination report Ext.22. Thereafter, the charge of investigation was taken from him by P.W.9.

The accused examined himself as D.W.1. In his examination-in-chief he stated that on the relevant day at 9.30 PM he was chopping potatoes inside the Munna @ Gupta hotel, Boden. At that time, the main door of the hotel was closed and one Pitambar Kanda was sleeping inside the hotel. The deceased knocked at the door and requested him (accused) to open. When he did not open, the deceased forcibly opened the door, entered inside the hotel and caught hold of his neck. Thereafter, there was a tussle between them. During the course of such tussle the deceased hit on his chest with the knife held by him and thereafter ran away from the hotel. So, he has not committed murder of the deceased. In cross-examination by the prosecution he admitted that the knife was kept in the hotel for cutting the vegetables and chopping the potatoes including onion. P.W.11 was his co-employee. Due to pressing of neck by the deceased, there was tenderness on his neck. He further admitted that during tussle the deceased was using his left hand, as he was holding a knife in his right hand, and he caught hold of the hand of the deceased and did not snatch away the knife from his hand.

9. From the analysis of evidence made above it is crystal clear that P.Ws.2, 3 and 11 are witnesses to the occurrence. They have categorically deposed that in the night of occurrence the appellant by means of a knife (M.O.X) committed murder of the deceased and caused injuries on the person of P.W.2 when he tried to rescue the deceased. Their evidence has remained unshaken despite thorough cross-examination. There is also nothing on record to show that they have any axe to grind against the appellant. It is in the evidence of P.Ws.2 and 11 that at the relevant point of time electric bulbs were burning inside the hotel. So, identity of the appellant cannot be doubted. In addition, the appellant while in custody made disclosure statement before police in presence of P.Ws.6 & 7, led them to the place of concealment and gave recovery of the weapon of offence, i.e., knife, which was seized under Ext.4. Apart from the above, as is evident from the chemical examination report, the wearing apparels of the appellant which were sent for chemical examination along with other incriminating articles were found stained with human blood, and in regard to that no

explanation has been offered by the appellant. The ocular testimony gets support from the medical evidence. The postmortem doctor, who had also examined the weapon of offence (M.O.X) on police requisition, has opined that the injuries on the person of the deceased could be possible by M.O.X. He also opined that the injuries on the person of P.W.2 could be possible by the said weapon of offence (M.O.X). For all these reasons, this Court holds that the prosecution has been able to establish that the appellant by means of M.O.X has committed murder of the deceased and caused bodily injuries on the person of P.W.2, who came to the rescue of the deceased.

10. Now, it is to be seen whether the act committed by the appellant falls within the purview of any of the exceptions provided under Section 300, IPC. We have gone through the judgments in ***Sandhya Jadhav (Smt) Vrs. State of Maharashtra***, (2006) 4 SCC 653, and ***Mangulu Behera Vrs. State of Orissa***, (2011) 48 OCR-808. Keeping in mind the ratio decided in the above cases, this Court examined the matter. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. It is crystal clear from the evidence of P.Ws.2, 3 and 11 that the deceased by breaking open the door entered into the hotel and caught hold of the neck of the appellant, while he was chopping potatoes by means of the knife (M.O.X), for which there was a tussle between them during the course of which the incident took place. The evidence of P.W.2, that on the material date and time the deceased requested to accompany him to confront the appellant as to why he was accusing him (deceased) for having illicit relationship with the wife of one Jagannath Pandey, further reveals that the deceased had gone to the hotel, where the appellant was working, with aggression. In view of the injuries found on the body of the appellant, it is proved that there was a tussle between the deceased and the appellant. Thus, it is established that there was no premeditation but due to sudden quarrel and on heat of passion the occurrence took place and, therefore, the act of the appellant squarely attracts Exception-4 to Section 300, IPC.

11. So far as the conviction of the appellant under Section 324, IPC is concerned, this Court finds that the appellant has been found guilty of such offence for having caused injuries to P.W.2. On careful assessment of the evidence on record, this Court is satisfied that the prosecution has been able to prove beyond reasonable doubt that while P.W.2 tried to separate the deceased from the appellant he was assaulted by the appellant, as a result of which he sustained injuries. The medical evidence corroborates the ocular

testimony of P.Ws.2, 3 and 11. Therefore, the trial court has rightly convicted the appellant under Section 324, IPC.

12. In view of the discussions made above, conviction of the appellant under Section 302, IPC is converted to one under Section 304, Part-II, IPC. But, however, his conviction under Section 324, IPC is confirmed. The appellant, on both the counts, is sentenced to the period of imprisonment already undergone. Consequently, the appeal is allowed in part and the impugned judgment of conviction and sentence is modified to the extent indicated.

Appeal allowed in part.

2013 (II) ILR - CUT- 711

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

W.P.(C) NO.1219 OF 2013(Dt.24.09.2013)

BIJAY MISHRA & ORS. ……..Petitioners

.Vrs.

UNION OF INDIA & ORS …….Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.226

Writ jurisdiction – Power of the High Court – Held, while exercising power under Article 226 of the Constitution of India, the Court can review its own order.

In this case while passing the impugned judgment under annexure-4, the Court has taken care to see that no prejudice is caused to any of the parties – Held, the writ application is without any merit hence dismissed. (Paras 6,9,10)

Case laws Referred : -

1.AIR 1963 SC 1909 : (Shivdeo Singh-V- State of Punjab)

2.AIR 2002 SC 834 : (The State Financial Corporation & Anr.-V- Jagdamba Oil Mills & Anr.)

For Petitioners - M/s. Bijan Ray, B. Mohanty, S. Mohanty, D.Chhotray, D.R. Das & B. Moharana.

For Opp.Parties - Mr, S.D.Das, Asst. Solicitor General of India, (for O.P.No.1)
Mr. Ramesh Ch. Swain(for O.P.No.2)
Addl. Govt. Adv.(for O.P.Nos.3 to 5)
M/s. G. Rath, Sr. Advocate, S.Rath & B.K. Nayak (for O.P.No.6)
Mr. S.K. Padhi, Sr. Advocate (for O.P.No.7)
Mr. S.P. Panda & R. R. Swain, (for O.P.No.8).

BISWAJIT MOHANTY,J. This writ application has been filed by three petitioners with a prayer to set aside /modify/review/ recall the order dated 21.12.2012 passed by this Court in WP(C) Nos. 24106 and 24325 of 2011.

2. Shortly stated the undisputed facts are as follows:

The Government of Orissa in General Administrative Department vide its letter dated 17.7.2010 called for nomination of Non-State Civil Service Officers for consideration for appointment to two posts of Indian Administrative Service for the year 2010 in accordance with the Indian Administrative Service (Appointment by Selection) Regulations, 1997 (in short "1997 Regulations"). Initially, 10 names including the names of the present petitioners and opposite party nos.6 to 8 were sent by the G.A. Department for consideration of their case. However, on 25.10.2010, the Government in G.A. Department decided to exclude the name of Niranjan Sethi from the eligibility list of 10 names recommended earlier in view of some vigilance investigation against him. Accordingly, on 9.11.2010 the Selection Committee held its meeting and interviewed 9 officers including the present petitioners and opposite party nos.7 and 8. On 15.11.2010 said Niranjan Sethi submitted a representation against deletion of his name and not calling him to appear in the interview board. Later on Niranjan Sethi filed O.A. No.718 of 2010 before the Central Administrative Tribunal, Cuttack Bench, Cuttack with prayer to declare the Selection Committee meeting held on 9.11.2010 for appointment to IAS as per 1997 Regulations as illegal, arbitrary and ab initio void and prayed for conducting the selection afresh. There also Niranjan Sethi made an alternative prayer so as to direct the official respondents to consider his case for appointment to IAS as per 1997

Regulations against two vacancies. O.A. No.718 of 2010 was disposed of on 22.11.2010 with a direction to the UPSC to consider the points raised in the petition dated 15.11.2010. On 19.1.2011 the representation filed by Niranjan Sethi was rejected. Challenging the same, Niranjan Sethi filed O.A. No.33 of 2011 before the Tribunal with the following prayers:

"(i) To declare the Selection Committee meeting held on 9th November, 2010 for appointment to IAS in terms of "Indian Administrative Service (Appointment by Selection) Regulations, 1997" as illegal, arbitrary and ab initio void being contrary to the Regulation and direct the Respondent to conduct selection afresh;

(ii) To quash the order of rejection under Annexure- A/6 on 19th January, 2011 being contrary to the Rule, law and without due application of mind;

(iii) And/or to direct the Respondents to consider the case of the Applicant for appointment to IAS as per "Indian Administrative Service (Appointment by Selection) Regulations, 1997" against the two vacancies of IAS 2010; and

(iv) to pass any other order/orders as deemed fit and proper."

OA. No.33 of 2011 was filed on 23.1.2011 before the Tribunal. On 27.4.2011, the present petitioners filed O.A. No.236 of 2011 before the Central Administrative Tribunal, Cuttack Bench, Cuttack with the following prayers:

"(i) To declare the Selection Committee Meeting held on 9th November, 2010 for appointment to IAS in terms of Indian Administrative Services (Appointment by Selection) Regulations, 1997 as ab initio void, illegal arbitrary being done malafied.

(ii) to direct the Respondents to conduct the selection afresh by 10 candidates who names were already in the list at Annexure-A/1.

(iii) to pass any other order/orders as deemed fit and proper."

Though the petitioners in O.A. No.236 of 2011, who are also the petitioners here made a prayer to declare the Selection meeting held on 9.11.2010 as ab initio void and illegal, they did not make all official candidates who have appeared in the interview along with them as parties to the case. It is important to note here that the 9 recommended officers included the three petitioners in O.A. No.236 of 2011 and in the writ application. These three petitioners in O.A. No.236 of 2011 only made three

officers as opposite parties besides the official opposite parties. Thus, four recommended officers were left out from O.A. No.236 of 2011.

O.A. No.33 of 2011 filed by Niranjan Sethi was disposed of by the Tribunal on 22.6.2011. In the said Original Application, none of the 9 recommendees including the present three petitioners were initially made parties. Later on Pradeep Kumar Biswal and Gopabandhu Satpathy two out of 9 recommendees intervened. Still rest 7 recommended officers were not made parties. Challenging the order dated 22.6.2011 rendered in O.A. No.33 of 2011; W.P.(C) Nos.24325 and 24016 of 2011 were filed by Gopabandhu Satpathy (opposite party no.7) and Pradeep Kumar Biswal (opposite party no.8) respectively. In the meantime, on 9.8.2011, O.A. No.236 of 2011 filed by the present petitioners was disposed of by the Tribunal. The Tribunal held that the same has become infructuous in view of the disposal of O.A. No.33 of 2011 and respondent nos.1 and 2 were directed to conduct selection within the period as directed in O.A. No.33 of 2011. In W.P.(C) No.24325 of 2011 and W.P.(C) No.24016 of 2011 which were filed against the order dated 22.6.2011 passed by the Tribunal in O.A. No.33 of 2011, the present petitioners did not implead themselves as parties. Ultimately on 21.12.2012, this Court pronounced its judgment under Annexure-4. By the said judgment this Court held that the direction of the Tribunal to set aside the entire selection held on 9.11.2010 is not proper and the interest of Niranjan Sethi will be protected by directing the UPSC to consider the case of Niranjan Sethi alone. Thereafter, the Selection Committee should publish the result of selection that was held on 9.11.2010 along with the result of selection of Niranjan Sethi and accordingly, make necessary recommendations. It was also made clear that this course was being adopted as the same would not cause any prejudice and harassment to the parties. Challenging the same, the present writ application has been filed.

3. Mr. Bijan Ray, learned Senior Advocate for the petitioners submitted that under the fact and circumstances, the petitioners are necessary and proper parties to W.P.(C) Nos.24106 and 24325 of 2011. Since they were not made parties, they are going to suffer irreparable loss and injury for eternity by the judgment under Annexure-4 of this Court as there would be no uniformity in the matter of selection. Secondly, he submitted that this Court's direction to consider the case of opposite party no.6 (Niranjan Sethi) alone is an error apparent on face of record. Lastly, he submits that since the order dated 9.8.2011 passed in O.A. No.236 of 2011 still holds the fields, the same runs contrary to the order passed by this Court confining the selection to consider the case of Niranjan Sethi (opposite party no.6) only. Thus, there exists two contradictory orders in the field.

4. Mr. S.K. Padhi, learned Senior Advocate for opposite party no.7 submitted that the present petitioners are neither necessary nor proper parties in W.P.(C) Nos24106 and 24325 of 2011. Since in those writ applications order passed by the Tribunal in O.A. No.33 of 2011 was under challenge he had impleaded only those persons who were already before the Tribunal. Secondly, he submitted that the direction of the Tribunal in O.A. No.236 of 2011 has to be read in toto and it cannot be read confining the order to a particular direction as has been interpreted by the petitioners in this case in their written submission. According to the petitioners, the order dated 9.8.2011 passed by the Tribunal in O.A. No.236 of 2011 meant that Respondent nos.1 and 2 are duty bound to conduct the selection. However, Mr. Padhi, learned Senior Advocate invited our attention to the last sentence of the order of the Tribunal in O.A. No.236 of 2011 which reads like thus:

> "Hence while disposing of this O.A. holding that this OA. has been made infructuous, Respondent Nos.1 and 2 are hereby directed to conduct the selection within the period as directed in O.A. No.33 of 2011. No costs".

Thus, Mr. S.K. Padhi, learned Senior Counsel took exception to the limited interpretation given by the petitioners to the direction given by the Tribunal in O.A. No.236 of 2011. He further submitted that since O.A. No.236 of 2011 was rendered infructuous, and since the direction contained in O.A. No.33 of 2011 has been modified by this Court while rendering its judgment under Annexure-4, the question of two inconsistent orders operating in the same field does not arise. The order passed in O.A. No.236 of 2011 was not an independent order but an order that depended on the order passed in O.A. No.33 of 2011. Thus, once that order is modified; it should be treated that the latter order passed in O.A. No.236 of 2011 also stands modified accordingly. Lastly, he contended that it is not correct to say that this Court vide its judgment under Annexure-4 directed to consider the case of opposite party no.6 (Niranjan Sethi) alone as that would be a wrong reading of the directions issued by this Court under Annexure-4. In the facts and circumstances of the case and in the light of the alternative prayer made by opposite party no.6 in his O.A. No.33 of 2011, this Court committed no error in directing to consider his case and publish the result taking into account the result of 9.11.2010 selection along with the result of selection relating to opposite party no.6 (Niranjan Sethi).

5. In such background we have to see whether the prayer as made by the petitioners in this writ application merits acceptance.

6. The main contention of the petitioners is that in the background of facts narrated above, they are necessary and proper parties to both the writ applications. In this context, certain facts are to be noted. In W.P.(C) Nos. 24106 and 24325 of 2011 the order dated 22.6.2011 passed in O.A. No.33 of 2011 was challenged. In that Original Application, the present petitioners were not parties. So in a certiorari proceeding they were not required to be made parties in the above noted two writ applications. Secondly, in the judgment under Annexure-4 no order has been passed against the petitioners rather the direction has been to consider the case of opposite party no.6 and publish the result of all candidates including the present petitioners taking into account earlier selection dated 9.11.2010 and the selection relating to opposite party no.6. Thus, they cannot claim that they are going to be prejudiced. Further as indicated earlier in O.A. No.236 of 2011 filed by the present petitioners praying for quashing of the entire selection they themselves did not make all 9 recommendees as parties. In fact in the said O.A. they have left out four recommendees. In such view of the matter even if they are heard on merits, the entire selection cannot be quashed. Further, the very fact that the petitioners are highly placed officials and are highly educated persons who knew tit bit about O.A. No.33 of 2011 proceeding and the very fact that the order passed in O.A. No.236 of 2011 was in the background of order passed in O.A. No.33 of 2011; in ordinary course of human conduct they are expected to know about the two writ applications which have been disposed of under Annexure-4. Accordingly, if so desired, they should have intervened in those two writ applications. For all these reasons it cannot be said that disposal of the above noted two writ applications in absence of the petitioners has caused any prejudice to the petitioners. So far as the decision of the Apex Court reported in **AIR 1963 SC 1909** (**Shivdeo Singh** v. **State of Punjab**) is concerned, in that case though a writ application was filed by 'A' for cancellation of the order of allotment passed by the Director of Rehabilitation in favour of 'B', the High Court cancelled the order in favour of 'B' though he was not a party to the writ proceedings. Subsequently 'B' filed a petition under Article 226 of the Constitution of India for impleading him as a party to 'A's writ petition and rehearing the whole matter. Accordingly, the High Court reviewed its previous order at the instance of 'B' who was not a party to the previous proceedings. In such background the apex Court held that the High Court has power under Article 226 of the Constitution of India to review its own order.

In the present case, the facts are little different. Both the writ applications disposed of vide common judgment under Annexure-4 relate to certiorari proceedings challenging the order passed by the learned Tribunal in O.A. No.33 of 2011. Therefore, there was no question of petitioners of the

two writ applications impleading others as parties in those writ applications, who were not parties before the Tribunal. There is no dispute that while exercising the power under Article 226 of the Constitution of India, the Court can review its own order, but here the facts being totally different do not warrant a review of the judgment under Annexure-4 so as to uphold the order dated 22.11.2010 passed by the Tribunal quashing the entire selection. As indicated earlier the petitioners themselves did not make all recommendees, who have undergone the process of selection as parties. In such background the entire selection cannot be set aside at their behest. In **AIR 2002 SC 834** (**The State Financial Corporation and another** v. **M/s. Jagdamba Oil Mills and another**) Hon'ble Supreme Court has made it clear that the Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which the reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appeared. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Each case depends on its own facts and a close similarity between one case and another is not enough became even a single significant detail may alter the entire aspect.

7. In such background we humbly hold that on account of totally different factual situation, Shivdeo Singh's Case (supra) has no application to the present case.

8. So far as the contention relating to two inconsistent orders one of this Court under Annexure-4 and other of Tribunal dated 9.8.2011 passed in O.A. No.236 of 2011 is concerned, we find that the question of inconsistent orders being operating in the same field does not arise. As rightly submitted by Mr. S.K. Padhi, learned Senior Counsel that the Tribunal has declared O.A. No.236 of 2011 infructuous and thereafter has issued an order while referring to the order passed in O.A. No.33 of 2011 and once the order in O.A. No.33 of 2011 got modified by the judgment under Annexure-4, it would automatically modify the order passed in O.A. No.236 of 2011.

9. Regarding the contentions of Mr. Ray, learned Senior Counsel for the petitioners that the direction under Annexure-4 passed by this Court to UPSC to consider the case of Niranjan Sethi (opposite party no.6) alone, is an error apparent on the face of record; we can only say that this submission is based on a wrong reading of direction contained under Annexure-4. In the background of alternative prayer made by Niranjan Sethi, such a direction cannot be faulted as he was illegally deprived of being considered by the

selection committee. Further the direction of this Court under Annexure-4 does not end at directing the UPSC to consider the case of opposite party no.6 alone. The direction makes it clear that the result of selection held on 9.11.2010 in which the present petitioners participated and the result of selection in respect of opposite party no.6 shall be published together. Therefore, while passing the impugned judgment under Annexure-4, the Court has been taken care to see that no prejudice is caused to any of the parties.

10. For all these reasons, the writ application is without any merit and the same is accordingly dismissed. No costs.

Writ petition dismissed.

2013 (II) ILR - CUT- 718

M. M. DAS, J & B. K. MISRA, J.

W.P.(C) NO.1769 OF 2013 (Dt.17.05.2013)

JYOTSNA RANI TRIPATHY .....Petitioner

.Vrs.

STATE OF ORISSA & ANR. .....Opp.Parties

EXAMINATION – Odisha Superior Judicial Service – Petitioner having successful in preliminary written Examination Sat for main written examination and as her name did not find place in the merit list she applied for her marks – She secured 337 marks out of 750 i.e. 44.93% marks in aggregate – She obtained minimum 33% marks in each subject but failed to secure 45% marks in aggregate to get a call for the interview – From the photo copies of her answer scripts it is marked that in "Law of contract" paper she was awarded 86 marks but the figure 86 has been encircled and adjacent to it the figure 75 has been shown in the answer script and the figure 75 has been taken in to consideration and in the other hand petitioner became unsuccessful

for lack of 0.07% of marks – Held, considering the peculiarity, this case is taken as a fit case to issue direction to O.P.S.C. for re-examination and re-valuation of the "Law of contract" paper by an expert and if the O.P.S.C. finds that the petitioner would have passed the main written examination to face viva-voce test it shall allow the petitioner to face the interview in the next recruitment test directly without requiring to appear in the preliminary as well as main written examination again.

(Paras 8,9)

For Petitioner - M/s. B.K. Sharma & A.U. Senapati.
For Opp.Parties - M/s. P.K. Mohanty, D.N. Mohapatra, J. Mohanty, P.K. Nayak, S.N. Dash. Govt. Advocate (for O.P.1).

M. M. DAS, J. The petitioner in this writ petition has sought for quashing the marks obtained by her in "Law of 'Contract' papers and issuing a direction to the opposite party no.2 to issue a fresh mark sheet to her by taking into account the original marks awarded to her in the said paper which, according to her, is 86.

2. Facts of the case reveal that the petitioner pursuant to the advertisement under Annexure-1 published by the Odisha Public Service Commission (hereinafter referred to as 'O.P.S.C.') made an application to appear in the competitive examination consisting of three parts. viz. Preliminary Written Examination, Main Written Examination and Interview to be conducted by the O.P.S.C. under the provisions of the Odisha Superior Judicial Service and Odisha Judicial Service Rules, 2007 (as amended from time to time) for recruitment to 55 posts of Civil Judges in Odisha Judicial Service under Law Department by direction recruitment in the Pay Scale of Rs. 27,700-770-33,090-920-40,450-1080-44,770/- with usual Dearness Allowances and other allowances as sanctioned by the Government of Odisha from time to time.

3. The petitioner being successful in the Preliminary Written Examination sat for the Main Written Examination, which was conducted from 4.8.2012 to 8.8.2012. The list of successful candidates, who were eligible for interview, was published on 1.10.2012, but the name of the petitioner did not find place in the said list. Immediately after publication of the result of the Main Written Examination, the petitioner applied for her marks obtained in the said examination and the said mark sheet was supplied to her on 24.11.2012, which has been annexed as Annexure-2 to the writ petition. After receiving the same, the petitioner came to know that she has secured 337 marks out

of 750 marks, i.e. 44.93% of marks in aggregate and not less than minimum of 33% of marks in each subject.

4. As per Rule 24 of the Rules, the candidates who have secured not less than 45% of aggregate marks and not less than minimum of 33% of marks in each paper in the main written examination were to be called for viva-voce test. Since the petitioner secured 44.93% of marks in aggregate though she accused much more than 33% of marks in each of the papers, she was not called for the viva-voce test. As per the notice dated 19.7.2012 issued by the O.P.S.C., the petitioner applied for photocopies of the answer scripts of all the papers, which were obtained and have been annexed as Annexure-3 series to the writ petition.

5. It is alleged by the petitioner that a mere perusal of her answer script in 'Law of Contract' paper would reveal that she was awarded with 86 marks for the answers given to Question Nos.4,6,7,9 and 10. The said figure of 86 marks has been encircled and adjacent to it '75' has been shown in the answer script which mark has been taken into consideration, for which she secured in total 44.93% of marks.

6. During course of hearing, we called for the original answer scripts, copies of which have been annexed to the writ petition. On scrutinizing the same, we found that the allegation made by the petitioner with regard to reduction of her marks as awarded originally in 'Law of Contract' paper is correct. However, it appears that though in each place where the marks have been reduced, the signature of either the valuer or the Head Examiner is not there, but it can be gathered that the reduction has been made by the Head Examiner. We also went through some of the answers given by the petitioner in 'Law of Contract' paper as well as 'General English', 'Procedural Law', 'Law of Crime & Law Torts' and 'Law of Property' papers where the petitioner has secured 72,63,65 and 62 marks respectively, no deduction whatsoever have been made from the said marks given by the valuers at the instance of the Head Examiners in those papers.

7. Though we are aware of the settled position of law that the Court is not to revalue the answer scripts of an examinee, but taking into consideration that the examination was conducted for recruitment of Judicial Officers to the post of Civil Judge (Junior Division) and ultimately such successful candidates are to discharge their judicial duties on being appointed under the administrative control of the High Court, we thought it proper to peruse the standard of the answers given by the petitioner. We are not surprised to find that the standard of the answers given by the petitioner in all the above

papers clearly depict the clarity of thought and the fact that the petitioner has a clear conception on the subjects relating to the aforesaid papers.

8. Considering this peculiarity existing in this particular case we are of the view that since the petitioner was not selected in the main written examination being unsuccessful for lack of 0.07 percentage of marks, this is a fit case where a direction should be issued to the O.P.S.C. to get the answer script of the petitioner in 'Law of Contract', paper re-examined and revalued by an expert in the said subject and if it is found that the petitioner is entitled to any higher mark in the said paper, which, if added to the aggregate, will make her qualify to go through the main examination so as to face the interview, the O.P.S.C. should allow the petitioner to face the interview in the next recruitment test directly without requiring the petitioner to again appear in the Prelimin ary Written Examination as well as the Main Written Examination.

9. We, therefore, direct the O.P.S.C. to get the 'Law of Contract' Paper of the petitioner re-evaluated through an expert and taking the marks awarded by such expert in such paper, if the O.P.S.C. finds that the petitioner would have passed the Main Written Examination qualifying herself to face the viva-voce test, it shall allow the petitioner to face the interview in the next recruitment test directly without requiring her to appear in the Preliminary as well as Main Written Examinations again. Such exercise shall be positively completed by the time the candidates get selected in the next recruitment test for facing the interview. The Chairman, O.P.S.C. shall act on production of a certified copy of this order before him by the petitioner. With the aforesaid direction, this writ petition is disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 721

M. M. DAS, J & DR. A. K. RATH, J.

W.P.(C) NO. 25371 OF 2011 (Dt.20.08.2013)

BISHNUPRIYA DEI ……Petitioner

.Vrs.

BOARD OF SECONDARY EDUCATION,

ORISSA & ORS. ……Opp.Parties

BOARD OF SECONDARY EDUCATION (AMENDMENT) REGULATIONS, 1997 - REGULATION 22 (e)

Period of qualifying service rendered by an employee under any educational institution recognized by the Board and/or any Research Institution aided by the State/Centre Government shall be counted for the purpose of pension under Regulation 22 (e) – The Board of Secondary Education should not have rejected the petitioner's representation to compute the period of service rendered by her in Ganeswarpur Girls High School from 13.11.1972 till 23.09.1980 for the purpose of payment of pension – Held, order rejecting petitioner's representation is quashed – Direction issued to Opp.Parties to compute the pensionary benefit of the petitioner by taking in to account the past service rendered by her in Ganeswarpur Girls High School – On such calculation the differential arrear amount of pension from the date of superannuation till date be paid to her.

(Paras 6,7,8)

Case law Referred to:-

2006 (I) OLR 293 : (Rama Narayan Padhi-V-State of Orissa & Anr.)

For Petitioner - Mr. Kalyan Patnaik

For Opp.Parties - Advocate General &
Mr. P.K.Mohanty, (Sr.Adv.)

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1) The petitioner, who is a retired teacher of Secondary Board High School has assailed the action of the Secretary, Board of Secondary Education, Orissa, Cuttack rejecting her representation vide Annexure-4 for grant of pension taking into account the services rendered by her as an Assistant Teacher in Ganeswarpur Girls High School, Ganeswarpur in the district of Puri and to compute the pensionary benefits taking into account the past services rendered by her.

2) The case of the petitioner is that after acquiring B.A. B.Ed. she was appointed as an Assistant Teacher in Ganeswarpur Girls High School in the district of Puri on 13.11.1972 and continued there till 23.09.1980. While the matter stood thus, she was selected as an Assistant Teacher in the Secondary Board High School, Cuttack. Pursuant to the same, she joined as an Assistant Teacher in Secondary Board High School, Cuttack on 24.09.1980 after she was relieved from Ganeswarpur Girls High School on

23.09.1980. After superannuation on 31.08.2010, she applied for pension on 07.09.2010 enclosing all relevant papers. The pension was sanctioned on 04.07.2011. However, the period of service rendered by her in Ganeswarpur Girls High School was not taken into account, resulting in sanction of less pension. Thereafter she made a representation to the Board authorities regarding exclusion of seven years service period. However, the said representation was rejected by the Board of Secondary Education on jejune grounds. The order of rejection is impugned in the present writ petition on the ground, inter alia, that in view of the decision of this Court in the Case of **Rama Narayan Padhi v. State of Orissa & another**, 2006(I) OLR 293, the services rendered by her in Ganeswarpur Girls High School ought to be taken into account for the purpose of computation of pension. The further ground of challenge is that the Regulation of the Board which was amended in 1997 is clear and unambiguous for which reference to the Orissa Treasury Rules is uncalled for. She further stated that her pension is to be computed in accordance with Regulation 22 of the Board of Secondary Education, Orissa (Amendment) Regulations, 1997.

3) Pursuant to issuance of notice, opposite parties entered appearance and filed their counter affidavit. The specific case of the opposite parties is that in view of Regulation 22 of the Orissa Secondary Education (Constitution, Maintenance and Administration of Pension Fund) Regulations, 1997, Controller of Accounts, Odisha, Bhubaneswar functioning under the administrative control of Government in Finance Department is the competent authority to interpret the Pension Regulations of the Board. But the opposite parties are not competent to implement Pension Rules. Further the Pension Regulations of the Board have been framed by the Government of Orissa in exercise of their powers conferred under Section 21 of the Orissa Secondary Education Act, 1953 providing therein that no regulation or addition or amendment to or repeal of the Regulation made by the Board, shall be valid without approval of the State Government. It is further stated that opposite parties are estopped under the law from interpreting or interfering with the Pension Regulation and to act beyond its scope. It is also stated that, if the petitioner is aggrieved by the calculation made by the opposite parties, she could have moved the competent authority for appropriate action. It is further stated that the service book submitted by the petitioner in support of her service rendered under Ganeswarpur Girls High School, Puri reveals that she has actually served in the same school up to 31.12.1979. No particular of service rendered by her during the period from 01.01.1980 till 22.09.1980 is available in the service record. It is further revealed from the service book that the petitioner was allowed to proceed on leave with effect from 30.12.1979, but there was no record of joining after

returning from leave. No verification of service has been recorded as per the provisions of Orissa Service Code pertaining to the period from 31.12.1979/01.01.1980 to 22.09.1980. The petitioner remained absent from the school from 31.12.1979 to 22.09.1980 and joined in the Secondary Board High School on 24.09.1980.

4) We have heard Mr. Kalyan Patnaik, learned counsel for the petitioner, learned Advocate General and Mr.P.K.Mohanty, learned Sr. Advocate for the opposite parties.

5) Relying on Regulations- 21 and 22 of the Board of Secondary Education, Orissa (Amendment) Regulations, 1997, the learned Advocate General argues with vehemence that since the school in question, where the petitioner earlier worked is purely a private school and the services rendered by her was not in a pensionable establishment/post, the representation of the petitioner was rightly rejected. He further submits that if on a conjoint reading of Rule 2(r) of the Orissa Civil Services (Pension) Rules, 1992, which defines "qualifying service" and Rule 18 of the said Rules, which speaks that service does not qualify for pension unless it is rendered in a pensionable establishment/ post, a conclusion is irresistible that since the services rendered by the petitioner in Ganeswarpur Girls High School, Puri does not qualify for pension as the same was not a pensionable establishment/post. We are at lose to appreciate the submission made by the learned Advocate General. An identical question came up before this Court for consideration in the case of **Rama Narayan Padhi** (supra). Interpreting Regulation 22(e) and (f) of the Board of Secondary Education, Orissa (Amendment) Regulations, 1997, this Court in paragraph-8 of the judgment held as under:-

> "8. The argument of the learned counsel for the opposite parties is that there shall be a conjoint reading of Rule- 2(r) of the OCS (Pension) Rules, 1992, which defines "qualifying service" and Rule 18 of OCS (Pension) Rules, 1992, which speaks that service does not qualify for pension unless it is rendered in a pensionable establishment post. The interpretation of learned counsel for the opposite parties that the aforesaid Rule 2 (r) and Rule 18 read conjointly with Regulation 22 of the Board of Secondary Education Orissa (Amendment) Regulations, 1997 is not acceptable because I am of the opinion that the Regulations of the Board, which was subsequently amended in 1997 is clear and unambiguous. There is no need to take the help of OCS (Pension) Rules, 1992 for the interpretation of Board Regulation, 1997 so also there is no need for a conjoint reading of Board Regulation, 1997 and OCS Rules to

> interpret the former and to decide whether the petitioner is entitled to get the benefit of the amending Regulations and whether his services elsewhere would be counted for the purpose of pension."

6) Mr. Patnaik, learned counsel for the petitioner submits that the said judgment was challenged by the Board authorities in a writ appeal and ultimately the matter went to the Hon'ble apex Court. But then, the same was not interfered with. Again in **Prabodha Kumar Patnaik**'s case (in W.P. (C) No. 11794 of 2006 disposed of on 19.08.2010) applying the ratio of the judgment of Rama Narayan Padhy(supra), this Court in no uncertain terms held that the petitioner therein is squarely covered under Regulation 22(e), i.e., the period of qualifying service rendered by an employee under any educational institution recognized by the Board and/or any Research Institutions aided by the State/Central Government shall be counted for the purpose of pension. Be it noted that the Board of Secondary Education being unsuccessful, challenged the said order before the Division Bench of this Court. Thereafter the matter went to the Hon'ble Apex Court. The special leave petition was dismissed by the Hon'ble Supreme Court with the following observation"

> " In our view, the order passed by the learned Single Judge and the judgment of the Division Bench of the High Court are based on correct interpretation of the Orissa Civil Services (Pension) Rules, 1992 and the Orissa Civil Services(Commutation of Pension) Rules, 1993 and the direction given by the learned Single Judge for computation of the total length of service of respondent no.1 for the purpose of fixation of pension and grant of other retiral benefits does not suffer from any legal infirmity warranting interference by this Court under Article 136 of the Constitution."

7) Though, the matter was settled by this Court as well as by the Hon'ble Apex Court time and again, but then the Board authorities have adopted a discriminating attitude. The law is no more res integra that if a person similarly circumstanced approaches the Tribunal/High Court and gets some relief, the benefit of the judgment ought to be extended to those persons, who have not approached. The Board of Secondary Education, who is an ideal employer, ought to have extended the benefits of **Rama Narayan Padhy** (supra) and **Prabod Kumar Patnaik** (supra), to the petitioner.

8) As a necessary corollary, the order rejecting the representation of the petitioner under Annexure-4 is hereby quashed. The opposite parties are directed to compute the pensionary benefit of the petitioner by taking into

account the past services rendered by her in Ganeswarpur Girls High School excluding the period from 31.12.1979 to 22.09,1980. The entire exercise shall be completed within a period of eight weeks from the date of production of a certified copy of this order. On such calculation the differential arrear amount of pension from the date of superannuation of the petitioner till date shall be paid to her within a further period of four weeks and she will thereafter continue to receive the pension amount as would be computed as per the direction given above. The writ petition is allowed. There shall be no order as to costs.

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Writ petition allowed.

2013 (II) ILR - CUT- 726

M. M. DAS, J & DR. A. K. RATH, J.

W.P.(C) NO. 25280 OF 2011 (Dt.21.08.2013)

SARAT KU. RAJ & ORS. .....Petitioners

.*Vrs.*

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

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

Fixation of headquarter of Tahasil Office – Policy decision of the Government – Challenged in writ petition – Scope of judicial review – Held, the Court cannot strike down a policy decision taken by the State government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical – The Court can interfere only if the policy decision is contrary to any statutory provision or the constitution or it is patently illegal, arbitrary, discriminatory or mala fide. (Para 21)

B. CONSTITUTION OF INDIA, 1950 – ART.226

Fixation of headquarter of Tahasil Office challenged – Executive function of the Government – Even if Government had passed any order it has power to reconsider and alter the same at any point of time if circumstances so warrant particularly if the earlier order has not been given effect to.

In this case reports submitted before the Government by different authorities at different points of time are conflicting to each other – Held, direction issued to the Chief Secretary of the State to constitute a High Power Committee consisting of Commissioner-cum-Secretary to the Government of Odisha, Revenue and Disaster Management Department, Revenue Divisional Commissioner, Central Division, Cuttack and Collector-cum-District Magistrate, Balasore to take a decision pertaining to fixation of headquarter of Bahanaga Tahasil and submit its report to the government and the Government after careful consideration of the report may take an informed decision as stated by the Hon'ble Supreme Court. (Para 28)

Case laws Referred to:-

1.(2011)7 SCC 493 : (ITC Ltd. –V- State of Uttar Pradesh & Ors.)
2.(1999)1 SCC 492 : (Raunaq International Ltd.-V- I.V. R. Construction Ltd. & Ors.)
3.(2009)15 SCC 221 : (Madhya Pradesh State Cooperative Dairy Federation Ltd. & Anr. -V- Rajnesh Kumar Jamindar & Ors.)
4.AIR 1996 SC 11 : (Tata Cellular-V- Union of India)
5.AIR 2004 SC 456 : (People's Union for Civil Liberties-V- Union of India)
6.(1994)2 SCC 691 : (Premium Granites & Anr.-V- State of T.N. & Ors.)
7.(2002)2 SCC 333 : (Balco Employees' Union (Regd.)-V- Union of India & Ors.)
8.(2010)6 SCC 303 : (Shimnit Utsch India Pvt. Ltd. & Anr.-V- West Bengal Transport Infrastructure Development Corporation Ltd. & Ors.)
9.AIR 2005 SC 2080 : (State of N.C.T. of Delhi & Anr.-V- Sajeev @ Bitto)
10.(2000)6 SCC 359 : (Kunhayammed & Ors.-V- State of Kerala & Anr.)

For Petitioners - Mr. Ashok Parija, Sr.Advocate,
S.P.Sarangi, P. P. Mohanty,
D.K. Das, P.K. Dash, A. Patnaik,
B. P. Das.

For Opp.Parties - Advocate General,

Mr. R.K. Mohapatra, Govt. Advocate,
Sri S,K. Padhi, Sr. Advocate,
M/s. S. Mohanty & R.R. Swain (for Intervenors).

DR. A.K.RATH, J. The short question that arises for consideration in this case is about fixation of headquarter of Bahanaga Tahasil Office in the district of Balasore. Though the question raised is very short, but the history of the case shows that it is a long drawn litigation from this Court to Hon'ble Supreme Court. This is the third journey of the petitioners to this Court.

2. Way back in 1995, the Government of Orissa in its Revenue and Disaster Management Department took a policy decision to open new Tahasils in all Block headquarter having no Tahasil Offices. It was decided that the Tahasil Office should be opened in Block headquarter with the support of OAS-II Officers available at the disposal of the Revenue and Disaster Management Department by way of equitable deployment of officers between the existing Tahasils and Tahasils to be newly created. It was further decided that Panchayat Samiti should provide necessary infrastructure support which includes a record room, a room for the officer and a sizeable big hall for the employees of the Tahasils. It was further decided that the Government is to open new Tahasils where Panchayat Samiti is willing to provide infrastructure support and the same should be in shape of Panchayat Samiti resolution. The new Tahasils so opened will be co-terminus with the Block area. Be it noted that the Government of Orissa in the Revenue Department is empowered under the provisions of Orissa Revenue Administration (Units) Act, 1963 (hereinafter referred to as 'Act' for the sake of brevity) to constitute Tahasils for the purpose of better revenue administration. In terms of Section 4 of the said Act, the Government is required to specify the area over which the jurisdiction of the new Tahasil will extend.

3. The case of the petitioners is that in the district of Balasore, there are eight Tahasils. One of the Tahasils is located at Soro, which is twelve kilometers away from Bahanaga. The residents of twenty one Gram Panchayats under the Bahanaga Panchayat Samiti faced a lot of problem to go to Soro to deal with the revenue records in respect of their landed properties. Since the residents of Bahanaga Panchayat Samiti wanted a Tahasil to be constituted at Bahanaga, the Panchayat Samiti of Bahanaga unanimously resolved on 30.11.2002 for opening of a Tahasil Office at Bahanaga. It is further stated that pursuant to the policy decision of the State Government, the Additional District Magistrate, Balasore wrote a letter on 20.11.2003 to the Tahasildar, Soro requesting therein to report, if

Government building is available at Bahanaga. Pursuant to the said letter, on 24.12.2003, the B.D.O. wrote a letter to the Additional District Magistrate, Balasore stating therein that accommodation for the Office of Addl. Tahasildar is available within the Block premises. While the matter stood thus, the State Government on 6.8.2008 issued a notification constituting eighty five new Tahasils along with new Tahasil of Bahanaga having its headquarter at Gopalpur. Being aggrieved by the aforesaid notification, the residents of Bahanaga Panchayat Samiti represented to the Chief Minister of Orissa stating therein their inconvenience with regard to opening of the new Tahasil at Gopalpur. It is further stated that the Joint Secretary to Government in the Department of Revenue and Disaster Management in his letter dated 21.8.2008 referred the aforesaid representation to the Collector-cum- District Magistrate, Balasore to submit his views with regard to the shifting of the headquarter of Bahanaga Tahasil from Gopalpur to Bahanaga. Pursuant to the said letter, the Deputy Collector, Revenue, Balasore called for a meeting of the President, Zilla Parishad, Balasore, Chairman, Bahanaga Panchayat Samiti and others with regard to creation of new Tahasil. A meeting of the elected representatives of the area was also held on 10.9.2008. The total number of public representatives was forty four, out of them, twenty six representatives offered their views in favour of Bahanaga to be the Tahasil headquarter, whereas fourteen representatives opined that Gopalpur would be the convenient place for opening of the Tahasil headquarter. Both, the Member of Parliament and Member of Legislative Assembly offered their views that the headquarter of new Tahasil should be at Bahanaga. On 21.10.2008 the Collector-cum-District Magistrate, Balasore sent a report vide Annexure-9 to the State Government stating therein that he has examined the matter and found that Bahanaga is the Block headquarter and people coming to the Block will find it convenient to do their work at Tahasil. Further, most of the roads are connecting the Block headquarter and Bahanaga is itself located on the side of the National Highway. The opinion tilted in favour of Bahanaga where Block headquarter is located. On the basis of the report of the Collector-cum-District Magistrate, Balasore, the State Government on 16.1.2009 issued a notification modifying the earlier notification dated 6.8.2008 fixing the headquarter of Bahanaga Tahasil at Bahanaga instead of Gopalpur. The further case of the petitioners is that during General Election of the State Assembly, the Tahasil Office could not be opened at Bahanaga. At that point of time the then Collector-cum-District Magistrate, Balasore sent a report on 06.7.2009 to the opposite party no.1 recommending therein to open the Tahasil Office at Gopalpur since the same is centrally located. On 29.9.2009, the Under Secretary to Revenue Divisional Commissioner wrote a letter to the Collector-cum-District Magistrate, Balasore requesting him to comply the orders of the Government

vide letter dated 21.8.2008 and submit the report along with his views. The Collector-cum- District Magistrate, Balasore submitted his report to the Revenue Divisional Commissioner, Central Zone, Cuttack, whereafter the latter submitted a report to the Government with regard to creation of the new Tahasil. It is further stated that number of persons approached this Court in W.P.(C) No.1093 of 2009 for quashing the notification dated 16.1.2009 issued by the Government of Orissa, Revenue and Disaster Management Department, vide Annexure-10, declaring the headquarter of Bahanaga Tahasil Office at Bahanaga instead of Gopalpur. The petitioners along with others also filed writ application, being W.P.(C) No.5832 of 2010, seeking a direction to the opposite parties to open the Bahanaga Tahasil Office at Bahanaga pursuant to the notification dated 16.1.2009. Both the writ applications were heard together and disposed of by a common order on 18.8.2010 . The letter dated 29.9.2010 issued by the Revenue Divisional Commissioner, Central Division, Cuttack was quashed. Further, a writ of mandamus was issued to the State Government to give effect to the notification dated 16.1.2009. However, this Court rejected the prayer made in W.P.(C) No.1093 of 2009. Being aggrieved by the said judgment, one Girish Chandra Das and others filed a petition for Special Leave to Appeal in the Hon'ble Supreme Court of India, which was registered as Petition for Special Leave to Appeal (Civil) No.25175 of 2010. By order dated 17.09.2010, the S.L.P. was dismissed. However, the Hon'ble Supreme Court granted leave to the petitioners therein to give representation to the State Government with regard to their grievances. Pursuant to the said order passed by the Hon'ble Supreme Court, Girish Chandra Das and some others made representation to the State Government. At this juncture, since the Tahasil Office at Bahanaga was not opened pursuant to the order dated 18.8.2010 passed by this Court, the petitioners filed CONTC No.2212 of 2010. On 5.7.2011 this Court passed an order directing the State Government to comply with the order dated 18.8.2010 within four weeks. Against the aforesaid order, again Girish Chandra Das and others moved the Hon'ble Supreme Court by way of a petition for Special Leave to Appeal, which was registered as Appeal (Civil) CC No.12341 of 2011. After granting leave to appeal, the order dated 5.7.2011 passed by this Court in the contempt petition was set aside. The Hon'ble Supreme Court permitted the State Government to take an informed decision within twelve weeks from the date of the order. The further case of the petitioners is that pursuant to the order passed by the Hon'ble Supreme Court, out of twenty one Panchayats, fourteen Panchayats of Bahanaga Panchayat Samiti passed respective resolution in their Gram Sabha requesting the State Government to open the Tahasil Office of Bahanaga Tahasil at Bahanaga vide Annexure-14. Out of three Zilla Parishad members of Bahanaga Panchayat Samiti Zone, two

members have also represented to the State Government to open the Tahasil Office at Bahanaga. Similarly some of the Panchayat Samiti Members made representation for opening of Tahasil Office at Bahanaga. While the matter stood thus, on 25.8.2011, the State Government in the Department of Revenue and Disaster Management issued a notification fixing the headquarter of Bahanag Tahasil at Gopalpur.

4. The legality and propriety of the said notification is the subject matter of dispute in the present writ application.

5. Pursuant to issuance of notice, opposite party no.1 entered appearance and filed counter affidavit contending, inter alia, that the State Government vide notification dated 6.8.2008 created new Tahasils and fixed their headquarter wherein Gopalpur was shown as the headquarter of the newly created Bahanaga Tahasil. The State Government on the basis of the report of the Collector, Balasore subsequently issued notification on 16.1.2009 modifying the earlier notification dated 6.8.2008 and fixed the headquarter of Bahanaga Tahasil at Bahanaga instead of Gopalpur. The further case of the opposite party no.1 is that, being aggrieved by the aforesaid decision of the State Government, one Girish Chandra Das along with others filed W.P.(C) No.1093 of 2009 before this Court challenging the fixation of headquarter of Bahanaga Tahasil at Bahanaga instead of Gopalpur. Similarly W.P.(C) No.5832 of 2010 was also filed by present petitioners challenging the delay in functioning of the Tahasil Office at the notified place. This Court vide its judgment dated 18.8.2010 dismissed W.P.(C) No.1093 of 2009 and directed the State Government to act in terms of the notification issued on 16.1.2009. Thereafter, Special Leave to Appeal being SLP (Civil) No.25175 of 2010 was filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide his order dated 17.9.2010 though dismissed the said SLP, however, observed that the petitioner may submit a representation to the State Government ventilating their grievances relating to fixation of headquarter of Bahanaga Tahasil. The further case of opposite party no.1 is that while the matter stood thus, the present petitioners filed Contempt Petition, being CONTC No.2212 of 2010, before this Court. This Court vide order dated 5.7.2011 directed the State Government to comply with the order dated 18.8.2010 within four weeks. The said order dated 5.7.2011 was challenged by the intervention petitioner and others in Special Leave to Appeal. The Hon'ble Supreme Court vide order dated 2.8.2011 in Civil Appeal No.6307 of 2011 observed that fixing the headquarter of a Tahasil is purely an executive function and it is for the Government to take a decision with reference to all facts and circumstances and while so observing set aside the order dated 05.07.2011 passed by this Court. It is further stated that pursuant to the order dated 2.8.2011 passed by the

Hon'ble Supreme Court, the State Government after much deliberation and taking into consideration the report of the Board of Revenue and the Revenue Divisional Commissioner, (Central Division), that from the point of view of suitability, geographical location, communication and availability of infrastructure, the headquarter of Bahanaga Tahasil may be located at Gopalpur as the said location will be nearer to fourteen Gram Panchayats whereas Bahanaga will be closer to seven Gram Panchayats and that Gopalpur will be a more suitable place as villages under the proposed Tahasil have better communication and connectivity to Gopalpur than Bahanaga, issued the notification on 25.8.2011 notifying the headquarter of Bahanaga Tahasil Office at Gopalpur.

6. The intervenor-opposite party no.4 also filed counter affidavit, which is in tune of the counter filed by the State Government.

7. It is apt to state here that in W.P.(C) No.1093 of 2009, the petitioners claiming to be the residents of some villages coming under Bahanaga Tahasil as well as Panchayat members of the said Panchayat Samiti sought for quashing the notification dated 16.1.2009 issued by the Government of Odisha, Revenue and Disaster Management Department declaring the headquarter of Bahanaga Tahasil at Bahanaga instead of Gopalpur. In W.P.(C) No.5832 of 2010, the present petitioners along with others prayed inter alia for a direction to the opposite parties to open Bahanaga Tahasisl Office with headquarter at Bahanaga pursuant to the notification dated 16.1.2009. Both the writ petitions were heard together and disposed of by a common order dated 18.8.2010. The relevant portions of the said order are quoted hereunder.

> "4.Placing strong reliance upon the report of the Collector, Balasore dated 21.10.2008 under Annexure-5 to the writ petition in W.P.(C) No.5832 of 2010 with regard to shifting of headquarters of Bahanaga Tahasil from Gopalpur to Bahanaga on the basis of several petitions received by the State Government, instruction was given to the Collector to conduct an enquiry, consult public representatives and submit a factual report for its consideration. On the basis of such direction issued on 21.8.2008 the District Collector conducted an enquiry and examined 44 public representatives excluding MP and MLA. Out of them 26 gave their views in favour of having the headquarters of Bahanaga Tahasil at Bahanaga whereas 14 opined that the Gopalpur will be the convenient place for all and four representatives abstained. Thereafter both the M.P. and M.L.A. gave their views that the headquarters of Bahanaga Tahasil should be at

Bahanaga. The said report was accepted by the Government and in exercise of powers under Section 4 of the Orissa Revenue Administration (Units) Act, 1963 notification was issued by locating the headquarters of Bahanaga Tahasil at Bahanaga. Issuance of such notification is seriously questioned by the petitioners in the first writ petition, i.e. W.P.(C) No.1093 of 2009.

5. We have carefully examined the correctness of issuance of such notification by the State Government on the basis of the report of the District Collector by conducting the enquiry and examining the views of the public representatives. Majority of the representatives including the M.P. and M.L.A. gave their views in favour of the representation made by the villagers of Bahanaga to locate the headquarters of Bahanaga Tahasil at Bahanaga instead of Gopalpur. The same cannot be termed as non application of mind on the part of the State Government about feasibility of locating the headquarters of Bahanaga Tahasil at Bahanaga. Once the notification is issued by the State Government on the basis of the report of the Collector, the same has to be given effect to by the State Government.

6. The earlier notification dated 6th August, 2008 under Annexure-2 to the writ petition in W.P.(C) No.5832 of 2010 was modified by the State Government by the impugned notification dated 16.1.2009 the headquarters of Bahanaga Tahasil was fixed at Bahanaga instead ofGopalpur. After the notification dated 6.8.2008 was issued mentioning the headquarters of all the newly established Tahasils, representation was given by the residents of Bahanga Panchayat Samiti requesting the State Government to change the headquarters of Bahanaga Tahasil from Gopalpur to Bahanaga and therefore the State Government rightly referred the matter to the Collector, Balasore to conduct an enquiry and report. Consequently, the Collector submitted report recommending establishment of Tahasil headquarters at Bahanaga instead of Gopalpur. The petitioners of W.P.(C) No.5832 of 2010 have filed a rejoinder affidavit enclosing therewith the status report for creation of new Tahasils by the State Government under Annexure-11. We have examined the said report. Fifth paragraph of the said report which is relevant for this case is quoted herein below:-

“In view of the fact that it is a long standing demand of the people of the State and Government stands committed way back in 1995 it is now decided that Tahasil Offices should be opened in Block headquarters with the support of OAS-II Officers available at the

disposal of the Revenue & Disaster Management Department by way equitable deployment of officers between the existing Tahasils and Tahasils to be newly created. Besides, Panchayat Samiti should provide necessary infrastructure support which includes a record room, a room for the officer and a sizeable big hall for the employees of the Tahasil."

7. Apart from the status report, we have examined Annexure-10 to the rejoinder which is the Map of Bahanaga Block. It appears that Bahanaga is located on the side of N.H.5. Further more infrastructural facilities such as road communication, telecommunication and railway line etc. are available at Bahanaga whereas those infrastructural facilities are not available at Gopalpur.

8. In this view of the matter, the decision taken by the Government on the basis of the views of the representatives of the local people submitted by the Collector in his report, in issuing notification under Annexure-6 to the writ petition in W.P.(C) No.5832 of 2010 is perfectly legal and valid. Further the communication of the Revenue Divisional Commissioner, Central Division, Cuttack vide his letter dated 29.9.2009 (Annexure-8) that the Government in its letter dated 10.9.2009 had kept in abeyance its decision fixing the headquarters of Bahanaga Tahasil at Bahanaga is not legal and valid. The State Government notification dated 16.1.2009 has to be given effect to. Therefore, the petitioners in W.P.(C) No.5832 of 2010 are legally justified in seeking a direction for implementation of the said notification by the Government re-establishing the headquarters of Bahanaga Tahasil at Bahanaga. For the aforesaid reasons we are not inclined to accept the case of the petitioners in W.P.(C) No.1093 of 2009.

9. The learned counsel appearing for the petitioner in W.P. (C) No.1093 of 2009 tried to justify his contention that the headquarters at Gopalpur was originally fixed by the Government taking various relevant facts into consideration. We have carefully perused the averments made in the first writ petition, i.e. W.P.(C) No.1093 of 2009 with regard to the justification made by petitioners for not to shift the headquarters of Tahasil office from Gopalpur to Bahanaga. After careful perusal of the pleadings and legal contentions urged by the learned counsel for the petitioners in both the writ petitions as well as the learned Advocate General, we are of the view that the averments made in W.P.(C) No.5832 of 2010 are wholly

entertainable in law and the same are supported by legal contentions urged by the learned Advocate General and the contentions of learned counsel for the petitioners in W.P.(C) No.1093 of 2009 cannot be accepted for the reason that the State Government having accepted the report of the Collector on the basis of the relevant materials for establishing the headquarters of new Tahasil, same cannot either be kept in abeyance or changed in exercise of power under Section 4 of the Orissa Revenue Administration (Units) Act, 1963. Once a new Tahasil is established, normal procedure as indicated in Annexure-2 to the writ petition (W.P.(C) No.5832 of 2010) should be followed and the same has been rightly done by the villagers of Bahanaga and other villagers which has been properly considered by the Collector who submitted the report to the Government, which has accepted the same. In the above ground, acceptance of the report regarding change of the headquarters of Tahasil office from Gopalpur to Bahanaga cannot by any stretch of imagination be said to be illegal and erroneous and therefore it does not call for any interference with the notification dated 16.1.2009 under Annexure-6 on the basis of which writ of mandamus sought to the State Government for giving effect to the said notification has to be issued.

10. Accordingly, the letter dated 29.9.2009 issued by the Revenue Divisional Commissioner, Central Division, Cuttack under Annexure-8 to the connected writ petition i.e. W.P.(C) No.5832 of 2010 is quashed and the said petition is allowed. Rule is issued and further a writ of mandamus is issued to the State Government to see that the notification dated 16.1.2009 shall be given effect forthwith without further delay in the matter.

11. The representation given by the villagers to the State Government in the first writ petition (W.P.(C) No.1093 of 2009) for reconsideration of its decision after passing Annexure-6, the notification dated 16.1.2009 under Annexure-7, is wholly unnecessary. Having regard to the undisputed fact that the Collector of the district after ascertaining the views of the representatives of the local people submitted the report in support of shifting of Tahasil headquarters to Bahanaga in place of Gopalpur, the prayer made in this regard in the connection writ petition i.e., W.P.(C) No.1093 of 2009 is rejected as it does not amount to illegality in the change of administrative unit.

8. Thereafter, a contempt petition was filed by the petitioners, which was registered as CONTC No.2212 of 2010. A direction was issued by this Court on 5.7.2011 in the said contempt petition to comply with the order dated 18.8.2010. Against the said order, one Girish Chandra Das and others filed Special Leave to Appeal before the Hon'ble Supreme Court in Civil Appeal No.6307 of 2011. The Hon'ble Supreme Court set aside the order dated 5.7.2011 passed by this Court in CONTC No.2212 of 2010 on 2.8.2011. The relevant portion of the said order is quoted hereunder.

> "7. We are of the view that the Government should have sufficient time to consider the representation, the divergent reports and the relevant factors to pass appropriate orders. Fixing the headquarters of a Tehsil is purely an executive function and it is for the Government to take a decision with reference to all facts and circumstances. Even if it had passed any order, it has the power to reconsider and alter the same at any point of time, if the circumstances so warrant particularly if the earlier order has not been given effect. In the circumstances, it was not proper for the High Court to foreclose the entire matter by directing the Government to implement the order dated 16.1.2009 and thereby render useless the representation given by the appellants in pursuance of the liberty reserved by this court.
>
> 8 .In the circumstances, without expressing any opinion on the merits of the matter, we allow this appeal, set aside the order dated 5.7.2011 of the High Court in the contempt proceedings and permit the State Government to take an informed decision within twelve weeks from today. If such a decision is not taken or if the appellants' representation is rejected, the earlier Government Order dated 16.1.2009 shall be implemented."

9. Mr. Ashok Parija, learned Senior Counsel appearing on behalf of the petitioners vehemently argued that re-fixing the headquarter of Bahanaga Tahasil at Gopalpur in suppression of earlier notification dated 16.1.2009 vide Annexure-10 wherein the headquarter of the Tahasil was fixed at Bahanaga is contrary to the policy decision of the State Government regarding creation of new Tahasil and fixation of their headquarter. The stand taken by the State Government in paragraph-9 of the counter affidavit that Gopalpur was chosen in view of suitability, geographical location, communication and availability of infrastructure is contrary to the finding of the facts rendered by this Court on 18.8.2010 in W.P.(C) Nos.1093 of 2009 and 5832 of 2010. Furthermore, the stand of the State Government is that fourteen Gram Panchayats are closer to Gopalpur and seven Gram

Panchayats are closer to Bahanaga is factually incorrect. The report of the Board of Revenue and Revenue Divisional Commissioner suffers from the vice of non-application of mind. Above all, the general public of the locality are in favour of Bahanaga as Tahasil headquarter.

10. Elaborating his submission, Mr. Parija submitted that the Government of Odisha formulated a policy for opening of new Tahasils styled as "status paper for the creation of New Tahasils in the State". The said document has been annexed as Annexure-1. The said documents would indicate that the Tahasil Offices should be opened in the Block headquarter with the support of OAS (II) Officers available at the disposal of the Revenue and Disaster Management Department by way of equitable deployment of officers between the existing Tahasils and Tahasils to be newly created. The Panchayat Samities should provide necessary infrastructure support which includes a record room, a room for the officer and a sizeable big hall for the employees of the Tahasil. The decision of the Government to open a new Tahasil where Panchayat Samiti is willing to provide infrastructure support should be in shape of Panchayat Samiti resolution. It has been further decided that the new Tahasil so opened will be co-terminus of the block area. In furtherance to the said policy, the Additional District Magistrate, Balasore vide Annexure-4 wrote a letter to the Tahasildar, Balasore/ Soro/ Nilagiri/ Jaleswar to report if Government buildings are available at Remuna, Bahanaga, Khaira, Oupada and Bhograi Block headquarter or private buildings are available to function Additional Tahasil Office for accommodation of Additional Tahasildar and Staffs. The name of Gopalpur is absent, in the said letter since it is not a Block headquarter and, therefore, does not qualify for being a Tahasil headquarter as per the policy of the State Government.

11. Mr. Parija further submitted that in response to the letter of Additional District Magistrate, Balasore vide Annexure-4, the Block Development Officer, Bahanaga vide Annexure-5 wrote a letter to the Additional District Magistrate, Balasore confirming that accommodation for the office of the Tahasildar is available within the block premises. Thus, while Bahanaga fulfils the twin requirements of the policy, being a Block headquarter and the Panchayat Samiti has passed a resolution to provide the infrastructure support, Gopalpur is neither a Block headquarter nor has requisite infrastructure support. He further submitted that the Government of Odisha on 6.8.2008 vide Annexure-6 opened 85 new Tahasils and all the Tahasil headquarter were fixed at the respective block headquarter co-terminus with the block area, except Bahanaga, which was fixed at Gopalpur, contrary to

the policy of the State Government. No ostensible reason or exceptional circumstance was stated which occasioned the deviations from the Policy.

12. Mr. Parija further submitted that on 21.10.2008, pursuant to the direction issued by the State Government in Revenue and Disaster Management Department, the Collector, Balasore submitted its report with the State Government in connection with shifting of the headquarter of Bahanaga Tahasil from Gopalpur to Bahanaga. The said letter was inter alia communicated. Enquiry was conducted by the Collector-cum- District Magistrate, Balasore. The Chairman, Bahanaga Panchayat Samiti, Member of Zilla Parishad, Panchayat Samiti Members of Bahanga and Sarpanches were consulted. The total number of public representatives excluding MP and MLA are 44. Out of them, 26 gave their views in favour of Bahanaga Block headquarter to be the Tahasil headquarter, whereas 14 opined that Gopalpur will be convenient for them and four representatives abstained. Both MP and MLA gave their views that the headquarter of Bahanaga Tahasil should be at Bahanaga Block headquarter. The report further reveals that the Collector had examined the matter and found that Bahanaga is the Block headquarter and people coming to the Block headquarter will find it convenient to do their work at Tahasil. Furthermore, most of the roads are connecting Block headquarter and Bahanaga is itself located on the side of National Highway. The opinion tilted in favour of Bahanaga where Block headquarter is located. Based on the said letter on 16.1.2009, the State Government relocated the headquarter of Bahanaga New Tahasil at Bahanaga in place of Gopalpur.

13. Mr. Parija relying on the decision of the State Government dated 16.1.2009 submitted that the findings of fact arrived at by this Court have attained finality between the contesting parties and therefore the same is binding and hence opposite parties are estopped from taking a different view. He further submitted that the report of the Board of Revenue and Revenue Divisional Commissioner suffer from the vice of non-application of mind inasmuch as the finding of the Revenue Divisional Commissioner that Gopalpur will be more nearer to 14 GPs whereas Bahanaga would be closer to 7 Gram Panchayats. He placed reliance upon the judgments of Hon'ble Supreme Court in the case of ***ITC Limited V. State of Uttar Pradesh and others*** reported in ***(2011) 7 SCC 493*** and in the case of ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and others,*** reported in ***(1999) 1 SCC 492*** and in the case of ***Madhya Pradesh State Cooperative Dairy Federation Limited and another Vs. Rajnesh Kumar Jamindar and others,*** reported in ***(2009) 15 SCC 221***.

14. Learned Advocate General appearing for opposite party no.1 submitted that pursuant to the order dated 2.8.2011 passed by the Hon'ble Supreme Court, the State Government after much deliberation and taking into consideration the report of the Board of Revenue and the Revenue Divisional Commissioner (Central Division) decided that from the point of view of suitability, geographical location, communication and availability of infrastructure, Gopalpur is more suitable to be the headquarter of Bahanaga Tahasil as the said location will be nearer to fourteen Gram Panchayats, whereas Bahanaga will be closer to seven Gram Panchayats. He further submitted that Gopalpur will be a more suitable place as villages under the proposed Tahasil have better communication and connectivity to Gopalpur than Bahanaga.

15. Mr. S.K. Padhi, learned Senior Advocate appearing on behalf of opposite party no.4, intervenor, placing strong reliance on the order dated 2.8.2011 passed by the Hon'ble Supreme Court in Civil Appeal No.6307 of 2011 submitted that pursuant to the observation of the Hon'ble Supreme Court in its order dated 17.9.2010 in SLP (Civil Appeal No.25175 of 2010), the opposite parties made a representation to the State Government ventilating their grievances with regard to fixation of headquarter of Bahanaga Tahasil. Furthermore, the order dated 5.7.2011 passed by this Court in CONTC No.2212/2010 to implement the judgment dated 18.8.2010 within four weeks was set aside by the Hon'ble Supreme Court in Civil Appeal No.6307 of 2011. Placing strong reliance on the order dated 2.8.2011 in Civil Appeal No.6307 of 2011, more particularly paragraph-7 thereof, Mr. Padhi submitted that Court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from malafide, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order has been passed by the authority illegally, irrationally or suffers from procedural impropriety before it interferes. The court does not have the expertise to correct an administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure. He further submitted that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority. Thus, the court is devoid of the power to reappreciate the evidence and come to its own conclusion on the proof of a particular charge, as the scope of judicial review is limited to the process of making the decision and

not against the decision itself and in such a situation the court cannot arrive on its own independent finding. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of policy are ordinarily not amenable to judicial review.

To buttress his submission, Mr. Padhi cited the decisions of Hon'ble Supreme Court in the case of ***Tata Cellular Vs. Union of India,*** reported in *AIR 1996 SC 11* and ***People's Union for Civil Liberties V. Union of India,*** reported in *AIR 2004 SC 456*.

16. On an anatomy of the pleadings of the parties and submissions made by respective counsel for the parties, really three points arise for our consideration, such as:-

(i) What is the scope of judicial review in the policy matter such as fixation of headquarter of Tahasil ?

(ii) Whether the order dated 18.8.2010 passed by this Court in W.P.(C) Nos.1093 of 2009 and 5832 of 2010 respectively have attained its finality.

(iii) Whether the decision of the Government in re-fixing the headquarter of Bahanaga Tahasil at Gopalpur is vitiated by arbitrariness.

17. **Point No.(i)**

Before embarking upon the rival contention of the parties, wewould like to deal with the ambit and scope of judicial review with regard to tenability of policy decisions.

The Hon'ble Supreme Court in ***Premium Granites and another v. State of T.N. and others,*** *(1994) 2 SCC 691* while considering the Court's powers in interfering with the policy decision observed at page-715 as under: (SCC para-54)

> "54. It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be."

18. The Hon'ble Supreme Court in ***Balco Employees' Union (Regd.) Vs. Union of India and others,*** *(2002) 2 SCC 333* held that it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

19. The same view is echoed in the case of ***Shimnit Utsch India Private Limited and another Vrs. West Bengal Transport Infrastructure evelopment Corporation Limited and others,*** *(2010) 6 Supreme Court Cases 303.* In paragraph-52 of the report, their Lordships' held as follows:-

> "The courts have repeatedly held that the government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The Government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in the policy lies with the authority. But like any discretion exercisable by the Government or public authority, change in policy must be in conformity with *Wednesbury* reasonableness and free from arbitrariness, irrationality, bias and malice.

20. In the case of ***Tata Cellular Vrs. Union of India***, *AIR 1996 SC 11*, the Hon'ble Supreme Court has succinctly stated about the Wednesbury unreasonableness. In paragraph-96 of the report, their Lordships' held as follows:-

> "What is this charming principle of Wednesbury unreasonablenss? Is it a magical formula? In Re: v. Askew [1768] 4 2168, Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later: It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practice this profession is trusted to the College of Physician: and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not

arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike.

21. In the case of ***State of N.C.T. of Delhi and Another Vrs.Sajeev @ Bitto***, *AIR 2005 SC 2080*, the Hon'ble Supreme Court had again considered the principle of Wednesbury and held that :-

> "Therefore, to arrive at a decision on 'reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for the authority to decide upon the choice and not for the Court to substitute its view".

Thus, the Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

22. **Point No.(ii)**

Mr. Praija, learned Senior Counsel appearing for the petitioners argued with vehemence that the judgment dated 18.8.2010 passed by this Court in W.P.(C) Nos.1093 and 5832 of 2010 has attained finality in as much as the SLP against the aforesaid judgment was dismissed by the Hon'ble Supreme Court. Per contra, Mr. Padhi, learned Senior Counsel placing reliance on the order dated 2.8.2011 passed by the Hon'ble Supreme Court in Civil Appeal No.6307 of 2011 arising out of CONTC No.12341 of 2011, more particularly at paragraph-7 of the said order, submitted that Hon'ble Supreme Court have held that fixing the headquarter of a Tahasil is purely an executive function and it is for the Government to take a decision with reference to all facts and circumstances. In the said judgment, the Hon'ble Supreme Court further held that even if the Government had passed any order, it has the power to reconsider and alter the same at any point of time, if the circumstances so warrant particularly if the earlier order has not been given effect to. Mr .Padhi, learned Senior Counsel further submitted that the Hon'ble Supreme Court set aside the order dated 5.7.2011 passed by this Court in the contempt proceeding and permitted the State Government to take an informed decision within twelve weeks from the date of the order.

23. The Hon'ble Supreme Court in the case of ***Kunhayammed and others Vrs. State of Kerala and another,*** *(2000) 6 Supreme Court Cases 359*, had the occasion to consider as to whether the judgment of the High Court gets merged when SLP is dismissed in limini. In paragraph-7 of the said report, their Lordships' held as follows:-

> "The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times."

24. Further, in paragraph-44 (iv) of the report, their Lordships' held that "an order refusing Special Leave to Appeal may be a non speaking order or a speaking one, In either case it does not attract the doctrine of merger. An order refusing Special Leave to Appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed".

25. One distinguishing feature of this case is that after the SLP was dismissed, liberty was granted to the appellants therein by the Hon'ble Supreme Court to file representation before the Government. Further more, in Civil Appeal No.6307 of 2011 arising out of CONTC No.12341 of 2011, the Hon'ble Supreme Court permitted the State Government to take an informed decision within twelve weeks from the date of the order. In view of the same, no fault can be found with the Government in again taking a decision. Thus the decisions cited by Mr.Parija, learned Senior Counsel in the case of *Darshjit Singh and I.T.C. Ltd*. (supra) that where an authority makes regulation and issues policies and procedures they are intended to be followed and complied with are of no avail since the Government has issued fresh notification fixing headquarter of Bahanaga Tahasil at Gopalpur. But then decision of the Government in re-fixing the headquarter of the Tahasil is to be decided on the anvil of the decisions cited supra.

26. **Point No.(iii)**

After the notification dated 6.8.2008 issued by the Government declaring the headquarter of Bahanaga Tahasil at Gopalpur, there was public resentment. Thereafter, the Government in the Revenue and Disaster Management Department directed the then Collector-cum- District

Magistrate, Balasore to conduct an inquiry. He submitted a report on 21.10.2008 vide Annexure-9. From the said report, it is evident that an inquiry was conducted by him. He had also consulted the M.P., Balasore, M.L.A., Soro and Chairman, Bahanaga Panchayat Samiti, Members of Zilla Parishad, Panchayat Samiti Members of Bahanaga and Sarpanches. Out of forty four public representatives, 26 gave their views in favour of Bahanaga Block headquarter to be the Tahasil headquarter, whereas fourteen opined that Gopalpur will be convenient for them and four representatives were abstained. The report further reveals that both M.P. and M.L.A. gave their views in favour of Bahanaga Tahasil at Bahanaga. He found that Bahanaga which the Block headquarter and people coming to Block headquarter will find it convenient to do their work at Tahasil. Further, most of the roads are connecting Block headquarter and Bahanaga which itself located on the side of the National Highway. He expressed that opinion tilted in favour of Bahanaga where Block headquarter is located. However, when another Collector-cum- District Magistrate, joined at Balasore, he submitted a report on 6.7.2009 to the Government taking a contrary view vide Annexure-11. Further more, the Revenue Divisional Commissioner, Central Division, Cuttack submitted a report on 16.2.2010 vide Annexure-D/4 series stating therein that Gopalpur is a more suitable place as it is located at a distance of about 20 K.M. from Soro Map. The villages of the proposed Tahasil have better communication and connective to Gopalpur than Bhanagaa. Besides, Gopalpur being centrally located has a thriving market and its surrounding areas are thickly populated and it will have required infrastructure to start the Tahasil Office with the help of Gram Panchayat. Basing on the said report, the Commissioner-cum-Secretary, Board of Revenue submitted a report on 23.10.2010 vide Annexure-D/4 series to the Commissioner-cum-Secretary to Government, Revenue and Disaster Management Department stating therein that from the point of view of suitability, geographical location, communication and availability of infrastructure, the headquarter of Bahanaga Tahasil may be located at Gopalpur. The said report further reveals that Gopalpur will be more nearer to fourteen Gram Panchayats whereas Bahanaga would be closure to seven Gram Panchayats of the same Block as reported by the Revenue Divisional Commissioner.

27. Be it noted, no where in the report dated 16.2.2010 vide Annexure-D/4 series it is stated that Gopalpur will be more nearer to fourteen Gram Panchayats whereas Bahanaga would be closure to seven Gram Panchayats of the same Block. In our considered opinion, report of the Commissioner-cum-Secretary, Board of Revenue, Orissa, Cuttack vide Annexure-D/4 series is a result of total non application of mind and not based on facts. Different reports were placed before the Government at

different points of time. At one point of time, there is a report of Collectorcum- District Magistrate, Balasore to create Tahasil headquarter at Bahanaga and at a latter point of time, when another Collector-cum- District Magistrate joined, he gave a contrary report. Both the reports of the Collector-cum-District Magistrate, Balasore are diametrically opposite and inconsistent. From the earlier report of the Collector-cum-District Magistrate, Balasore, it is evident that he consulted the public representatives including M.P. and M.L.A and expressed his view to locate the headquarter of the Tahasil at Bahanaga, whereas in the latter, we found that the Collector-cum-District Magistrate, Balasore conducted a suo motu inquiry and submitted the report. Furthermore, the report of the Commissioner-cum-Secretary, Board of Revenue, Orissa, Cuttack holding, inter alia, that R.D.C. had submitted a report stating therein that Gopalpur will be more nearer to fourteen Gram Panchayats whereas Bahanaga would be closure to seven Gram Panchayat of the same Block, is not borne out of the record. At the cost of repeation, we reiterate that the R.D.C. in his report dated 16.2.2010 has never stated so.

28. In view of the conflicting reports of the different authorities at different points of time, we are of the opinion that a High Power Committee consisting of Commissioner-cum-Secretary to the Government of Odisha, Revenue and Disaster Management Department, Revenue Divisional Commissioner, Central Division, Cuttack and Collector-cum- District Magistrate, Balasore should take a decision pertaining to fixation of headquarter of Bahanaga Tahasil. It is open to the said committee to consult the public representatives and take a decision on their own in the facts and circumstances of the case. The Chief Secretary to the State of Odisha is directed to constitute a committee of the aforesaid persons within a period of one month, where after the committee shall submit its report to the Government within two months. Needless to mention here that the Government after careful consideration of the report of the committee may take an informed decision as stated by the Hon'ble Supreme Court.

29. Accordingly, the notification dated 25.8.2011 under Annexure-16 is quashed. The writ application is allowed to the extent indicated above. There shall be no order as to costs.

Writ petition partly allowed.

2013 (II) ILR - CUT-746

M. M. DAS, J & DR. A. K. RATH, J.

W.P.(C) NO. 22778 OF 2012 (With Batch) (Dt.30.08.2013)

STATE OF ODISHA & ORS. .....Petitioners

.Vrs.

MANOJ KUMAR PANDA & ORS. .....Opp.Parties

A SERVICE LAW – Advertisement for admission to Odisha Civil Services Preliminary Examination, 2011 – Petitioners challenge Clause-3 of the advertisement before the Tribunal, prescribing age limit of 32 years as on 01.01.2011 in view of amendment of Odisha Civil Service (Combined Competitive Recruitment Examination) Rule, 1991, in the year 2011 – Odisha Civil Service Examination could not be held from 2007 to 2010 although vacancies occurred during all such years and the vacancies from the year 2007 till date including the vacancies of the year 2011 are consolidated and treated to be the vacancies of the year, 2011 – O.P.S.C. has also failed in its duty under the rules to invite applications during the particular year to fill up the vacancies of that year – Many Candidates who were eligible under 1991 Rules could not have applied to the post in view of the amending Rules – However Tribunal held that 2011 Rules is not illegal, unjust and unconstitutional – Order of the Tribunal is under challenge.

Held, posts which fell vacant prior to the amendment of the 1991 Rules would be governed by the old/original Rules i.e. 1991 Rules and not by the new Rules i.e. 2011 Rules – The amendment brought in 2011 to the 1991 Rules would have prospective effect – Vacancies arose subsequent to the amendment of the rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose – Candidates who were eligible prior to amendment of the Rules came in to force i.e. 2011 Rules are eligible to appear at the examination - Since a large number of Candidates could not have applied to the posts in view of the amending Rules, direction issued to O.P.S.C. to issue corrigendum in all the news papers making it clear that the Candidates, who are otherwise eligible before the amending rules came into force, can apply and appear at the Odisha Civil Service preliminary Examination, 2011 for recruitment to the posts and services coming under the Odisha Civil Services (Category-I and category-II). (Rules 22,13)

B. SERVICE LAW – Petitioners challenge the advertisement for admission to Odisha Civil Services Preliminary Examination, 2011, Providing 27% reservation for S.E.B.C. Candidates, providing reservation for more than 50%.

None of the Candidates before the Tribunal have challenged the Odisha Reservation of posts and services (For Socially and Educationally Backward Classes) Act, 2008 which provides 27% reservation for SEBC Candidates, accordingly O.P.S.C. issued the advertisement providing 27% reservation – Since Constitutionality of the Act, 2008 is not questioned by any of the petitioners the O.P.S.C. is justified in issuing the above advertisement – Held, the observations made by the learned Tribunal that State Authorities are at liberty to move the Central Government for inclusion of the Act, 2008 in the 9th Schedule of the Constitution as early as practicable to avoid future complications or continue with the reservation with 50% is neither desirable nor warranted, hence the said observation made in Para 14 of the Judgement is quashed. (Para 24)

Case law Relied on:-

(1983) 3 SCC 284 : (Y.V. Rangaiah & Ors.-V- J. Sreenivasa Rao & Ors.)

Case laws Referred to:-

1.(1983)3 SCC 33 : (A.A. Calton-V- Director of Education & Anr.)
2.(1997)10 SCC 419 : (State of Rajasthan-V- R.Dayal & Ors.)
3.(1998)9 SCC 223 : (B.L. Gupta & Anr.-V- M.C.D.)
4.(2008)3 SCC 641 : (A. Manoharan ^ Ors.-V- Union of India & Ors.)
5.(1996)6 SCC 721 : (Union of India & Ors.-V- Vipinchandra Hiralal Shah)
6.(1998)1 SCC 487 : (Government of Orissa-V- Haraprasad Das)
7.(2003)10 SCC 144 : (State of Orissa-V- Bhikari Charan Khuntia)

For Petitioners - Mr. Ashok Mohanty, A.G. Mr. R.K. Rath, Sr. Adv.
Mr. J. Pattnaik, Sr. Adv. Mr. B. Routray, Sr. Adv.

For Opp.Parties - M/s. D. Sethy & S.C. Dash (for O.P.40)
M/s. P.K. Mishra, D.C. Naik, N. Behera, (for O.P.44)
M/s. A.K. Nath, S.K. Rout & H.P.Mohanty, (for O.Ps.11 & 6)
M/s. A.K. Mohapatra, S. Mishra, S.K. Barik, T.Dash (for O.Ps.4 & 43)
M/s. B. C, Ghadei & S.K. Sahoo
M/s. B.P.B. Bahali & a.K. Sahu (for O.Ps.7,8,9 & 23).
M/s. P.K. Mohanty (for O.P.2)

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DR. A.K.RATH, J. All the above mentioned writ applications involve common questions of fact and law. Hence, they were heard together and are now disposed of by this common judgment.

2. Facts of the case, in nutshell, are as follows:-

An advertisement was issued by the Odisha Public Service Commission (Advertisement No.05 of 2011-12) inviting applications from the candidates for admission to the Odisha Civil Services reliminary Examination, 2011 for recruitment to the posts and services coming under the Odisha Civil Services (Category-I & Category-II). Pursuant to the same, the opposite parties in W.P.(C) No.22778 of 2012 and petitioners in other connected writ applications have applied for the said posts. For the purpose of disposal of these cases, they are described as petitioners. Thereafter they have filed Original Applications before the learned Odisha Administrative Tribunal (hereinafter referred to as "Tribunal") for a declaration that the "Odisha Civil Service (Combined Competitive Recruitment Examination) Amendment Rules, 2011 is ultra vires the Constitution, and further declaration that the age limit provided in Clause-3 of the advertisement i.e. "A candidate shall be under 32 years of age as on 1st January, 2011" as invalid and inoperative in the eye of law and for a direction to allow them to appear in the Combined Competitive Recruitment Examination, 2011 pursuant to the advertisement and to set aside the advertisement providing reservation for more than 50%.

3. The grievance of the petitioners is that though they were eligible to appear in the Combined Competitive Recruitment Examination, 2011 as per the Odisha Civil Service (Combined Competitive Recruitment Examination) Rule, 1991 (hereinafter referred to as "1991 Rules") till 13.7.2011 but by virtue of the amended Rule i.e. Odisha Civil Service (Combined Competitive Recruitment Examination) Amendment Rules, 2011 (hereinafter referred to as "2011 Rules") particularly the amendment brought to Rule 5(ii)(i)(a) of the 1991 Rules they became ineligible to make an application pursuant to advertisement dated 17.11.2011. The further case of the petitioners is that 2011 Rules has made discrimination between the candidates like the petitioners, who have crossed the age as prescribed in the said Rule and the candidates who have not crossed their age limit. In some cases reservation of 27% of the posts for SEBC candidates has been challenged.

4. Pursuant to issuance of notice, the State of Odisha, opposite party no.1 entered appearance before the learned Tribunal and filed comprehensive counter affidavit. Case of opposite party no.1 is that 2011

Rules can never be termed as unjust, illegal and unconstitutional, since the amendment is made with a purpose to maintain uniformity of age in entry into the Government service and for allowing young persons to enter into services keeping in view the increased thrust on e-governance and statewide initiatives to computerized offices for greater efficiency. It is further stated that the Government is not bound to adopt 1991 Rules after enactment of the 2011 Rules. Further Odisha Civil Services Examination could not be held from 2007 to 2010 due to pendency of the litigations before the learned Tribunal as well as this Court and due to restructuring of OAS, OPS and OFS cadres and creation of ORS and OT and AS and preparation of new Service Rules in 2010 and 2011. The vacancies from 2007 to 2011 including the vacancies for the year 2011 are consolidated and treated as vacancies for the year 2011 as per Rule 19-A of 1991 Rules and 2011 Rules. The eligibility of the candidates pursuant to the advertisement No.5 of 2011-2012 dated 17.11.2011 made by O.P.S.C. is governed by 2011 Rules. Out of the five services, namely, OAS, OPS, OCS, ORS and OT & AS, the ORS and OT & AS have been constituted in the year 2011. Hence, there were no vacancies in these services in the years 2007, 2008, 2009 and 2010.

5. The learned Tribunal, on a threadbare analysis of the pleadings of the parties and arguments advanced by respective counsel for the parties in an elaborate judgment, came to hold that 2011 Rules can never be termed as unjust, illegal and unconstitutional, since the amendment has been made with a purpose to maintain uniformity in entry into the Government services and for allowing young persons toenter into services for maintaining work culture and for increasing efficiency of the holders of civil posts. The amendment has been made following due procedure of law in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The learned Tribunal further came to hold that there may be thousands other than the petitioners, who have not submitted their applications, since upper age limit has been fixed at 32 as on 1.1.2011. All such aspirants will not be benefited in any manner if the relief as has been sought for by the petitioners is allowed and it will be a hostile discrimination and violation of Articles 14 and 16 of the Constitution of India.

So far as percentage of reservation is concerned, the learned Tribunal came to hold that since the petitioners have not challenged the Odisha Reservation of Posts and Services (for Socially and Educationally Backward Classes) Act, 2008 (hereinafter referred to as “Act, 2008”) which provides 27% reservation for SEBC candidates, there is no scope for the Tribunal to observe anything regarding irregularity or illegality in the

advertisement providing reservation of 27% in favour of SEBC candidates. The said judgment has been challenged by the State of Odisha as well as the writ petitioners, who are applicants before the Tribunal.

6. Be it noted that the State of Odisha has challenged the impugned judgment on the ground, inter alia, that the observation made in paragraph-14 of the judgment observing that the State authorities are at liberty to move the Central Government for inclusion of the Act, 2008 in the 9th Schedule of the Constitution as early as practicable to avoid future complications on the ground, inter alia, that the learned Tribunal, having refused to entertain the petition on merit, lacks jurisdiction to issue any direction.

7. We have heard Shri B. Routray, learned Senior Counsel, Shri R.K.Rath, learned Senior Counsel, Shri J. Pattnaik, learned Senior Counsel and Shri B.P.B.Bahali, learned counsel appearing for the petitioners and learned Advocate General for the State.

8. Crux of the issue is as to whether the petitioners, who are eligible under the 1991 Rules, which were subsequently amended in 2011, are governed under the 1991 Rules or 2011 Rules. The further question that hinges for consideration is as to whether providing 27% reservation for SEBC candidates, which exceeds 50% of the total vacancies, is unjust, illegal and unconstitutional.

9. For better reference, Rules 4, 5 and 19(A) of the 1991 Rules are quoted hereunder:-

> **4. Holding of Examination**-(1) The concerned Department of Government shall intimate each year the vacancy position to the Commission through the G.A. Department indicating the post reserved for candidates belonging to the categories of Scheduled Castes, Schedule Tribe, Socially and Educationally Backward Classes, Ex- Servicemen Sportsmen and Women.
>
> (2) The Commission shall on receipt of the vacancy position from the G.A. Department announce and invite application from the candidates eligible to appear in the examination.
>
> (3) The Commission shall conduct the combined competitive Examination in the manner prescribed in Schedule II for recruitment to the Services/Posts mentioned in Schedule I by an order to be issued by the Commission on that behalf.

(4) The date on which and the place at which the examination will be held, shall be decided and notified by the Commission.

(5) The candidates shall be examined in any of the subject/subjects specified in Schedule III.

5. Condition of eligibility – In order to be eligible to compete for the examination a candidate must satisfy the following conditions, namely:

(1) Nationality –

(i) He shall be a citizen of India;

(ii) He shall be able to speak, read and write Oriya; and shall have Oriya as the language subject in the H.S.C. Examination or an equivalent examination or has been declared to have passed a test in Oriya language equivalent to the Middle School standard conducted by the Education Department of the Government of Orissa.

(2) Age-

(i) Candidates shall be under thirty two years and over twenty one years of age on the first day of August of the year in which applications are invited

Provided that –

(a) where applications have not been invited by the Commission during any particular year to fill up the vacancies of that year, the applicants who would have been eligible to compete at the examination had the applications been invited by the Commission during that year shall be eligible to compete at the examination held in the subsequent year; (b) The maximum age-limit in case of candidate belonging to Scheduled Castes or Scheduled Tribes shall be relaxed by five years; and

(b-1) The upper age-limit in case of candidate belonging to Socially and Educationally Backward Classes shall be relaxed by three years.

(c) The upper age-limit in case of candidates, who are ex-servicemen, shall be relaxed in accordance with the Orissa Ex-Servicemen (Recruitment to State Civil Services and Posts) Rules, 1985.

(d) The upper age-limit in case of woman candidates shall be relaxed by five years.

(ii) Evidence of age which shall be accepted by the Commission is that entered the H.S.C. Examination or Matriculation or Secondary School Leaving Certificates or a Certificate recognised by an Indian University as equivalent thereto.

(3) Educational Qualification-

He must hold a Bachlor's Degree from any University incorporated by an Act of the Central or a State Legislature in India or an Educational Institution established by an Act
of Parliament or deemed to be a University under Section 3 of the Universities Grants Commission Act, 1956 or a foreign University approved by the Central Government from
time to time.

19-A. Notwithstanding anything contained in these rules and the provisions of the recruitment rules specified in column (3) of Schedule I, -

(i) where the Commission for any reason could not conduct the examination for one or more years in accordance with rule 4, a single examination may be conducted in the subsequent years for all the vacancies intimated during different years including the current year to the Commission, by treating them as the vacancies of the year in which the said examination is actually conducted and in that case the proviso to clause (i) of sub-rule of rule 5 shall apply; and

(ii) where a single examination is conducted all the vacancies which are required to be filled up by promotion, selection or transfer, as the case may be, under the relevant recruitment rules, remained unfilled shall be treated as the vacancies of the year in which such examination is conducted.

10. The said Rule was amended and published in the extraordinary Gazette of the State of Odisha on 15.7.2011. In sub-rule (2) clause (i) along with proviso thereunder, the following are substituted:

11. "(i) Age Limits: A candidate must have attained the age of 21 years and must not be above the age of 32 years on the first day of January of the year in which the advertisement is made:

Provided that the Upper Age limit in respect of reserved categories of candidates shall be relaxed for the respective categories in accordance with the provisions of the Orissa Civil Service (Fixation of upper Age Limit) Rules, 1989".

Further in clause (i), in Rule 19(A), the words "and in that case the proviso to clause (1) of sub-rule (2) of rule 5 shall apply", were omitted.

11. On a conspectus of Rule 4(1) & (2) of the 1991 Rules, it is evident that the concerned department of Government shall intimate each year the vacancy position to the Commission through the General Administrative Department indicating the post reserved for different categories and the Commission shall on receipt of the vacancy position from the General Administrative Department announce and invite application from the candidates eligible to appear in the examination. Rules 4(3) casts a duty on the Commission to conduct the combined competitive Examination in the manner prescribed in Schedule II for recruitment to the Services/Posts mentioned in the Schedule I by an order to be issued by the Commission on that behalf. 'Year' has been defined in Rule 2 as the calendar year. On a conjoint reading of sub-rules (1)(2)(3) of Rules 4 of the 1991 Rules, a conclusion is irresistible that the terms 'shall' appearing in the Rule 4(1) 4(2) 4(3) and 'each year' appearing in Rule 4(1) cast a statutory duty on the Odisha Public Service Commission (hereinafter referred to as "OPSC") to conduct the Odisha Civil Services Examination each calendar year. Furthermore, Clause (a) of sub-rule (2) of Rule 5 of the 1991 Rules was brought to the 1991 Rules by virtue of an amendment of the year 1993. The same provides that where applications have not been invited by the Commission during any particular year to fill up the vacancies of that year, the applicants who would have been eligible to compete at the examination had the applications been invited by the Commission during that year shall be eligible to compete at the examination held in the subsequent year.

12. Furthermore, Rule 19-A of the 1991 Rules was inserted by way of amendment of the year 1996. However, the 1991 Rules was again amended in 2011 and the same was published in the Orissa Gazette making cosmetic changes in clause-(i) of sub-rule (2) of Rule 5 and Rule 19-A. Sub-rule (2) of Rule 5 was amended and substituted providing age limits for the candidates. Clause (a) of sub-rule (2) of Rule 5 providing age relaxation to the candidates was deleted. The words "and in that case the proviso to clause-(i) of sub-rule (2) of Rule 5 shall apply" appearing in Rule 19-A has been omitted.

13. The pivotal issue is when the Commission could not invite applications during the particular year to fill up the vacancies of that year and the candidates who were eligible to compete at the examination, had applications been invited by the Commission during that year and eligible to compete the examination held in the subsequent year, can such candidates be debarred from appearing at the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the post and services coming under the Odisha Civil Services (Category-I & II) pursuant to the Advertisement No.5 of 2011-2012 issued by the OPSC, after amendment made to Rule 5 and 19-A of the Rules, 1991.

14. In ***Y.V. Rangaiah and others v. J. Sreenivasa Rao and others,*** (1983) 3 Supreme Court Cases 284, the question arose as to whether the vacancies which occurred in the post of Lower Division Clerk prior to amendment of the Andhra Pradesh Registration and Subordinate Service Rules would be governed by old rules or the amended rules. In paragraph 9 of the said judgment, their Lordships held as follows:-

> "9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules. "

15. In ***A.A. Calton V. Director of Education and another,*** (1983) 3 Supreme Court Cases 33, the Hon'ble apex Court held that the legislature may pass laws with retrospective effect subject to the recognised constitutional limitations, but no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the

statute either expressly or by necessary implication directs that it should have such retrospective effect.

16. In ***State of Rajasthan V. R. Dayal and others,*** (1997) 10 Supreme Court Cases 419, again the same view was reiterated. Their Lordships held that the posts which fell vacant prior to the amendment of the rules would be governed by the original rules and not by the amended rules. It was further held that as a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled
up in accordance with the law existing as on the date when the vacancies arose.

17. In ***B.L. Gupta and another V. M.C.D.,*** (1998) 9 Supreme Court Cases 223, the question arose before the Hon'ble apex Court as to whether the vacancies to the posts of Assistant Accountant in Delhi Electric Supply Undertaking, which had arisen prior to the amended Rule, 1995 came into force had to be filled up according to the statutory rules which were framed in the year 1978 or Rules of 1995. In paragraph 9 of the said judgment, their Lordships held as under:-

> "9. When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr. Mehta to a decision of this Court in the case of *N.T. Devin Katti v. Karnataka Public Service Commission.* In that case after referring to the earlier decisions in the cases of *Y.V. Rangaiah v. J. Sreenivasa Rao, P. Ganeshwar Rao v. State of A.P.* and *A.A. Calton v. Director of Education* it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules."

18. The same view has been reiterated by the Hon'ble apex Court in ***A. Manoharan and others V. Union of India and others,*** (2008) 3 Supreme Court Cases 641. In paragraph 25 of the said judgment, their Lordships held as under:-

> "25. Furthermore, the Regulations have been amended only with effect from 11-8-2004. It would have a prospective effect. It cannot be applied retrospectively. Any vacancy which has arisen prior to coming into force of the said amended Regulations must be filled up

in terms of the law as was existing prior thereto. (*State of Rajasthan v. R. Dayal,* SCC para 8)."

19. Again in ***Union of India and others V. Vipinchandra Hiralal Shah,*** (1996) 6 Supreme Court Cases 721, their Lordships in paragraph 11 of the said judgment held as follows:-

"11. It must, therefore, be held that in view of the provisions contained in Regulation 5, unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service officers who fulfil the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in clause (2) of Regulation 5. The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Select List for that year. If for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service officers who were eligible and fell within the zone of consideration for selection in that year."

20. Though a stand has been taken by the State of Odisha that Odisha Civil Service Examination could not be held from 2007 to 2010 due to pendency of the cases before the learned Tribunal, High Court and due to restructuring of OAS, OPS and OFS cadre and creation of ORS and OT & AS and preparation of New Service Rule of 2010 and 2011 existing vacancies including the vacancies for the year 2011 are consolidated and treated to be the vacancies of the year 2011 as per Rule 19-A of the 1991 Rules and 2011 rules, but then the petitioners brought to the notice, Annexure-6, i.e. Draft of Approval dated 20.1.2012, the letter sent by the Revenue and Disaster Department to the Under Secretary to Govt. of Odisha, Cooperation Department showing the vacancy position occurred year-wise i.e. from 2007 to 2011. As would be evident from the said Annexure, the number of vacancies in OAS (Junior Branch) were 34, 44, 20, 42, 50 for the years 2007 to 2011 respectively. In view of the same, the submission of learned Advocate General that since the five services, namely, OAS, OPS, OFS, ORS and OT & AS have been constituted in the year 2011 and as such there was no vacancy in those services in the years 2007 to 2011 have no legs to stand.

21. Relying on the decisions of the Hon'ble apex Court, in the case of ***Government of Orissa v. Haraprasad Das,*** (1998) 1 SCC 487 and in ***State of Orissa v. Bhikari Charan Khuntia,*** (2003) 10 SCC 144, learned Advocate General submitted that merely because the vacancies are notified, the State is not obliged to fill up all the vacancies and that to fill up or not to fill up a post being a policy decision, unless it is infected with arbitrariness, there is no scope for interference in judicial review. There is no quarrel over the said proposition of law.

22. Rule 4 of the 1991 Rules provides that the Commission shall, on receipt of the vacancy position from the G.A. Department, announce and invite applications from the candidates eligible to appear in the examination. It is the statutory duty of the Commission to hold examination after the concerned Department of the Government intimates the vacancy position to the Commission through G.A. Department indicating the post reserved for candidates each year. The word "shall" occurring in sub-rule (1)(2)(3) of Rule 4 of 1991 Rules, more particularly, 'each year' appearing in sub-rule(1) cast a statutory duty on the OPSC to hold Odisha Civil Services Examination each year. It is incumbent upon the OPSC to carry out the mandate of the Rule and to see that examination is held in each year. The amendment brought in 2011 to the 1991 Rules would have prospective effect. In view of the authoritative pronouncements of the Hon'ble apex Court in the decisions cited supra, the conclusion is irresistible that the posts which fell vacant prior to the amendment of the 1991 Rules would be governed by the original rules and not by the 2011 Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose.

23. In view of analysis made in the preceding paragraphs, we hold that the candidates, who were eligible prior to amendment of the rules came into force i.e. 2011 Rules, are eligible to appear at the examination. A large number of candidates could not have applied to the posts in view of the amending Rules. For the said purpose, we direct that the OPSC may issue corrigendum in all the newspapers making it clear that the candidates, who are otherwise eligible before the amending rules came into force, can apply to appear at the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the Posts and Services coming under the Odisha Civil Services (Category-I and Category-II).

24. The next question, which survives for our reconsideration, is as to whether providing 27% reservation for SEBC candidates, which exceeds

50% of the total vacancies, is constitutionally valid. None of the candidates before the learned Tribunal have challenged the Act, 2008 which provides 27% reservation for SEBC candidates. Except making submission that reservation cannot exceed 50%, as has been rightly observed by the learned Tribunal, there is no scope to observe anything relating to irregularity or illegality in the impugned advertisement relating to reservation of 27% in favour of the SEBC candidates. The State of Odisha enacted the Act, 2008 to provide 27% reservation for the SEBC candidates. The OPSC has issued an advertisement providing 27% reservation in accordance with the said Act. Since the constitutionality of the Act, 2008 is not questioned by any of the petitioners, the OPSC is justified in issuing advertisement. However, the observations of the learned Tribunal that the State authorities are at liberty to move the Central Government for inclusion of the Act, 2008 in the 9th Schedule of the Constitution as early as practicable to avoid future complications or continue with the reservation within 50%, is neither desirable nor warranted. The said observation made in paragraph-14 of the judgment is hereby quashed.

25. The writ applications are accordingly allowed to the extent indicated above. There shall be no order as to costs.

Writ petition allowed in part.

2013 (II) ILR - CUT- 758

I. MAHANTY, J & B. N. MAHAPATRA, J.

W.P.(C) NO. 8084 OF 2013 (With Batch) (Dt.24.07.2013)

AJIT KUMAR ROUTRAY & ORS. ……..Petitioners

.Vrs.

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

A. BIHAR & ODISHA EXCISE ACT, 1915 – S.29 (2) (a)

Excise policy Dt.23.03.2013 for grant of exclusive privilege through 'e-auction' and subsequent order of the Government Dt.05.04.2013 prescribing procedure to conduct 'e-auction' challenged.

Without making rules as provided U/s.89 of the Act, Government should not have issued the impugned order Dt.05.04.2013 for consideration of eligibility through 'e-auction' – Lack of internet facilities, electricity connection, education in computer are genuine difficulties for some licensees to participate in 'e-auction' – Held, impugned order Dt.05.04.2013 is unsustainable in law – Directions given to the State Government to reconsider different aspects as per the guidelines given in Para-75 of the judgment and to take a fresh decision in the matter as early as practicable and till then existing arrangements shall continue. (Paras 75,77)

B. BIHAR & ODISHA EXCISE ACT, 1915 – S.29 (2) (a)

Excise Policy Dt.23.03.2013 to settle IMFL OFF shops and Country Liquor Shops through "e-auction', challenged – Both 'auction' and 'e-auction' aim at transparency in grant of exclusive privilege – Held, grant of exclusive privilege through 'e-auction' comes within the enabling provision of Section 29 (2) (a) of the Act and there is no need for amendment of the said provision – Hence the policy decision Dt.23.03.2013 is correct and sustainable in law. (Paras 45,46)

C. CONSTITUTION OF INDIA, 1950 – ART.226

Writ petition – Excise policy for grant of IMFL OFF shops and Country Liquor Shops through 'e-auction' and subsequent order prescribing procedure to be followed in 'e-auction' challenged – Maintainability – Policy is contrary to the statutory provisions as well as the constitution and not workable – Held, writ petitions are maintainable. (Para 20)

Case laws Referred to:-

1.(2013)2 SCC 565 : (State of Bihar & Ors.-V- Nirmal Kumar Gupta)
2.(2011)1 SCC 640 : (Bajaj Hindustan Ltd.-V- Sir Shadilal Enterprises Ltd.)
3.(2002)2 SCC 333 : (Balco Employees' Union -V- Union of India & Ors.)
4. (1972)2 SCC 36 : (State of Orissa & Ors.-V- Harinarayan Jaiswal & Ors.)
5.(2006)5 SCC 702 : (Kuldeep Singh-V- Government of NCT of Delhi)
6.105(2008)CLT 16 :(Dr. Sashi Bhusan Acharya & Ors.-V- State of Orissa

& Ors.)
7.AIR1954 SC 440 : (T.C. Basappa-V- T. Nagappa & Anr.)
8.AIR 1966 SC 81 : (Dwarkanath-V- I.T. Officer)
9.(2004)11 SCC 26 : (State of Punjab & Anr.-V- Devans Modern Breweries Ltd.& Anr.)
10.(2002)7 SCC 140 : (Secretary to Govt. T.N. & Anr.-V- K. Vinayagamurthy)
11.(1986)4 SCC 566 : (State of M.P. & Ors.-V- Nandlal Jaiswal & Ors.)
12,AIR 2006 SC 651 : (State of Orissa & Ors.-v- Gopiath Dash & Ors.)
13.AIR 1975 SC 1121 : (Har Shankar & Ors. etc. etc.-V- The Deputy Excise & Taxation Commissioner & Ors. etc.)
14.AIR 1969 SC 1081 : (Rashihari-V- State of Orissa)
15.AIR 1997 SC 3387 : (Union of India & Anr.-V-G.Ganayutham(Dead) by LRs.)
16.AIR 2011 Ori.174 : (Bijay Ku. Panigrahi & Ors.-V- State of Orissa)

For Petitioner - M/s. Ramakanta Mohanty, D. Mohanty, S. Mohanty, D. Varadwaj, A. Mohanty,S. Mohanty, P.Jena, A.K. Das.
M/s. Gopal Kr. Mohanty, P.K. Panda, D.Mishra & N.K.Khan
M/s. Narasingh Patra, A.K. Patra, B. Shadangi.
M/s. Kali Pr. Mishra, S.Mohapatra, T.P. Tripathy, L.P.Dwivedy, J.K. Khandeayatray, S. Dash.
M/s. Pitambar Acharya, S. Rath, B. Bhadra, B.K. Jena, P.Pattnaik, J.P. Parida.
M/s. Dr. S.C. Hota, S.K. Behera, K.Ghadai, J.K.Mohapatra, Miss A.R. Nayak.
M/s. Prafulla K. Rath, R.N. Parija, A.K.Rout, S.K. Pattnaik, A. Behera, S.K. Singh, P.K. Sahoo & D. Mohapatra.
M/s. Achyutananda Routray, U.R. Bastia, Mrs. M. Routray, N. B. Dora.
M/s. M. S. Panda & M. Panda.
M/s. Sambit Rath & B.K. Nayak-3.
M/s. Nitryananda Panda & S. Das.
M/s. Samarendra Mohanty.
M/s. Jaydeep Pal, B.K. Mishra, A.K. Behera & R. Mohapatra.
M/s. P.K. Dhal, S.Das, P Ranjan & S.K. Das.
M/s. Umesh Ch. Pattnaik, S.D. Mishra, S. Pattnaik & K.K. Rout.

M/s. Amar Ku. Mohanty, K.A. Guru & S.K. Mohapatra.
M/s. N. Paikray, B.P. Mohanty, A.N. Ray, J.J. Pradhan, R.P. Kar, K.K. Sahoo.
M/s. B. P. Mohanty, A.N. Ray, & J.J. Pradhan.
M/s. N. Paikray & R. P. Kar.
For Opp.Parties – Advocate General.

B.N. MAHAPATRA, These Writ Petitions have been filed with a common prayer to quash Notification No.1964/Ex dated 23.03.2013 (hereinafter referred to as "Excise Policy") and subsequent order No.2158/Ex. dated 05.04.2013 (for short, "Order") issued by the Government of Odisha in Excise Department prescribing the procedure to be followed in conducting "e-auction" to settle the IMFL OFF Shops and Country Liquor Shops for the excise year 2013-14 on the ground that such Excise Policy and order are without jurisdiction, contrary to the provisions of Bihar and Orissa Excise Act, 1915 (in short 'the Act") and the Orissa Excise Rules, 1965 (in short "the Rules"), arbitrary, irrational, discriminatory, *mala fide* and unworkable.

2. Since the grounds of challenge in all the writ petitions are almost similar, for the purpose of convenience, all those grounds of challenge are dealt in this judgment.

3. The petitioners challenge the impugned Excise Policy and order on several grounds, i.e., that settlement of IMFL OFF shops and CS shops through 'e-auction' for the excise year, 2013-14 is a clear case of discrimination; 'e-auction' process is beyond the scope of Section 29(2) of the Act since Section 29(2) does not empower the State authorities for settlement of privilege and grant of licence through e-auction, determination of consideration money through 'e-auction' without amending Section 29 to that effect is illegal; in the event of implementation of 'e-auction' process there will be monopoly of big traders in selling their own products as a result of which numerous small traders will be deprived of their livelihood in remote areas, 'e-auction' process cannot be implemented properly due to illiteracy, lack of skill, interrupted power supply and inter-net connection; the stringent condition imposed in the impugned order will deprive the new comers and will encourage big business houses which is contrary to the instruction 100 of the Boards Instructions; in case of entertaining outside State solvency certificate, it will be impossible for the State to collect arrear excise revenue from the defaulting licensees; by implementing e-auction process there is no chance of generation of more revenue; in exercise of power under Section 89(2) (1) of the Act Government has not made any Rule regulating

procedure to be followed and prescribing the manner to be ascertained before issuing any licence for the whole year for retail vend or any intoxicant is granted for any locality; grant or renewal of licence for exclusive privilege without complying paragraph 40 of the policy which provides that the provisions of Section 22 and 26-A of the Act will be complied with in relation to public notice and approval of the Grama Panchayat respectively is illegal. Thus, it is contended by the petitioners that the Excise Policy and the Order suffers from gross infirmity, arbitrariness, unreasonableness, discrimination and the same has the tendency of overriding various provisions of the Act and Rules made thereunder.

4. Per contra, opposite party-State has filed counter affidavit in W.P.(C) No.8084 of 2013 taking various stands opposing the contentions taken by the petitioners. Mr.Ashok Mohanty, learned Advocate General submitted that the State adopts the counter filed in W.P.(C) No.8084 of 2013 in all the writ petitions. The preliminary objection raised by learned Advocate General is that the writ petitions are not maintainable either in law or in fact. Some writ petitioners are existing licensees, who are granted licences during the excise year to year beginning from 1st of April and ending on 31st of March and as such renewal or otherwise of the existing licence is the prerogative of the Government. There is no vested right with the petitioners, either statutory or fundamental, to continue with the existing licence and to challenge the procedure or modalities prescribed by the authority under the Act. The petitioners therefore, have no *locus standi* to maintain the writ petitions and hence, the same are liable to be dismissed.

5. The Excise Policy was formulated for the year 2013-14 and the same has been duly approved by the Cabinet in the matter of dealing in intoxicants. Exercising the power conferred under Section 29(2) of the Act the State Government in its wisdom after analysing various factors has decided to hold ‘e’ auction to settle the exclusive privilege as it is likely to fetch more competitive bids in comparison to straight renewal. The order made under empowerment of statute does not require legislative sanction. Section 29(2) of the Act specifically provides for settlement of exclusive privilege under Section 22(1) of the Act. ‘E-auction’ is nothing but a mode of auction and therefore to say that ‘e-auction’ itself is beyond the purview of the statute is a misnomer.

6. The modalities prescribed under the order dated 05.04.2013 is neither arbitrary nor unreasonable; rather all care has been taken to make it transparent and to allow all intending bidders a reasonable opportunity to participate in the ‘e-auction’.

7. The Government intended to give enough time to the intending bidders to get themselves equipped for participating in 'e-auction' process and familiarize themselves with the modalities for which the Government decided to grant extension of two months, i.e., from 1st April to end of May, 2013 with a hike of 20% over the monthly consideration money of the previous year which is legal and reasonable.

8. The out-still liquor shop has never been similarly placed with the CS shops or IMFL OFF shops and is treated in a different footing. Out still system is prevalent mostly in the tribal districts and has been treated on a different footing as the vending of the out still liquor also includes the manufacture of out still liquor whereas in respect of C.S. shops or IMFL OFF shops as the case may be, the liquor is supplied by the State Beverage Corporation.

9. Referring to the judgment of the Hon'ble Supreme Court in the case of *State of Bihar and others v. Nirmal Kumar Gupta*, (2013) 2 SCC 565, learned Advocate General submitted that in view of the injurious effect of excessive consumption of liquor on health this trade or business must be treated as a class by itself and it cannot be treated on the same basis as the other trades while considering Article 14. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Bajaj Hindustan Limited. V. Sir Shadilal Enterprises Limited*, (2011) 1 SCC 640, learned A.G. submitted that even if some persons are at a disadvantage and suffered losses on account of formulation and implementation of the Government Policy that is not by itself a sufficient ground for interference by the Court.

10. Referring to the judgment of the Hon'ble Supreme Court in the case of *Balco Employees' Union V. Union of India and others*, (2002) 2 SCC 333, it is emphatically argued that the wisdom and advisability of economic policies of Government are not amenable to judicial review. It is not for the Courts to consider the relative merits of different economic policies. Court is not the forum for resolving the conflicting clauses regarding the wisdom or advisability of policy.

11. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *State of Orissa and others v. Harinarayan Jaiswal and others*, in (1972) 2 SCC 36, it is submitted that power given to the Government by the Act to sell the exclusive privilege in such other manner as it thinks fit is a very wide power. That power is unrestricted. It undoubtedly includes the power to sell the privileges in question by private negotiation. The Hon'ble Supreme Court in the case of *Kuldeep Singh v. Government of NCT of Delhi*, (2006) 5 SCC 702, held that the matter relating to grant of licence for dealing in liquor is within the exclusive domain of the State.

12. Mr. Mohanty, learned Advocate General further submitted that 'e-auction' is covered by the word "auction". Alternatively, it is argued that e-auction is covered under the expression "other wise" appearing in Section 29(2). All ingredients of auction being present in 'e-auction', the same is "auction". Sales of Goods Act has no application to 'e-auction'. Sales of Goods Act is applicable to tangible goods.

13. On the rival contentions of the parties, the following questions fall for consideration of this Court:

(i) Whether the writ petitions challenging the Excise Policy dated 23.03.2013 and notification dated 05.04.2013 are maintainable?

(ii) Whether the Excise Policy dated 23.03.2013 and order dated 05.04.2013 are arbitrary, irrational, discriminatory, *mala fide* and not workable?

(iii) What order?

14. Question No.(i) is with regard to maintainability of the writ petitions. Mr. Ashok Mohanty, learned Advocate General appearing for the State Government raised the preliminary objection with regard to maintainability of the writ petitions on the ground that the policy decisions of the Government are not amenable to judicial review. It is not for the Courts to consider the relative merits of different economic policies. In support of his contention, learned Advocate General relied upon the decisions of the Hon'ble Supreme Court in the cases of *Balco Employee's Union (supra), Bajaj Hindustan Ltd.'s case (supra)*. Learned Advocate General also placing reliance on a case of this Court in *Dr.Sashi Bhusan Acharya & Ors. Vs. State of Orissa and others, 105 (2008) CLT 169* submitted that policy being not violative of either constitutional right or statutory right, the Court has no power to interfere with it.

15. It is true that in the matter of policy decision of the Government, the scope of judicial review is extremely limited. Unless the decision is arbitrary, contrary to any statutory provision or the Constitution, the Court cannot interfere with the same.

16. Article 226 of the Constitution of India, 1950 (in short 'the Constitution') confers an express power on the High Court "to issue to any person or authority, including in appropriate cases, any Government, directions/orders/writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part-III and fo r any other

purpose". Construing this Article, the Hon'ble Supreme Court in the case of *T.C. Basappa v. T. Nagappa and another*, AIR 1954 SC 440 held as under :

> "(6) The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history of the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

17. In *Dwarkanath v. I.T. Officer*, AIR 1966 SC 81, the Hon'ble Supreme Court held that the power of the High Court under Article 226 cannot be equated to the English Courts to issue prerogative writs and the High Court has wider power and can mould relief to meet the peculiar and complicated requirements of this country.

18. Needless to say that where the obligation sought to be enforced is associated with public duty or public interest and there is no adequate alternate remedy for its enforcement and justice of the case requires such enforcement, the same must be enforced under Article 226 by issue of writ in the nature of mandamus.

19. In the present case, challenges have been made to various clauses of the Excise Policy dated 23.03.2013 and order dated 05.04.2013 on the ground that those are arbitrary, unreasonable and contrary to the statutory provision as well as the Constitution and unworkable. The petitioners prima facie have made out a case in their favour, the details of which we shall deal with while answering to question no.(ii) hereinafter.

20. In the above backdrop, we are of the considered view that the present writ petitions are maintainable.

21. Question No.(ii) is as to whether the Excise Policy dated 23.03.2013 and notification dated 05.04.2013 are arbitrary, irrational, discriminatory, *mala fide* and not workable.

22. Prior to issuance of the present policy and notification, a decision was taken by the State Government vide order No.1401/Ex dated 28.02.2013 for settlement of all existing new IMFL Off Shops and CS Shops through 'e-auction'. The said order was challenged in W.P.(C) No.5606 of 2013 and the State Government was directed to show cause. However, during pendency of the writ petition, the said order dated 28.02.2013 for holding 'e-auction' was withdrawn vide Government Order No.1856 dated 18.03.2013 and consequently, the same was rendered infructuous. Thereafter, the Government declared the present Excise Policy with regard to excise duty, fee structure and guideline for the year 2013-14 vide letter dated 23.03.2013 for settlement of IMFL OFF Shops and CS shops through e-auction and consequently, notification dated 05.04.2013 was issued, which are under challenge in the present writ petitions on the ground that the policy and notification in question are arbitrary, irrational, discriminatory, *mala fide* and not workable.

23. Law is well-settled that trade in liquor is considered inherent, noxious and pernicious. There is no fundamental right to trade in intoxicating liquor. [See *State of Punjab and another vs. Devans Modern Breweries Ltd. and another, (2004) 11 SCC 26; Khoday Distilleries Ltd. and others Vs. State of Karnataka and others*, 1995 (1) SCC 574; *State of Orissa and others, Vs. Harinarayan Jaiswal and others*, (1972) 2 SCC 36 (Orissa)].

24. In ***Secretary to Govt., T.N. and another vs. K. Vinayagamurthy,*** (2002) 7 SCC 104, the Hon'ble Supreme Court has held as under:

> "7..... So far as the trade in noxious or dangerous goods is concerned, no citizen can claim to have trade in the same and intoxicating liquor being a noxious material, no citizen can claim any inherent right to sell intoxicating liquor by retail. It cannot be claimed as a privilege of a citizen of a State. That being the position, any restriction which the State brings forth, must be a reasonable restriction within the meaning of Article 19(6) and reasonableness of the restriction would differ from trade to trade and no hard-and-fast rule concerning all trades can be laid down....."

25. The Hon'ble Supreme Court in the case of ***State of Bihar and others vs. Nirmal Kumar Gupta***, (2013) 2 SCC 565, held as under:

> "In *Amar Chandra Chakraborty* v. *Collector of Excise*[2] this Court held thus: (SCC p. 448, para 10)
> 10. Trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category

requiring legislative control which has been in force in the whole of India since several decades. In view of the injurious effect of excessive consumption of liquor on health this trade or business must be treated as a class by itself and it cannot be treated on the same basis as other trades while considering Article 14."

20. In *Nashirwar* v. *State of M.P.*[3] this Court opined that the State has the exclusive right or privilege in manufacturing and selling of liquor and a citizen has no fundamental right to do business in liquor. It has been further ruled that it is within the police power of the State to enforce public morality by prohibiting trade in noxious or dangerous goods.

21. In *Har Shankar* v. *Excise and Taxation Commr.*[4] the Constitution Bench reiterated the principles that there is no fundamental right to do trade or business in intoxicants and the State has the authority to prohibit every form of activity in relation to intoxicants including manufacture, storage, export, import, sale and possession. It has also been laid down that a wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants in such terms of general application as the State deems expedient."

26. The Hon'ble Supreme Court in the case of ***State of M.P. and others vs. Nandlal Jaiswal and others****, (1986) 4 SCC 566,* held as under:

"34. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government has done, unless it appears to be plainly arbitrary, irrational or mala fide. We had occasion to consider the scope of interference by the Court under Article 14 while dealing with laws relating to economic activities in *R.K. Garg* v. *Union of India*[6]. We pointed out in that case that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. We observed that the legislature should be

allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature.

xx xx xx

The problem of Government" as pointed out by the Supreme Court of the United States in *Metropolis Theatre Co.* v. *State of Chicago*[8]" "are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void."

The Government, as was said in *Permian Basin Area Rate cases*[9] is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution." *(underlined for emphasis)*

27. The Hon'ble Supreme Court in the case of *Nandlal Jaiswal (supra)* further held that when the State decides to grant its exclusive right or privilege of manufacturing and selling of liquor it cannot escape the rigour of Article-14. In paragraph 32 of the said Judgment the Hon'ble Supreme Court held as under:

"32. But, before we do so, we may at this stage conveniently refer to a contention of a preliminary nature advanced on behalf of the State Government and Respondents 5 to 11 against the applicability of Article 14 in a case dealing with the grant of liquor licences. The contention was that trade or business in liquor is so inherently pernicious that no one can claim any fundamental right in respect of it and Article 14 cannot therefore be invoked by the petitioners. Now,

> it is true, and it is well settled by several decisions of this Court including the decision in Har Shanker v. Deputy Excise & Taxation Commissioner that there is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants — its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and Respondents 5 to 11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that article."
>
> *(Underlined for emphasis)*

28. Let us see whether either any of the provision of the Excise Policy dated 23.03.2013 and/or order dated 05.04.2013 is arbitrary, irrational, discriminatory, mala fide and not workable.

29. The Excise Policy decision dated 23.3.2013 has been challenged basically on two grounds.

First ground of attack is that the policy of 'e-auction' is discriminatory and violative of Article 14 of the Constitution. In paragraph 19 of the impugned policy, it is provided that all the existing licences of Bhang, Tari, Pochwai and Out Still shops shall be renewed for the year 2013-14 with hike of 12% increase over and above the existing consideration money after observing the formalities. Similarly, paragraph 21 provides that the licensees of all the existing Out Still Shops operating in 21 districts shall be renewed from 2013-14 with hike of 20% over and above the existing consideration money. In respect of unsettled shops, Collector may take steps for settlement by draw of lottery. However, paragraph 20 provides that all the existing C.S. shops will be settled by e-auction for the year 2013-14 and extension for two months i.e. April and May, 2013 was granted with hike of 20% over and above the consideration money.

It was argued by the petitioners that "Out Still" (O.S.) and "Country Spirit" (C.S.) both are licences granted for sale of country liquor, within the definition provided under Section 2 of Act 1915. Only difference is Country Spirit licensee gets country spirit liquor from distillery and sells the same. Out Still licensee produces country spirit through a still and sells it through a maximum permissible ten numbers of branch shops. Merely because O.S. licensee produces C.S. that by itself does not make it a class of its own, as the object sought to be achieved is one and the same i.e. sale of country liquor. Therefore, it is argued that the Excise Policy of the Government to, on one hand renew the licences of all existing Bhang, Tari, Pochwai and Out still shops for the year 2013-14 and on the other hand debarring renewal of all other existing country spirit shops for the entire year 2013-14 is illegal, contrary to the principle of equality, procedural discrimination, unreasonable classification, test of principle of equal protection of law that is the right to equal treatment to similar circumstances since Out Still and C.S. are both country liquor as defined under Section 2 of the 1915 Act.

It is further argued that the petitioners in some of the cases are licensees of Country Spirit shops and are continuing their Country Spirit shops on renewal basis on payment of licence fees as per the Excise Policy for the last 13 years by investing huge amount of money towards land and building, show case, engagement of man power etc. Hence they have the legitimate expectation that their licences will be renewed for the year 2013-14 so that they will maintain their livelihood from the earning or profit. It is further argued that the order or policy decision has to satisfy the test of reasonableness and must also appear to be a reasoned decision and advanced public interest. But the present policy decision is arbitrary and irrational.

30. Secondly, the excise policy for the year 2013-14 by the State Government is inconsistent and against the statutory provisions of law contained in the Act as well as Orissa Excise (Exclusive Privilege) Foreign Liquor Rules, 1989 (in short 'Privilege Rules'). The impugned Excise Policy providing 'e-auction' runs counter to Section 29(2) of the Act. The express ion 'or otherwise' as found place in Clause (a) of sub-section (2) of Section 29 cannot include 'e-auction' because when the provision was enacted, the concept of 'e-auction' could not have been conceived and the Legislatures had never intended to include 'e-auction' in the expression 'Or otherwise'. Therefore, the Excise Policy and impugned government order in respect of 'e-auction' are not feasible in the eye of law. Moreover, the 'e-auction' will never come under the word 'auction', because an "auction" would require the bidders to be present in person before the Collector at the time of auction but in an 'e-auction' realm that requirement is totally absent. Reliance was

placed in the case of *State of Orissa and others v. Gopinath Dash and others*, AIR 2006 SC 651 in support of the contention that the scope of judicial enquiry is confined to be questioned whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution.

31. The stand of the State Government is that in the matter of dealing in intoxicant, there is no right either statutory or fundamental of the petitioners to continue with the existing licences. The policy for the year 2013-14 has been duly approved by the Cabinet. The Government after considering existing policy and the previous policies have come to the conclusion that the policy of renewal has effectively resulted in creating a vested right with a few of the licensees which is practically becoming heritable. Further, Government has formed an opinion that to determine the consideration amount for parting with the privilege order to grant exclusive privilege 'e-auction' would fetch more competitive bids than the statutory 10% increase in the consideration amount. Grant of exclusive privilege through 'e-auction' maintains transparency and allows all intending bidders a reasonable opportunity to participate in 'e-auction'.

Further, it was submitted that "out-still system" is prevalent mainly in tribal and forest areas where raw materials, i.e., to say, mahua flower is available in plenty. Therefore, taking into consideration the nature of the out-still system which includes manufacture and sale of liquor, it has to be treated in a different footing. The State has introduced the "e-auction" for the first time and intends to cover all types of liquor and it has been in principle decided to go for 'e-auction' in respect of "out-still" also from the next year, as evident from the Excise Policy. Viewed from this angle also, policy decision can not be faulted with on the ground of discrimination. It will be relevant here to state that grievance regarding discrimination has been made not by the Out-still licensees but by the privilege holders of CS and IMFL who hold particularly different kind of licence from that of the out-still lincensees. There is no discrimination per-se between the exclusive privilege holders of IMFL and/or privilege holder of CS.

32. To deal with the challenges made against policy dated 23.03.2013 on the above two grounds, it is to be kept in mind that the trade in intoxicants is a State monopoly under the Act. The aim and object of the Act may have more than one object, i.e., the benefit of revenue, improvement of public health or morals by control of liquor trade etc. It may also be presumed that it was the intention of the Legislature when enacting the Act to include prohibition as well. The Hon'ble Supreme Court in the case of *Rajendra*

Singh Vs. State of M.P., AIR 1996 SC 2736 held that the object of all Excise Laws is two folds, to raise revenue and regulate the trade in liquor which is an obnoxious substance. The Hon'ble Supreme Court in *Har Shankar and others etc. etc. Vs. The Deputy Excise and Taxation Commissioner and others etc.*, AIR 1975 SC1121 further held that the manner and extent of regulation rests in the discretion of the governing authority. The specific stand of the State is that there is no vested right with the petitioners to challenge the procedure or modalities described by the authority under the Act. The policy has been formulated for the year 2013-14 and the same has been duly approved by the Cabinet in the matter of dealing with intoxicants. The Government after considering the existing policy and previous policies have come to the conclusion that the policy of renewal is creating a vested right with the licensee which is becoming heritable. Further, the government has formed an opinion to hold auction to determine the consideration amount for parting with the privilege or to grant the privilege or to grant the exclusive privilege to deal with the trade which will fetch more competitive bids and will thus result in earning of more public revenue rather than the stipulation of 10% increase of the consideration amount.

33. If we will closely look into the system of renewal of licence it will reveal that the said system tends to create monopoly in favour of the persons, who were granted licence in the past, to the exclusion of others interested in the trade, who may be willing to offer higher price. The grant of licence must be viewed in the background of the aims and objects sought to be achieved by the Excise Act.The object of the Act is to create State monopoly. But the State has no power to sacrifice public interest for the benefit of third parties or to create monopoly in their favour. Creation of a right of renewal in favour of the existing purchaser irrespective of the fact that others who are prepared to offer higher price would be creating a monopoly in favour of existing licensees and that is certainly not in public interest. Such a system is against the public policy and interest of the public. Renewal system is not the appropriate method to achieve public interest. Therefore, we are of considered view that grant of licence to trade in intoxicants through auction in each year instead of renewal is more appropriate and is in consonance with the objects sought to be achieved by the Excise Act.

34. The Hon'ble Supreme Court in the case of *Rasbihari Vs. State of Orissa*, AIR 1969 SC 1081 considered a Scheme evolved by the State of Orissa for sale and disposal of Kendu leaves under Section 10 of Orissa Kendu Leaves (Control of Trade) Act, 1961. Under the Scheme, the Government offered to renew the contracts of the existing purchasers if they had observed and performed all the terms and conditions to the satisfaction

of the Government and had been prompt in taking delivery of leaves and making payments. Hon'ble Supreme Court held the said Scheme invalid and observed as under:-

> "Section 10 leaves the method of sale or disposal of Kendu leaves to the Government as they think fit. The action of the Government if conceived and executed in the interest of the general public is not open to judicial scrutiny. But it is not given to the Government thereby to create a monopoly in favour of third parties from their own monopoly."

The Hon'ble Supreme Court in the said case, further held as follows:-

> "The classification based on the circumstances that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary: it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State."

35. In view of the above, the system/policy of renewal or any clause in the agreement to that effect should be construed against the existing licensees. We do not think that it is necessary to find out as to whether a distinction has been made for grant of licence for trade in CS and IMFL through e-auction for the year 2013-14 and there is any reasonable cause to adopt the same procedure in respect of OS in the next year, i.e., 2014-15. Moreover, it is nobody's case that the State has made any distinction among the licensees of CS and IMFL shops. A conscious decision was taken by the State that the CS and IMFL shops shall be settled by e-auction throughout the State. It is also nobody's case that the settlement of OS through 'e-auction' has been totally excluded; on the other hand, it is postponed to the next year only.

36. Moreover, exclusion of one sub-class from the Policy will not itself vitiate the Policy. [See M.P. Oil Extraction and another Vs. State of M.P. and others, (1997) 7 SCC 592].

37. In the fact situation, we are of the view that the impugned Excise Policy is not discriminatory and/or hit by Article 14 of the Constitution, inasmuch as "Out-still system" of liquor has been permitted to enjoy exclusive

privilege on the basis of renewal for the year 2013-14, whereas such privilege has been denied to the existing licensees in respect of CS and IMFL.

38. Now, coming to the second ground of challenge it is vehemently argued that clause (a) of sub-section (2) of Section 29 of the Act does not bring within its sweep 'e-auction'. Therefore, without amending the said provision, the State has no power to grant exclusive privilege through e-auction.

The specific stand of the State is that 'auction' in its generic term will include 'e-auction'. The word 'auction' has not been defined in the Act. Therefore, the meaning thereof has to be gathered from common parlance of the word as per the dictionary meaning. Oxford Advanced Learner's Dictionary of Current English, Eighth Edition, 2010 defines 'auction' "a public event at which things are sold to the person who offers the most money for them". The examples provided therein also include "an internet auction site". Meaning 'e' has been given in Oxford ALD: 'e' as a combining form (in nouns and verbs) is connected with the use of electronic communication, especially the internet, for sending information and doing business etc. The main ingredients of auction namely 'Public participation', 'bid' and 'auctioneer' are present also in the 'e-auction' process.

In the alternative, it is submitted by the State that the word 'otherwise' as given in Section 29(2) (a) of the Act will comprehend in its grammatical variation mode of 'e-auction'. Therefore, there is no infringement of statue as such.

39. For better appreciation of rival contentions, it is necessary to quote here sub-section (2)(a) of Section 29 of the Act:-

> "(2) The sum payable under Sub-section (1) shall be determined as follows:
>
> (a) by auction or by calling tenders or otherwise the State Government may, in the interest of excise revenue, by general or special order, direct; and"

40. A plain reading of Sub-section (2)(a) of Section 29 reveals that it provides three modes of settlement of exclusive privilege, i.e., (a) by auction, (b) by calling tender, and (iii) 'or otherwise' as the State may in the interest of excise revenue by general or special order direct. The stand of the State Government is that auction includes e-auction. In support of such contention, reliance is placed on the Dictionary meaning of the word 'auction' given in Oxford Advanced Learner's Dictionary of Current English, Eighth Edition.

Alternatively, it is also contended that "or otherwise" appearing in Section 29(2)(a) also will comprehend in its grammatical variation mode of 'e-auction'. An attempt has been made by the petitioners to distinguish and draw distinction between 'auction' and 'e-auction'. Referring to the dictionary meaning and Halsbury's Laws of England, 3rd Edition, Vol.2, page 69 it is argued that 'auction' as defined in other statutes which requires the presence of the participants in case of auction which is absent in 'e-auction'. Therefore, it is argued that State has no power of holding e-auction within the existing provisions under Section 29(2)(a) of the Act. Some of the petitioners have also raised an interesting point that when the provisions of Section 29(2)(a) were enacted the 'e-auction' concept was not thinkable and the Legislature had never intended to include 'e-auction' in the words "or otherwise".

41. We have already stated that the objects and reasons of enactment of the Act; it is a State monopoly and the Act has more than one object, i.e., benefit of the revenue and improvement of public health or moral by control of liquor trade etc.

42. The Hon'ble Supreme Court in *Har Shankar (supra)* held that it is not a privilege of a citizen of a State to sell intoxicating liquor by retail, as it is a business attended with danger to the community, it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the discretion of the governing authority.

43. On this background, if we consider the provisions of Section 29(2)(a) of the Act, one of the modes for grant of exclusive privilege appearing in the said Section is "or otherwise". The expression 'or otherwise' is wide enough to adopt any mode as the State Government may think proper in the interest of excise revenue. The expression "or otherwise" has been provided in Section 29(2)(a) in addition to "by auction" or "by calling tender". The sole purpose is that in the prevalent circumstances there may be some more proper/suitable mode for grant of exclusive privilege besides "by auction" or "by calling tender".

44. The matter can be looked into from a different angle. The petitioners have no grievance for grant of exclusive privilege through auction. Their grievance is against grant of exclusive privilege through 'e-auction'. Undisputedly, both 'auction' and 'e-auction' aim at transparency in grant of exclusive privilege. The only grievance of the petitioners is that in case of 'e-auction', the physical presence of the bidders is not necessary. In our opinion, such a grievance is hyper technical and in no way detrimental to the object sought to be achieved by settling the exclusive privilege through 'e-

auction'. With the advancement of technology and technical know-how and keeping with the change of time and circumstances more transparency and fair play can be maintained in case of settlement of exclusive privilege through 'e-auction'.

45. For the reasons stated above, we are of the considered view that grant of exclusive privilege through 'e-auction' comes within the enabling provision of Section 29(2)(a) and there is no need to bring any amendment to Section 29(2)(a) for grant of exclusive privilege through 'e-auction'.

46. In view of the above, it cannot be said that the policy decision dated 23.03.2013 is not sustainable on the challenges made by the petitioners.

47. Now, we have to examine as to whether the order dated 05.04.2013 issued in pursuance of the above Excise Policy is arbitrary, irrational, discriminatory, *mala fide* and not workable.

48. To deal with the above aspect, it would be beneficial to know what Wednesbury principle is? The Hon'ble Supreme Court in the case of *Tata Cellular Vs. Union of India*, AIR 1996 SC 11 held as under:-

> "98. At this stage, The Supreme Court Practice, 1993, Vol. 1, pp. 849-850, may be quoted :
>
> 4. Wednesbury principle.— A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. (Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. 31, per Lord Greene, M.R.)"
>
> 99. Two other facets of irrationality may be mentioned.
>
> (1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in Emma Hotels Ltd. v. Secretary of State for Environment 34, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the

factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.

(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R. v. Barnet London Borough Council, ex p Johnson 35 the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down."

xx xx xx

101. A modern comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction :

"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See Healey v. Minister of Health 36. But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. See H.K. (an infant), Re 37, and R. v. Gaming Board for Great Britain, ex p Benaim and Khaida 38. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation. See Punton v. Ministry of Pensions and National Insurance 39. And if the decision-making body has gone wrong in its interpretation they can set its order aside. See Ashbridge Investments Ltd. v. Minister of Housing and Local Government 40. (I know of some expressions to the contrary but they are not correct). If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. See Pad field v. Minister of Agriculture, Fisheries and Food 41. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding — so unreasonable that a reasonable person

would not have come to it — then again the courts will interfere. See Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.31 If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. See Anisminic Ltd. v. Foreign Compensation Commission42. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside. See Sydney Municipal Council v. Campbell 43. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons — in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly. See Padfield case (as AC pp. 1007, 1061).

xx xx xx

111. In Sterling Computers Limited v. M&N Publications Ltd.5 this Court observed thus : (SCC p. 455, para 12)

"In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive."

112. In Union of India v. Hindustan Development Corpn.6 this Court held thus : (SCC p. 515, para 9)

> "... the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In Erusian Equipment & Chemicals Ltd. v. State of W.B.9 this Court observed as under : (SCC p. 75, para 17)
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> 'When the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions". The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure.' "

49. The Hon'ble Supreme Court in the case of *Union of India and another Vs. G.Ganayutham (Dead) by LRs,* AIR 1997 SC 3387 held as under:-

> 10. This case is treated as laying down various basic principles relating to judicial review of administrative or statutory discretion. Before summarising the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.8 (KB at p. 229: All ER p. 682). It reads as follows:
>
> "... It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority. ... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."
>
> Lord Greene also observed (KB p. 230: All ER p. 683)

"... it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."
(emphasis supplied)

Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

The CCSU case (1985) and the expectation of future adoption of proportionality

11. The principles of judicial review of administrative action were further summarised in 1985 by Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service9 as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

"... Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;"

Lord Diplock explained "irrationality" as follows:

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at."

50. Since the State has filed counter in W.P.(C) No.8084 of 2013, and filed memo with a prayer to adopt the same in other connected writ petitions, let us first examine the various challenges made to the order dated 5.4.2013 in the said writ petition taking into consideration the rival contentions of the parties.

51. The first ground of challenge is that the State Government is not authorised under Section 29(2) of the Act to introduce the process of e-auction as under the said provision the legislature has not empowered the authority to implement the modality for settlement of exclusive privilege. Therefore, the impugned excise order is contrary to law, beyond the scope of statute and hence liable to be quashed.

(ii) The stand of State-opposite parties is that the modality to be prescribed for settlement of exclusive privilege under Sec. 29(2) being an order made under the empowerment of statute does not require legislative sanction.

(iii) At this juncture, it is necessary to quote the relevant portions of Section 29 of the Act, which provides for payment for grant of exclusive privilege.

> "29. **Payment for grant of exclusive privilege –** (1) Instead of or in addition to, any duty leviable under this Act, the (State Government) may accept payment of a sum in consideration of the grant of any exclusive privilege under Section 22.
>
> (2) The sum payable under Sub-section (1) shall be determined as follows:
>
> (a) by auction or by calling tenders or otherwise as the State Government may, in the interest of excise revenue, by general or special order, direct; and
>
> (b) by such authority and subject to such control as may be specified in such order."

(iv) A true construction of Section 29(1) reveals that the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege under Section 22 instead of or in addition to any duty leviable under the Excise Act. Clause (a) of Sub-section (2) of Section 29 prescribes the modes how the consideration amount payable under Sub-section (1) of Section 29 shall be determined. Clause (b) of Sub-section (2) of Section 29 empowers the State Government to pass order specifying the authority and control subject to which the consideration money shall be determined.

(v) It may be noted that Section 89 (2)(i)(I) and (II) of the Act provides that the State Government may make rules for regulating the procedure to be followed and prescribing the matters to be ascertained before any licence for the wholesale or retail vend or any (intoxicant) is granted for any locality and for regulating the time, place and manner of payment of the sum payable under Section 29.

(vi) Thus, Section 89 empowers the State Government to make rules for regulation, procedure etc. as provided under Section 89(2)(i)(1) and (II). Therefore, without making such rules, as contemplated under Section 89 (2) (i) (I) and (II), the State cannot issue the impugned order in exercise of its power under Section 29(2) prescribing modality, eligibility criterion etc. for determination of consideration through e-auction.

52. Further stand of petitioners is that process of 'e-auction' is not provided in the statute and as per the definition of 'auction', the presence of bidders is necessary at the time of conducting the same whereas in case of 'e-auction', the said practice is not followed.

Since we have already held that the settlement of exclusive privilege through 'e-auction' is coming within the purview of Section 29(2)(a), the said ground of challenge on that score fails.

53. The next ground of challenge is that 'e-auction' will certainly entail loss of Government revenue and will also against the interest of State Government as many *bona fide* EP holders will be deprived of participating in the e-auction process due to several restrictions imposed in the said order. Every licensee has to arrange his own upgraded computer, internet connection, back up, generator, scan machine, etc. and shall be well conversant in internet system. The other restriction is that in case of internet failure, the State Government will not be responsible in any manner. It is submitted that such stringent requirements are nothing but aimed to put the

bona fide licensees to harassment and to deprive them from participating in the process. Moreover, in remote areas of Odisha, it is not possible to comply such requirements. The genuine difficulties of the licensees in remote rural areas of Odisha where no internet facilities, electricity connection are available as yet, were not taken into consideration at all. Even in Naxal areas, time and again, the internet towers are being damaged. Thus, the e-auction system will only help a group of licensees of urban areas who are in privileged position.

It is further alleged that the existing licensees of Odisha are mostly uneducated so far as internet system is concerned and to get them educated it needs sufficient time otherwise the e-auction process cannot be implemented properly and the genuine licensees will be deprived of participating in the same due to their lack of education and ultimately they will lose their source of income.

The reply of the State is that the order does not prohibit the bona fide 'e-auction' holder from participating in the e-auction process. There is no intention to harass the bona fide licensees as alleged. In the present day, the requirement of a computer and internet system is essential. If it is not available for any reason with the intending bidder, he can take the help of a person on whom he has confidence and who possesses such facilities. Therefore, clause (a) provides the bidder or his associates and contemplates a bidder who has access to hardwire and it is not the requirement that every bidder is required to own a computer and internet facility. A reasonable time has been granted to the intending bidder to have access to the computer and internet from a place where it is so available. The intending bidder, who pays a monthly consideration amount in thousands and at time, running into lakhs, cannot be said to be deprived of the facility to travel and avail access to a computer and internet facility in a place of his choice. There is no stipulation under the Act that the person bidding for a particular shop must belong to that particular area or must give a bid from that particular place.

Further reply of the State is that the operation of the exclusive privilege involves a whole gamut of following of forms as prescribed under the Act and the Rules made there under and even uneducated persons are complying with such requirements through their staff engaged or their authorized agent. The process of e-auction is prevalent in the matters of coal allotment. Even for construction works of the State Government, in case of works exceeding Rs.10 lakhs e-tendering has been made mandatory. Therefore, it is too late in the day to say that the Government should be

precluded from e-auction as there is likelihood of some persons not being familiar or educate enough to participate in the 'e-auction'.

After considering the allegation of the petitioners and reply of the State to the allegations, we do not find that participation in e-auction through internet is impracticable so far as the bidders belonging to remote rural areas are concerned. In the advanced technology age, computer and internet are always beneficial to carry on many transactions. That will create more transparency in the transaction and provide safety to the participants as there will be no threatening from hooligans at the instance of mischief mongers. However, at this stage, we feel it appropriate to suggest that the State should allow participants to take help of internet facility available at NIC maintained in each district at Collectorate Office and provide assistance of computer operator, if they so required to remove all apprehensions of internet failure, power supply failure, etc. as alleged by the petitioners.

54. The next ground of challenge is that the process of 'e-auction' is not adopted by any State throughout India till date except Odisha. The existing system of 'auction' is a clean system and running smoothly and facilitating the Government in raising revenue. By introducing the process of 'e-auction' there is less possibility of augmenting more revenue than before. It is only an eye wash and in the name of maintaining transparency such policy has been adopted by the Govt. to facilitate proxy bidders and outside bidders and deprive the existing licensees. The decision of the Excise Department is against the public policy and is an arbitrary action which is tainted with mala fide and also against the principles of natural justice.

To this, reply of the State is that the Government in its own wisdom, after analyzing various factors, has decided as a matter of policy to introduce 'e-auction' system as it is likely to fetch more competitive bids in comparison to straight renewal and it is not for the petitioner to say that under the existing system, there is less possibility of augmenting more revenue than before. It is further submitted that it is not known how the new system will facilitate proxy bidders and the existing licensees are likely to be harassed. Rather there is no scope for the proxy bidders and cartel with vested interest as each bidder will be issued with a separate mask ID.

Considering the rival contentions, we are of the opinion that there has to be a beginning at some point of time keeping in tune of the challenging situation and demand of the time and society. It is always wise to take advantage of the new technologies, if it serves better than the earlier existing/old method. Since each bidder will be issued with a separate mask

ID, we are unable to understand how the system of new e-auction will facilitate proxy bidders and the existing licensees are likely to be harassed. Merely because 'e-auction' has been introduced for the first time in our State, that cannot be a ground to strike down the process unless it is established that such system in any manner is detrimental to the public interest. Since the State in its wisdom has taken a decision that 'e-auction' system would fetch more revenue, we are not inclined to interfere with their decision without any convincing and valid reason.

55. The further challenge is that the Government who is the granting authority of exclusive privilege under Section 22 of the Act has delegated such power to the Collector of the District. In paragraph 96 of Chapter-3 Excise Manual Vol.III, it is clearly stipulated that Collector himself is to conduct the auction but in the 'e-auction' process such procedure has been violated. The Excise Auction Committee has been constituted for settlement of exclusive privilege. Therefore, it is argued that such formation of the Committee is contrary to the Act.

In reply, it is submitted by the State that it is trite law that delegatee will exercise the power till such time of delegation and the power really vests with the authority which delegates the power. The Excise Manual Vol.III is a manual and has no statutory effect and therefore cannot override the notification made under the statute.

There is no dispute that under Section 22 of the Act, the State Government is only empowered to grant exclusive privilege and has delegated such power to the Collector of the district. Therefore, the delegatee shall exercise such power during the period of delegation. Needless to say that power is always vested with the delegator. In the instant case, the State Government constituted a committee and delegated the power to process 'e-auction' to arrive at the highest bid on a Committee called "Excise Auction Committee' chaired by Commissioner.

At this juncture, it is relevant to deal with the grounds of challenge raised in other writ petitions with regard to vesting of the power of granting exclusive privilege with the 'Excise Auction Committee'. In W.P.(C) No.9471 of 2013 and others, a stand is taken that the impugned order is violative of and contrary to Rule 4 of the Privilege Rules. It is contended that Rule 4 of the said Rules provides for determination of consideration money by the Collector whereas in the impugned order such power is vested with Excise Auction Committee.

In W.P.(C) No.8911 of 2013, a stand has been taken that Chapter-III of Part-I of Rule 103 of the Board's Excise Rules, 1965 provides the manner of fixation and realization of fees for licences for retail vending of country spirit and Chapter-III of the instruction framed by the Board of Revenue, Orissa provides for settlement and grant of licenses under the Rules and Instructions. Paragraphs 93 to 108 provide the procedure for settlement by auction and the conduct of the auction. Therefore, it was argued that the order of the State Government to put the existing C.S. shops IMIFL OFF shops through 'e-auction' without prescribing any rules and instructions is illegal, arbitrary and contrary to law.

Now, the question arises as to whether the impugned order shall override Rule 4 of the Privilege Rules, which has been made by the State Government in exercise of the powers conferred by sub-section (1) of Section 89 of the Act read with proviso to sub-section (3) of the said Section. In our opinion, Privilege Rules made in exercise of rule making power vested with the State Government under sub-section (1) of Section 89 read with proviso to sub-section (3) of the said Rule is at higher pedestal than the impugned order passed under Section 29(2). Therefore, the impugned order cannot override the Rule 4 of Privilege Rules.

Similarly, the next question arises whether without amending Rule 103 of the Board's Excise Rules, 1965 which has been made in exercise of the power conferred by Section 90 of the Act, the State Government can provide the manner of settlement of CS shops in the order passed under Section 29(2) of the Act. We have no hesitation to hold that the Board's Excise Rules, 1965 is at higher footing than the impugned order. Therefore, without amending Rule 103, the issuance of the impugned order which provides new procedure to the extent inconsistent to the provisions of Rule 103 is not valid.

In view of the above, we are of the opinion that the action of the State Govt. delegating the power of determination of the consideration money to the Excise Auction Committee without amending Rule 4 and proviso to sub-rule (3) of Rules 1989 and Rule 103 of Board's Excise Rules, 1965 is not valid.

It may be noted that Section 89 (2)(i)(1) and (2) of the Act provides that the State Government may make rules for regulating the procedure to be followed and prescribing the matters to be ascertained before any licence for the wholesale or retail vend or any (intoxicant) is granted for any locality and for regulating the time, place and manner of payment of the sum payable under Section 29. A true construction of Section 29 reveals that the

State Government may accept payment of a sum in consideration of the grant of any exclusive privilege under Section 22 instead of or in addition to any duty leviable under the Act. Sub-section (2) of Section 29 prescribes the mode how the consideration amount payable under Sub-section (1) of Section 29 shall be determined. But as stated above, Section 89 empowers the State Government to make rules for regulation, procedure etc. as provided under Section 89(2)(i)(1) and (2). Therefore, without making such rules, as contemplated under Section 89 (2) (i) (1) and (2), the State cannot issue the impugned order in exercise of its power under Section 29(2) prescribing eligibility criterion to proceed for 'e-auction'.

56. The further challenge to the impugned order is that in the new system the Excise Department has decided that licensee has to produce solvency certificate for 12 months of the consideration amount of the exclusive privilege on the basis of the land records and similarly the licensee is prohibited to deal with the said land against which the solvency certificate would be issued. Such a system is highly stringent and harassing in nature and against the fundamental right of the licensee guaranteed under the Constitution of India.

In W.P.(C) No. 8911 of 2013 a challenge has also been made with regard to furnishing of solvency certificate. It is alleged that the Collector has accepted non-refundable application fee and solvency certificate three times of monthly consideration money in Form-VI issued under Rule 3 (v) of the Orissa Miscellaneous Certificates Rules, 1984 from the petitioners for the year 2013-14. Therefore, the payment of non-refundable application fee and submission of solvency certificate again equal to not less than 12 times of reserve price by the petitioners for each shop as per Para (vi) (a) and (c) of the impugned Order to qualify for participation in 'e-auction' is illegal and the petitioners having small means were not able to take part in 'e-auction' due to requirements of huge amount of solvency certificate within shot span of time. Because of such condition, the super rich people or big corporate shall capture liquor trade.

In the Counter, it is stated that the condition regarding production of solvency certificate is rational and logical as the excise licence is granted for the entire excise year, i.e., for the entire 12 months, and the intending licensee should have solvency at least 12 times of the monthly reserve price of the shop(s) to bid for and not the consideration amount as stated by the petitioners. There is no fundamental right to trade in intoxicants as has been decided time and again by the Hon'ble Supreme Court.

In our view, since the petitioner has already furnished the non-refundable application fee and solvency certificate for three times of monthly consideration money for the year 2013-14, there is no reason to ask to furnish solvency certificate again equal to not less than 12 times of the reserve price by the petitioner for each shop as per Para (vi) (a) and (c) of the order to qualify for participation in 'e-auction'. No doubt, the State having the exclusive right to deal with intoxicants and in order to protect the interest of Revenue, it can ask for reasonable adequate security, but the State should not fix the amount of security in such a manner that the genuine small intending parties shall be excluded from participating in the 'e-auction'. We do not find any cogent reason for asking solvency certificate equal to not less than 12 times of the reserve price despite the fact that the licensees have already furnished the solvency certificate three times of the monthly consideration money for the year 2013-14. Therefore, this needs reconsideration by the State.

57. The further allegation is that Out Still liquor shops are similarly placed but the 'e-auction' process has not been made applicable to it which amounts to discrimination.

Since earlier we have already held that there is no discrimination on this score, allegation on this score fails.

58. Another important challenge to the notification is that under the impugned order, the Excise Commissioner is the final authority in the matter of settlement of exclusive privilege. Such a clause is redundant and void in law since as per Rule 60 of the Rules, the Excise Commissioner is the appellate authority against the order of the Collector, who is the granting authority of the exclusive privilege. Such provision is still in vogue and therefore, the Excise Commissioner cannot act as the authority for settlement of exclusive privilege under the new system which is against the existing Rules.

State's reply is that Section 29(2)(b) provides that the sum payable under Sub-section (1) shall be determined by such authority and subject to such control as may be specified in such order. Therefore, the Notification having been made under Section 29(2) of the Act, formation of the Committee which is not to discharge any statutory function but to over-see the process of 'e-auction' being chaired by the Excise Commissioner cannot be faulted with. The Collectors of the respective districts are the licensing authorities under Section 20 of the Act. The power remains with the Collectors but only the process of 'auction' to arrive at the highest bid is being carried on by the Committee. A combined reading of clause (ii) with

clause (xix) which states that the decision of the Excise Commissioner or any grievance arising in course of the 'e-auction' process in the State shall be final will lead to the conclusion that the Committee is only to conduct the 'e-auction' and not the real process of settlement as would be evident from clause (4). 'E-auction', as stated under clause-3, will be published in the sale notice and will be made available in 'e-auction' website and official website. Therefore, 'e-auction' process has nothing to do with deciding the available statutory remedies.

Para (vii) (e) of the impugned order provides that "bidder shall abide by the decisions of the Excise Commissioner in case of any grievance arising in course of the 'e-auction' process. Clause (xix) of the impugned order also provides that "the decision of the Excise Commissioner on any grievance arising in course of the e-auction process in the State shall be final". As per Para (ii) of the impugned order, the process of settlement shall be conducted by a departmental Excise Auction Committee (EAC), chaired by the Excise Commissioner and comprising 3 to 6 members appointed by him from time to time.

At this juncture, it is necessary to refer to Section 8 of the Act provides for control, appeal and revision. Section 8 of the Act provides that the Collector, shall, in all proceedings under the Excise Act be subject to the control of the Excise Commissioner. Sub-section (2) of Section 8 further provides that the order passed under the Act or any Rule made there under shall be appealable to such authorities and under such procedure as may be prescribed by Rule 89, clause (c). Rule 60 of Rules, 1965 provides that appeal shall lie to the Commissioner from the order made by the Collector or Additional District Magistrate. Principles of natural justice demands that nobody should be the judge of his own cause. Section 8 of the Act and Rule 60 of the Rules being in vogue, in our opinion, the provisions contained in Paras (ii), (vii) (e) and clause- (xix) are contrary to Section 8 read with Rule 60 of the Excise Rules and violative of principles of natural justice and needs reconsideration. It would be desirable to designate somebody else as appellate authority or to head the Committee (EAC), to get over the legal deficiencies indicated above.

59. It is also alleged that as per report of the Committee consisting of Dr. Arabinda Kumar Padhi, IAS, Ex-Excise Commissioner, Odisha accompanied by two Deputy Excise Commissioners the renewal of excise shops in favour of existing licensees was appreciated and as such suggestion was given accordingly to the State Government. Therefore, introduction of e-auction for settlement of exclusive privilege is not just and proper.

In reply, it is stated that the State Government having been vested with the power of grant of exclusive privilege, on its wisdom, has decided not to accept the report of the Committee. The Committee has submitted an open mind report suggesting the pros and cons of the auction process vis-à-vis renewal process. After perusing the said report, the State Government has taken a conscious decision in the Cabinet to go for 'e-auction'.

In view of the above stand taken by the State, it cannot be said that introduction of 'e-auction' is improper being contrary to the suggestion given by the Dr. Padhi's Committee. Moreover, perusal of the said report does not reveal that any study has been made by the Committee as to whether 'e-auction' is beneficial to the Revenue or not and the three States referred to in the report of the Committee have introduced 'e-auction'. Therefore, the report of the Committee does not lend any support to the challenge made by the petitioner to the impugned order.

60. The impugned order has been challenged on the ground that the sum payable for grant of privilege and MGQ in favour of the petitioners have already been determined by the Government putting 20% hike over the existing consideration money as per Para 20 of the Excise Policy dated 23.03.2013 and taking into account the provisions of Section 29(2) of the Act and Rule 6-A of Rules, 1970. Therefore, the petitioners are entitled to renewal of CS shop licences for the year 2013-14.

It is only in order to facilitate completion of 'e-auction' as per the policy already approved by the Cabinet it has been decided to grant extension of licence to existing C.S. shops for two months, i.e., April and May, 2013 with a hike of 20% in consideration money. Therefore, on consideration of such ground, no right of renewal of the CS shops for the entire year 2013-14 accrues in favour of the petitioners on that basis.

61. It is further alleged that as per Rule 31 of the Rules, if any licence is granted at any time after 1st April it shall be granted only up to 31st March next year. Therefore, it is argued that since the licence has been granted after April, 2013 the same must be granted till 31st March, 2014.

A true construction of Sub-rule (6) justifies the action of the State in granting the licence for two months, i.e., April and May, 2013 out of the whole excise year 2013-14 for the reasons stated in paragraph 20 of the impugned order. Therefore, the claim of the petitioners for renewal of the licence for the whole year 2013-14 on the basis of Sub-rule (2) of Rule 31 merits no consideration.

62. Referring to Para (viii) of the impugned order it is challenged that the provisions contained in said paragraph are contrary to principles of natural justice. Clause (viii) of the impugned order reads as follows:

> "(viii) After the last date of online submission of pre-qualification documents by registered bidders, the EAC members with assistance of IT support staff, shall conduct online scrutiny of pre-qualification documents [verification of content of all scanned documents stipulated in paragraph (vi) of bidders through their Department authorized DSCs. In case, the online documents, on scrutiny, are found to be defective and/or inadequate, the bidder's profile shall be summarily rejected online along with the justification/reason which can be viewed online by the concerned bidder and he shall not be permitted by the system to participate in e-auction process. Bidders who are found to be eligible in online scrutiny shall be approved in the system by the EAC members with assistance of IT support staff. The e-auction pre-qualification status shall be updated automatically in the registered bidders' online profile before start date of e-auction, and system-generated e-mails and SMSs on pre-qualification status may also be sent to all registered bidders." (underlined for emphasis)

Perusal of such condition reveals that the EAC members with assistance of IT support staff, shall conduct online scrutiny of pre-qualification documents and on scrutiny if the said documents are found to be defective and inadequate the bidders' profiles shall be summarily rejected online along with the justification/reason which can be viewed online by the concerned bidder and thereafter the bidder shall not be permitted by the system to participate in 'e-auction' process. There is nothing in the said clause to show that before disqualifying the registered bidder by rejecting his/her scanned documents neither a show cause notice nor any opportunity of hearing has been provided to the registered bidder. Disqualification of a registered bidder has civil consequence. Therefore, before disqualifying a registered bidder from participating in the 'e-auction', principles of natural justice demands that an opportunity of hearing should be given to the registered bidder. To this extent, the provision contained in Clause (viii) of the impugned order is arbitrary and un-reasonable and the same needs reconsideration by the State. There is no dispute over the contention of the State that the trade in intoxicants is a State monopoly under the Excise Act, Rules made thereunder and no one can claim against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the

State decides to grant such right or privilege to others, the State cannot escape from rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It, therefore, cannot be possible to uphold the contention of the State Government that Article 14 can have no application in a case where the licence to manufacture or to sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that Article. (See Nadlal Jaiswal's case (supra).

63. It is challenged that e-auction principle as envisaged in Para (x) of the impugned order without framing Rule as contemplated under Section 89 of the Act and without issuance of Form-A statutory sale notice is illegal and not sustainable.

In view of the specific stand of the State, that necessary documents to be filled up will be floated along with the sale notice and there will be a gap in between the Sale Notice and the date of auction and intending bidders will have enough time to complete and process their applications in pursuance of the sale notice, the allegation of the petitioners on this score is premature. Further stand of the State which merits consideration is that the sale notice will be published in Form-A, which is a statutory document, and other affidavit is a format and it has been styled as Form 'B' which will be prescribed along with the sale notice.

64. The further challenge is that the pre-qualification scrutiny of bidders being done at the level of Excise Commissioner on the basis of the scanned documents uploaded online, there is every chance of presentation of forged or fabricated documents for the purpose of qualifying and to disturb the 'e-auction' by unscrupulous bidders. If any defective or fraud documents are detected during final verification stage, the entire 'e-auction' procedure will turn to be e-fraud and it will affect small traders and they have to ensure again internet connection and other infrastructure to participate in 'e-auction'.

On the above ground, the impugned order cannot be said arbitrary or unworkable. In such event, Clause (b) of Para (xiii) provides that all provisional highest bidders for respective shops are required to submit original documents to prove that he is the owner of the premises or has rented the premises where he intends to set up shops in designated locality. Failure to furnish the documents prescribed in the said paragraph before stipulated deadline or furnishing forged document shall be sufficient ground for cancellation of provisional highest bidder status and filing of false/forged document shall make the bidder liable for criminal proceedings under the provisions of IPC.

However, it may be appropriate to verify the genuineness of the documents before auction commences. This aspect needs consideration to avoid unnecessary post-auction complicacies.

65. Referring to para (xv) of the impugned order, it is submitted that in case the petitioners will become the highest bidder then they can provide their existing shop premises for opening of the shop(s) after issuance of licence, but in case of new bidder who becomes successful in e-auction cannot provide premises for opening of shop(s). Therefore, it is submitted that the conditions stipulated in para (xv) are contrary to Form-A public notice and the same cannot be enforced in case of the new bidders.

The reason given by the petitioners to challenge the illegality of Clause (xv) is not sustainable because on the basis of the documents furnished as required under Clause (xiii)(b) to prove that the highest bidder is owner or tenant of the premises, the licence shall be issued to a highest bidder.

66. Next challenge to the impugned order is that as per the condition stipulated in sub-clause (c) of Clause (vi), the bidders from outside the State of Orissa will take part in auction by submitting the Solvency Certificate in respect of the immovable property situated in outside State of Orissa. Therefore, it is argued that the 'e-auction', will certainly create scope to the big excise vendors to do monopoly in excise business as a result of which small excise vendors will be wiped out from the retail business and the said big excise vendors will certainly detect things to the office. Thus it is argued that sub-clause (c) of Clause (vi) is unreasonable, unfair and against the interest of the Government Revenue.

Further referring to Instruction No. 100 of the Instructions framed by the Board of Revenue, Orissa, it is submitted that the Excise policy does not envisage that the highest bid on every occasion must be accepted. State must prevent monopoly in a district. The instruction further envisages to promote small local businessman and to prevent capitalist who will scare away opposition. As per the said instruction, price is not the sole criteria for accepting a bid.

Paragraphs 6 and 8 of counter of the State Government in W.P.(C) No. 8084 of 2013 and W.P.(C) No. 7030 of 2013 clearly reveal that fetching of better revenue is the sole consideration for the 'e-auction'. Thus it is argued that e-auction is clearly against the instruction framed by the Board of Revenue which is the basis of the State's Excise Policy.

In this context it is further argued that the report of the Excise Commissioner is very relevant which clearly indicates that e-auction will increase monopoly of big houses and frighten away the small vendors who are ready to run the shop and pay the Govt. dues out of the profits of the shop. The fresh 'e-auction' order dated 5.4.2013 will bring the liquor barons of the country into the fray and virtually wipe out the small local vendors by creating a monopoly.

Reliance is placed on a judgment of this Court in the case of ***Orissa Printers and Binders Mahasangha Vrs. State of Orissa and others*** in W.P.(C) No.2862 of 2010.

Reliance is also placed on a judgment of the Hon'ble Supreme Court in ***Nandalal's*** case (supra) and it has been submitted that the State cannot act arbitrarily on its own sweet will.

Further placing reliance upon the Full Bench decision of this Court in the case of ***Bijay Kumar Panigrahi and others Vrs. State of Orissa (AIR 2011 Orissa 174)***, it is submitted that this Court upheld the State Government's endeavour to remove inequalities amongst Big Contractors and Small Contractors.

Now, it is relevant to extract here the Instruction No.100 of the Instructions framed by Board of Revenue, Orissa.

"***When advisable to accept other than highest bids-***

> It is not an absolute rule that highest bid must on every occasion be accepted. It is desirable to prevent monopoly in a district and unrestricted auction occasionally leads to monopoly of a large area. If a fair price therefore can be obtained from a small local man of good character and independent means, his bid may be accepted in preference to that of a capitalist who bids higher merely to frighten away the opposition. A vendor who manages his own shop may be preferred to one who conducts the business through hired servants."

This Court in the case of ***Orissa Printers and Binders Mahasangha (supra)*** struck down the resolution deciding to invite National Tender on the ground that such resolution was against the Industrial Policy issued by the State Government.

Instruction No. 100 of Instructions framed by Board of Revenue, Orissa, does not envisage that the highest bid on every occasion must be accepted. On the other hand, the State seeks to prevent monopoly in a

district. The Instruction also provides to promote small local businessman and seeks to prevent capitalist who will scare away opposition. Price is not the sole criteria for accepting the bid.

But, paragraphs-6 and 8 of the counter filed by the State reveal that better revenue is the sole consideration for adopting 'e-auction'. Such subjective is certainly against the instruction framed by the Board of Revenue which is also an Excise Policy.

At this stage, it is relevant to extract here the relevant portion of the Full Bench decision of this Court in the case of ***Bijay Kumar Panigrahi (supra).*** Same reads as follows:-

> "We are unable to accept the contention advanced by the learned counsel for the petitioners that no rational object is sought to be achieved by the State by promulgating such an amendment and incorporating the clause quoted above. The State has considered the consequences while amending the aforesaid rule. The State is bound "to act reasonably" and such act on the part of the State has to be tested on the touchstone of public interest.
>
> We are of the considered view that the public interest would be protected and limiting a higher class contractor to offering bids for his own category and the next lower class achieves the intent of protecting the interests of lower category contractors. The claim of the petitioner contractors of a higher category to permit them to bid for all work, meant for a lower category contractors is a clear attempt to try and make an inequals to compete as an equal and, therefore, violative of the constitutional guarantee of equality under Article 14. A contractor of a lower category would have a very poor chance or no chance of getting any work at all. Accordingly, we are of the view that the amendment made protects the interest of contractors of lower categories and has been enacted to protect the big fishes from eating "small fish".

It is also relevant to extract here the relevant portion of the Excise Department order dated 28.2.2013. Same reads as under:-

> "Original up to date solvency certificate in respect of immediate property situated in the State of Orissa obtained from Revenue authority of the State equal to not less than three times the combined annual reserve price(s) of the shop(s) the bidder intends to bid for."

We make it clear that we are not against introduction of 'e-auction' for the purpose of settlement of exclusive privilege in favour of successful bidders, but while doing so, the State may make appropriate rules and regulations to protect the interest of small traders of good character with independent means who manage their own shop(s).

This aspect of the matter can be looked at from a different angle. In view of the impugned order, bidders from across the country, small or big, can participate in 'e-auction' irrespective of situation of the property in any State. The bidders need not hold property in the State for the purpose of furnishing Solvency Certificate. It may so happen that liquor baron of the country, who is a manufacturer of IMFL, participates in the 'e-auction' and offering some attractive bids gets all IMFL shops of the State settled in his favour. Thereafter, he will try to sell his own product of IMFL in the State through all the IMFL retail outlets and Orissa State Beverage Corporation shall be bound to procure a particular IMFL brand as per demand of the retail IMFL outlets. This will certainly create unhealthy situation. The IMFL of other brands would be smuggled and sold in the State in fraudulent manner resulting loss of Government Revenue.

Therefore, it is necessary that the State must consider this aspect while framing the Rule and Regulations for settlement of exclusive privilege through 'e-auction'.

67. Referring to clause (vi)(b) and clause (xiv) of the impugned order, it is submitted that the intention of the Govt. is not clear from clause (xiv) and as it appears, the small new intending bidder arranges an amount equal to EMD to receive his licence. Thus, it is alleged that attempt has been made to wipe out the small businessman from the fray as his investment becomes doubled.

For better appreciation, it is necessary to quote here clause (xiv) of the impugned order.

> "(xiv) Post physical scrutiny of original documents, upon realization of advance consideration money as may be determined by the Government from time to time and after adjustment against deposited EMD, the highest evaluated responsive bidder shall be confirmed with the settlement of the shop. He shall then put his signature in the Register of Settlement and Register of Undertaking to lift the monthly minimum guaranteed quantity as may be determined by the Government from time to time and shall be then granted licence by the Collector."

Clause (xiv) contemplates that post physical scrutiny of original documents, upon realization of advance consideration money as may be determined by the Government from time to time and after adjustment against deposited EMD, the highest evaluated responsive bidder shall be confirmed with the settlement of the shop. He shall then put his signature in the Register of Settlement and Register of Undertaking to lift the monthly minimum guaranteed quantity as may be determined by the Government from time to time and shall be then granted licence by the Collector.

There is no question of determination of consideration money by the Government because on the basis of reserve price of the consideration money, the bidding starts and the bid is finalized with the highest bidder.

Further the expression “after adjustment against deposited EMD” also needs clarification as to whether the EMD has to be adjusted against the highest consideration money or anything else ?

On the other hand, clause (vi)(b) provides for furnishing of EMD in the form of Fixed deposit receipt of Scheduled Bank/Kisan Vikash Patra/Post Office Savings Bank Account/ National Savings Certificate/ Postal Office Time Deposit Account only having validity of at least 90 days from the date of publication of sale notice and duly pledged in favour of the concerned District Collector and payable at the concerned District.

These aspects need clarification by the State Government.

68. The next challenge to the impugned notification is that clause (xviii) of the notification dated 28.2.2013, which barred bidders of doubtful solvency, having criminal antecedents, persons disqualified under Rules 45 and 102A of Orissa Excise Rules, 1965 has been given a go-by in the notification dated 5.4.2013 without any valid and cogent reason.

This aspect needs consideration by the State Government to ensure that the disqualified fraudulent bidders are barred in taking part in ‘e-auction’ process in public interest.

69. Petitioners have further urged that the Government has been conferred with power under Section 89 (1) and (2) of the Act to make Rules. Powers given to the Commissioner under Para (ii) of the impugned order amount to sub-delegation of power by the Commissioner. Section 7 (2) (e) of the Act does not authorize the Government to give power of sub-delegation of delegated power.

This allegation of the petitioners are not correct. Under Section 7(2) (e) of the Act, the State Government may delegate to the Board, the Commissioner of a Division, [Excise Commissioner or the Collector of a district] all or any of the powers conferred upon the State Government by or under this Act, except the power conferred under Section 89 to make the Rules. Paragraph (ii) of the impugned order envisages that the process of settlement of shop shall be conducted by a departmental Excise Auction Committee chaired by the Excise Commissioner and comprising 3 to 6 members appointed by him from time to time. The EAC may be guided from time to time by a Core team of the Government comprising officials from different Departments, i.e., Excise Department, SPC, NIC, OMEGA. It is further provided that EAC shall be assisted by the IT support staff comprising of computer trained officers as may be provided by the Government from time to time. True construction of para-(ii) of the order does not show that the Government has given power of sub-delegation to the Commissioner. The Commissioner as the head of the Committee is responsible to the Government for proper discharge of the work entrusted to him. He can take assistance of other officials, but the decision of the EAC headed by the Commissioner is always final. Taking assistance to discharge the duty is not sub-delegation of the delegated power.

70. It is further alleged that Para (iii) of the impugned order speaks of issue of sale notice in Form-A inviting on line applications from bidders for settlement of shop or group of shops at least 10 days before the commencement of e-auction, but no form has been prescribed. Moreover, the issue of sale notice as provided in para (iii) violates provision of Section 22 of the Act and Rule 3 of the Privilege Rules.

Proviso to Section 22 of the Act postulates that public notice shall be given with the intention to grant any exclusive privilege under that Section and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted. In the impugned order, no provision has been made for inviting and considering objection of the person residing within the area affected. This needs reconsideration by the opposite party State.

71. It is also urged that the bargaining power does not entitle the State to impose any condition it desires. Placing reliance on the decision of the Hon'ble Supreme Court in *Krishnan Kakkanth Vs. Government of Kerala and others*, AIR 1997 SC 128, it is submitted that if the policy decision is capricious or arbitrary and not informed by reason whatsoever or it suffers

from vice of discrimination or infringes any statutes or provision of the Constitution the said Policy decision can be struck down.

There is no dispute over the above legal proposition settled by the Hon'ble Supreme Court and that is the reason why we are examining the validity of the impugned policy and the order.

72. The apprehension that appointment of associate for internet use may ditch the bidders and misuse his ID at the instance of his opponent/competitor has nothing to do with the validity of the impugned order since in commercial world the owner himself is not doing all the business activities but depends upon many associates in respect of important works. Therefore, there is nothing wrong in the said provision.

73. The order is further challenged on the ground that Rule 31 of the Rules, licence for retail vender intoxicants may be granted for one year from 1st April of the year to the 31st March of the next year subject to the condition provided thereunder. Sub-rule (6) of Rule 31 empowers the Excise authority for grant of licence for any shorter period. In paragraph 22 of the Policy State Government has itself decided to extend the policy for two months, i.e., for April and May, 2013. Therefore, settlement of privilege through e-auction for the whole year 2013-14 is self-contradictory and conflicting within itself.

This needs clarification from the State specifying the exact period for which the exclusive privilege shall be settled through e-auction.

74. The other ground of challenge is that under the present policy licence has been issued for two months, i.e., April and May, 2013. As a result of this, the licensees would not be able to sell away MGQ within the period of two months; but the petitioners would be forced to lift the MGQ for the said two months on the enhanced rate. Under the Excise Law, non-selling of certain quantity for a particular period is spread over to the next month and in the process the vender would be able to reequip the loss in the succeeding month(s) and by the end of the year the licensee manages to sell out the entire quantity being lifted over the entire year. In the current arrangement, the petitioners would suffer irreparably and the loss cannot be reequipped and compensated by any other means since the entire unsold quantity at the expiry of the licence period of two months would be treated as illegal stock and the same would be subject to destruction at the cost of the vendor as per excise law. Thus, it is argued that the decision to grant licence for two months without making any provision as to how the interest of the petitioners shall be protected with regard to unsold MGQ is illegal and arbitrary.

Under Sub-rule 6-A(5) of the Orissa Exclusive Privilege (Foreign Liquor) Rules, 1989 (for short, ' Foreign Liquor Rules'), the left over stock on expiry of the licence shall be forfeited to the government.

In the peculiar circumstances, provisions should have been made for transfer of the left-over stock to the incoming licensee who shall take it towards his MGQ on payment of cost price and excise duty to the outgoing licensee so that the licensee would be in a position to lift the stock as per MGQ.

This aspect also needs consideration by the State Government.

75. In essence, while upholding the maintainability of the writ petition and policy decision of the Government dated 23.03.2013, directions given for reconsideration of different aspects for the reasons stated above are summarized below:-

(i) The State should allow participants to take help of internet facility at NIC available at each district headquarters;
(ii) Clause-(vi) (a) and (c) of the impugned order asking solvency certificate equal to not less than 12 times of the reserve price to qualify for participation in e-auction despite the fact that the licensee have already furnished the solvency certificate 3 times of the monthly consideration money;
(iii) Clauses (ii) (vii) (e) and Clause-(xix) vis-à-vis Rule 8 read with Rule 60 of the Excise Rules for the purpose of designating somebody else as appellate authority or to head the EAC to get over legal deficiencies;
(iv) Clause (viii) of the impugned order which violates mandates of Article 14 of the Constitution so far not providing opportunity of hearing before disqualifying a registered bidder from participating in "e-auction";
(v) Sub-clause (c) of Clause-(vi) allowing bidders from outside the State to take part in auction by submitting solvency certificate in respect of immovable property situated outside the State of Odisha and to frame the Rules and Regulations in this regard;
(vi) Clause (vi)(b) and Clause (xiv) of the impugned order— post physical scrutiny of the original documents and adjustment of deposited EMD;
(vii) To make provision to bar bidders of doubtful solvency, having criminal antecedents, persons disqualified under Rules 45 and 102A of Orissa Excise Rules, 1965, as has been provided in Clause (xviii) of Notification dated 28.02.2013;

(viii) Clause (iii) of the impugned order with regard to issue of sale notice in Form-A which violates provisions of Section 22 of the Act and Rule 3 of the Privilege Rules and to make provision for inviting and considering objection of the persons residing within the area affected;

(ix) Exact period for which exclusive privilege shall be settled through 'e-auction' for the excise year 2013-14 should be clarified as a part of the year 2013-14 has already been settled in favour of the petitioners;

(x) Provision for transfer of left over stock to the incoming licensee who may take it towards his MGQ on payment of cost price and excise duty to the outgoing licensee so that licensee would be in a position to lift the stock as per MGQ for the extended license period.

77. In view of the above, we are of the opinion that the order dated 5.4.2013 appears to be unreasonable and unsustainable in law for the reasons stated supra. It would be, therefore, desirable if the State Government addresses itself on the aforesaid aspects to take a fresh decision as early as practicable and till then existing arrangements shall continue.

78. With the aforesaid observations and directions, all the writ petitions are disposed of.

Writ petitions disposed of.

2013 (II) ILR - CUT- 801

SANJU PANDA, J & DR. B. R. SARANGI, J.

MATA NOS. 64 & 65 OF 2011 (Dt.27.08.2013)

NIBEDITA DASH …….Appellant

.Vrs.

BIRANCHI NARAYAN SATPATHY & ORS. …….Respondents

HINDU MARRIAGE ACT, 1955 – S.12 (1) (c)

Proceeding U/s.12 (1) (c) of the Act – Husband is the applicant – Ground is, prior to marriage the wife was suffering from ovarian disease and had the said fact brought to his notice or to his family members they would not have given consent for such marriage – Trial Court allowed divorce on the ground of fraud – Hence this appeal.

Wife's Case is ovarian disease was detected after marriage and doctor opined that she was medically fit to lead a normal life but the husband forced her to remain with her parents – The Court below has held that the husband failed to establish convincingly that the wife had growth of moustache and beard on her face and she had ovarian complication prior to her marriage – Husband has also failed to establish the plea that by fraud and false representation he had been given in marriage with the appellant wife – Held, marriage could not be held invalid or void – Impugned judgment to that effect is set aside – Direction issued to the husband to pay maintenance at the rate of Rs.6000/- P.M. to the wife from the date of order as she has no income and has reason to stay separate from the husband.

(Paras 6,7,8 & 14)

Case laws Referred to:-

1.AIR 2001 Madhya Pradesh 94 : (Shrikant-V-Smt. Saroj)
2.AIR 2010 (NOC)441(P&H) : (Krishan Kumar-V- Smt.Nidhi Arora)
3.AIR 2000 SC 2582 : (Praveen Meheta-V- Inderjit Mehta)
4.AIR 2013 Delhi 83 : (Sangeeta-V- Hitesh Kumar)
5.AOR 2002 Orissa 125 : (Smt.Pratima Biswal-V-Amulay Ku. Biswal)

For Appellant - M/s. Bibekananda Bhuyan, B.N.Das, S.K. Panda, R.Ray, A.K.Rout, B.N.Mishra, C.R.Swain, P. Mohanty, Ms.S.Sahoo & S.Samal.

For Respondents – M/s. K.C. Kanungo, H.V.B.R.K.Dora, Chitra Padhi.

S. PANDA, J. Since both the appeals arise out of a common order, they were heard together and are being disposed of by this common judgment.

2. Challenge has been made in these appeals by the wife to the order dated 15.7.2011 passed by the learned Judge, Family Court, Cuttack in Civil Proceeding Nos. 251 of 2003 and 204 of 2005.

3. The husband filed Civil Proceeding No.251 of 2003 under Section 12(1)(c) of the Hindu Marriage Act, 1955 (in short, "the Act") to declare the

marriage with wife as void and in the alternative to grant a decree of divorce and permanently restrain her from claiming maintenance from him. The wife filed Civil Proceeding No.204 of 2005 under Section 9 of the Act for restitution of conjugal rights. The court below dismissed the application filed by the wife for restitution of conjugal rights on contest without cost and allowed the application filed by the husband on contest without cost and dissolved the marriage by a decree of divorce subject to payment of cost of Rs.3 lakhs as permanent alimony to the wife within three months from the date of the order.

4. Learned counsel for the appellant submits that C.P No.251 of 2003 was filed by the husband under Section 12(1)(c) read with Section 13(1)(i-a) of the Act. During pendency of the proceeding, by way of amendment, the relief claimed in the proceeding was only under Section 12(1)(c) of the Act and his prayer to declare the marriage as void on the plea of fraud, which could not be proved by him during trial. Therefore, the judgment and decree is liable to be reversed. The court below illegally granted relief under Section 13(1)(i-a) of the Act specifically when the said relief was deleted from the pleadings of the parties. The finding of the court below, that there is no chance of reunion without taking into consideration the application filed by the wife for restitution of conjugal rights, is illegal as the court below neither averred regarding desertion of wife nor proved the said facts. Therefore, the said finding is based on surmises and conjectures and not sustainable in the eye of law. It was further contended that ICC No.200 of 2006 was filed by the wife after threatening given by her to implicate the husband, his family members and relatives in a false case of torture and demand of dowry and the fraud practiced by the wife suppressing the facts that due to hormonal imbalance, moustache and beard were appeared on her from 1996 and on totality of the said facts, one can conclude that the husband has been subjected to cruelty by the wife and due to such harassment and mental agony practically there can be no reunion and therefore, the order passed by the court below granting divorce in favour of the husband is liable to be reversed. The application filed by the wife for restitution of conjugal rights should have been passed by the court below in view of the medical report that she is medically fit to lead a normal conjugal life. In support of his contention, he cited a decision of the Madhya Pradesh High Court in the case of Shrikant v. Smt. Saroj reported in **AIR 2001 Madhya Pradesh 94** and submits that in absence of any evidence to grant relief under Section 13 of the Act, the court below has exercised its power illegally in the absence of any evidence on record. Hence, the decree is liable to be set aside. He also cited a decision of the apex Court in the case of Dr.N.G.Dastane v. Mrs. S.Dastane reported in **AIR 1975 SC 1534** and the decision of the Punjab &

Haryana High Court in the case of Krishan Kumar v. Smt. Nidhi Arora reported in **AIR 2010 (NOC) 441 (P&H)** wherein it has been held that in absence of positive pleading and evidence, the court has lack jurisdiction to grant such relief.

5. Learned counsel appearing for the respondent submitted that learned Judge, Family Court dissolved the marriage by a decree of divorce subject to payment of Rs.3 lakhs on the ground of admission by the wife that the father of the wife refused to send her to the matrimonial home and the rebuttal evidence of P.W.2, the brother of the husband, amounts to cruelty and desertion. As the wife has already received Rs.3 lakhs as permanent alimony on 8.8.2012 as directed by this Court, the judgment and decree passed by the court below need not be interfered with as the judgment is passed as per the provision of Order 12 Rule 6(1) of the Civil Procedure Code read with Section 18 of the Indian Evidence Act on the admission of the wife. The court has jurisdiction under Section 23(1)(a) of the Act to draw a decree on the basis of material evidence in the end of justice. She further submitted that implicating the entire family members in criminal case by filing ICC Case No.200 of 2006 amounts to cruelty. As the husband was frustrated and sustained huge financial expenses for his frequent coming to court from his working place, there is no chance between the husband and the wife to lead a happy conjugal life. Therefore, the judgment and decree need not be interfered with. In support of his contention, the decisions of the apex Court in the case of Praveen Meheta v. Inderjit Mehta, reported in **AIR 2000 SC 2582** and the decision of the Delhi High Court in the case of Sangeeta v. Hitesh Kumar reported in **AIR 2013 Delhi 83** and the decision of this Court in the case of Smt. Pratima Biswal v. Amulay Ku. Biswal reported in **AIR 2002 Orissa 125** have been cited.

6. From the rival submissions of the parties and after going through the LCR and pleadings of the parties, it appears that the husband filed Civil Proceeding No.251 of 2003 on 23.3.2003 under Section 12(1)(c) read with Section 13(1)(i-a) of the Act on the ground that he is a permanent employee of Indian Railways and working as TTI. The wife is a Graduate and her father is also an educated person and working in an organization at Jagatsinghpur. The marriage was solemnized between the parties on 28th February, 2002 as per Hindu rites and customs. It was an arranged marriage. The wife lived one month in matrimonial home and returned to her father's house. The husband left for his service place. Thereafter, the wife went with him to his service place on 1st December, 2002 where she fell ill and was admitted to South Eastern Railway Hospital where it was detected ovarian tumor. The husband found moustache and beard on her face and on being asked, she

disclosed regarding her hormonal imbalance. She was under regular treatment from 1996. She also disclosed that she was under treatment of ovarian tumor. Accordingly, he was shocked. He informed the said facts to her father who took her to the native place for better treatment. She was admitted in a nursing home at Cuttack and operated there. After discharging from the nursing home on 14.1.2003, the doctor advised her to take rest. It came to his knowledge that the right ovary had been removed by operation and left ovary had been scratch for removal of cyst as a result of which chance of conception was very remote. The said fact was disclosed to all the family members of the wife. Though the family members of the wife were aware about the said illness of the wife, they did not disclose the said fact before marriage. Had the said fact been brought to his notice and his family members, he would not have given his consent for such marriage. Since it was an arranged marriage and the marriage was held by obtaining fraud and misrepresentation of facts and this fraud gave mental shock and agony, he is entitled to decree of divorce. To resolve the dispute, his family members and well-wishers arranged a meeting in his house on 23.4.2003. The father of the wife was invited to attend the meeting. He also admitted the above facts. It was disclosed before him that since the marriage was held by fraud and misrepresentation of facts and chance of wife to conceive was very remote, the husband was constrained to file an application for mutual divorce. The father of the wife did not agree to such proposal and threatened to implicate the family members in false case. As the matter was not settled amicably, he filed the proceeding under Section 12 of the Act.

7. The wife appeared and filed the written statement and it was stated therein that she was ill on 6.12.2002. She traversed all other allegations made by the husband. She stated that after marriage, she led a happy conjugal life for more than 10 months and the marriage was consummated. She also disclosed that she was admitted to a nursing home at Cuttack with prior intimation to the husband and his family members were very much present in the hospital on the date of the operation and took care of her. On 6.12.2002, the ovarian disease was detected. As per the opinion of the doctor, she was medically fit to lead a normal life; rather the husband forced her to remain with her parents and the relief sought by the husband should not be granted on a defamatory and unfounded allegations. Her father never threatened to file a false criminal case. She was ready and willing to join the company of the husband. Similar pleading was made in Civil Proceeding No.204 of 2005 filed by the wife for restitution of conjugal rights.

8. In support of their pleadings, the husband examined himself as P.W.1 and his brother as P.W.2. The wife examined herself as OPW 1, her

father was examined as OPW 2 and her mother as OPW 3. They filed documents and letters which were marked as exhibits. On analyzing the evidence on record, the court below recorded a finding that the marriage was not in dispute. The court below held that the husband failed to establish convincingly that wife had growth of moustache and beard on her face and she had ovarian complication prior to her marriage. Therefore, he failed to establish the plea that by false representation and fraud, he had been given in marriage with respondent-wife. Under such circumstances, the marriage could not be held invalid or void. However, the court below taking into consideration the fact that the wife was operated on 11.1.2003 and after her discharge from nursing home, when her in-laws sought to bring her back to the matrimonial house, her father refused to send her with a plea that the doctor advised her rest for 6 months. Since the wife did not return to the matrimonial home and she preferred to stay at her father's house, her said act amounts to cruelty to the husband. In view of that and on totality of the evidence on record, one could conclude that the husband was subjected to cruelty by the wife and on such findings, the court below passed the impugned judgment and decree.

9. From the above findings of the court below, it appears that the court below passed a decree under Section 13(1)(i-a) of the Act on the ground of desertion without analyzing what amounts to desertion.

10. Law is well settled that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. The inference of desertion has to be made on a balance of probabilities.

11. In view of the above settled principle of law and the pleadings as well as the evidence led by the parties, in the present case, it does not reveal that the wife is guilty of desertion. She left the matrimonial home with an intention to return back to the matrimonial home after treatment. Her subsequent conduct appears that she is ready and willing to return to the matrimonial home and resume the conjugal rights. However, on a false plea the husband was not willing to bring her back to the matrimonial home; rather through P.W 2 (elder brother of the husband), he pressurized the wife for a divorce. Thereafter on a false plea filed the present proceeding with an allegation that consent of marriage obtained by fraud and misrepresentation and he failed to prove such plea during trial.

Law is also well settled that the burden of proving desertion- the "factum" as well as the "animus deserendi" – is on the petitioner; and he or

she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the husband has still to satisfy the Court that the desertion was without cause **(See** AIR 1964 SC 40**, Lachman Utamchand Kirpalani v. Meena alias Mota and** AIR 1975 SC 1534**, Dr. N.G.Dastane v. Mrs. S.Dastane).** Hence, the husband has failed to prove the plea of desertion against the wife.

12. So far as cruelty is concerned, in the present case, the respondent-husband has not brought the wife to the matrimonial home. The appellant-wife when left the matrimonial home has not disclosed any intention of permanent forsaking or abandonment of the spouse or she has left the matrimonial home without consent; rather she has left the matrimonial home for treatment. As per the doctor's advice, she was overstayed to take rest. The said overstayed of wife in her parents house will not constitute cruelty towards husband.

Accordingly, the finding of the court below is arbitrary and perverse so far as cruelty is concerned.

13. The decisions cited by the husband in the case of Praveen Meheta (supra), Sangeeta (supra) and Smt.Pratima Biswal (supra) are not applicable to the facts and circumstances of the present case. It appears that the criminal case has been filed by the wife in the year 2006 during pendency of the present proceeding. Therefore, the allegation made by the husband that the father of the wife threatened to file criminal case against the family members of the husband is not correct.

14. Accordingly, we set aside the judgment and decree passed in Civil Proceeding No.204 of 2005 and reverse the judgment and decree passed in Civil Proceeding No.251 of 2003 and dismiss the said civil proceeding filed by the husband to declare the marriage as void on the plea of fraud and directs him to pay maintenance at the rate of Rs.6000/- (rupees six thousand) per month to the wife from the date of the order as she has reasons to stay separate from the respondent-husband and has no income. The appeals are accordingly disposed of.

Appeal disposed of.

2013 (II) ILR - CUT- 808

S. PANDA, J & DR. B. R. SARANGI, J.

CRLA NO. 294 OF 1996 (Dt.25.07.2013)

KRUSHNA CHANDRA SAMAL …..…Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – Ss. 302 & 304, PART-I

Conviction U/s.302 I.P.C., challenged – Appellant came to the spot with a knife to threaten the deceased at the first instance for which he allowed the deceased to leave the baby with him – The deceased when came back there was exchange of hot words between them for which he stabbed the deceased with successive blows – In this case on the direction of this Court it was submitted by the State Counsel that there is no criminal antecedent against the appellant and after being released on bail he is living peacefully and has not misutilised the liberty granted to him – Held, on consideration of the totality of the evidence of the witnesses this Court feels that the offence committed by the appellant comes U/s.304-Part-I I.P.C. but not U/s.302 I.P.C. and he is sentenced to undergo imprisonment for a period of 10 years – Since the appellant was on bail direction issued to the trial Court to apprehend him to serve the rest part of the sentence.

(Paras 7, 9)

For Appellant - M/s. Basudev Pujari, B. K. Ragada, A. K. Jena.
For Respondent - Addl. Standing Counsel.

S. PANDA, J. This appeal has been filed by the appellant challenging the judgment dtd.07.5.1991 passed by the learned Addl. Sessions Judge-cum-Special Judge, Bhubaneswar in S.T Case No.6/186 of 1990 convicting the appellant under Section 302 of I.P.C. and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that on 17.3.1990 one Purna Chandra Samal told something to the elder brother of the appellant, for which there was ill feeling between the appellant and Purna. On 18.3.1990 at about 6.00

P.M, the appellant came with a knife and challenged Purna regarding the earlier incident and tried to kill him. At that time Purna was holding a baby and left the place to leave the baby in the house of one Bibhuti and came back. Thereafter, the appellant chased Purna and Purna caught hold of the hairs of the appellant. The appellant stabbed on the chest of Purna and thereafter to his stomach by means of a knife, as a result of which Purna fell down sustaining bleeding injuries. Thereafter, Purna was shifted to Barang Hospital for treatment on a Scooter, where the Doctor declared him dead. After the occurrence, the appellant threw the knife on the spot and ran away. On the basis of the F.I.R, lodged by the informant-P.W.10, the brother of the deceased, Saheed Nagar P.S Case No.182 of 1990 was registered and investigation was taken up. After completion of the investigation, charge sheet was submitted for commission of offence under Section 302 of I.P.C. against the appellant.

3. The prosecution in order to establish the charges examined as many as eighteen witnesses and exhibited several documents which were marked as Exts.1 to 13. The weapon of offence was marked as M.O.I and wearing apparels were marked as M.O.II to M.O.VI. Out of the witnesses examined by the prosecution P.Ws.1, 2, 9, 12, 13, 14, 16 and 17 were the eyewitnesses to the occurrence. P.Ws.3, 4 and 5 were the witnesses to the seizure. P.Ws.6 and 7 were the Scientific Officers of State F.S.L., Rasulgarh. P.W.8 was the Constable, who produced the wearing apparels of the deceased for chemical examination and post mortem. P.Ws.10 and 11 were the post occurrence witnesses. P.W.15 was the Doctor, who conducted post mortem examination on the dead body of the deceased and P.W.18 was the Investigating Officer.

The plea of the appellant was complete denial of the prosecution case. The appellant neither has examined any witness nor has he exhibited any document.

4. The trial court relying on the evidence of P.Ws.1, 2, 9, 12, 13, 14, 16 and 17 who are eyewitnesses to the occurrence and the evidence of P.W.15, the Doctor who conducted the post mortem examination found the appellant guilty under Section 302 of I.P.C and convicted him thereunder.

5. Learned counsel appearing for the appellant submits that though the appellant came to the spot with a knife, immediately he did not assault the deceased rather he had the intention to give a threatening to the deceased only, for which the appellant allowed the deceased to leave the baby and came back. He further submits that as the deceased caught hold the hairs of

the appellant, the deceased provoked the appellant and on such provocation the appellant gave stab blows on the chest and stomach of the deceased, therefore, the impugned judgment is not sustainable in law and need to be set aside.

6. Learned Addl. Standing Counsel while supporting the impugned judgment passed by the trial court submits that the appellant had prior intention to kill the deceased, therefore, he came with a knife with an intention to kill the deceased. He further submits that as the appellant stabbed successively on the chest and stomach of the deceased with an intention to kill him, the trial court rightly convicted him under Section 302 of I.P.C, therefore, the impugned judgment may not be interfered with.

7. Considering the rival submissions of the parties and after going through the materials available on record, it appears that the occurrence took place on 18.3.1990 at about 6.00 P.M. and at that time P.Ws.1, 2, 9, 12, 13, 14, 16 and 17 were present at the spot and nearby places, which is visible to them clearly. They saw the entire incident and nothing has been brought out from those witnesses in cross-examination to disbelieve their testimony. The Doctor-P.W.15, who conducted the post mortem examination found the following external injuries:

> i) Stab wound vertically placed on the left side of chest of size 2 c.m. x 1 c.m. The upper end was little more wider than the lower end. It is placed 3 c.m above and 2 c.ms. towards the middle line of the left nipple. On gently probing, the depth of the wound is 4 c.m., but on manipulation, the depth is 11 c.ms. On opening the wound, there was a haematoma of size 8 c.m. x 6 c.ms. x 5 c.ms. Underneath the skin and involving the inter costal muscles, portions of third and 4th ribs on the left side have been cut at a distance of 1 c.m from the xiphisternum to the left side. On opening the rib cage, both the lungs were in tact and collapsed and pale. The pericardium is cut below the side of the injury of size 1 c.m. x 5 c.m and pericardial cavity contains 1 ½ liters of partially clotted blood. On clearing the blood, the left ventricle was found to be cut vertically of the size 1 c.m. x 5 c.m. involving the entire length of the musculature of the left ventricle at 6 c.m. above the base of the heart. All the chambers of the heart were empty.
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> ii) Incised wound 3 c.m. x 1 c.m x 1 ½ c.m. on the abdominal wall 13 c.ms. towards the left and 5 c.ms. above the level of umbellics. The injury was extending downwards and towards the mid

line. On opening, there was a haematoma of size 4 c.ms. x 3 c.ms. x ½ c.m present under the skin. On further opening neither the peritoneum nor intra abdominal organs were injured.

P.W.15 further stated that both the injuries were ante mortem in nature. The cause of death was due to shock and hemorrhage consequent upon the injury sustained on the chest wall affecting the heart. In all natural circumstances, the injuries may cause immediate death in ordinary course of nature. Injury no.(i) is possible by M.O.I. Taking into consideration the nature of injuries, it is crystal clear that the stab blows were given with force. P.Ws.1, 2, 9, 12, 13, 14, 16 and 17, who were eyewitnesses to the occurrence also corroborated regarding the successive blows made by the appellant. However, the appellant came with a knife to give threatening to the deceased at first instance and allowed him to come back after leaving the baby. The deceased when came back there was exchange of hot words between them and due to such altercation of words the appellant stabbed the deceased by giving successive blows. This Court by order dtd.17.7.2013 directed learned Addl. Government Advocate to obtain criminal antecedents of the appellant. The letter dated 21.7.2013 of the Inspector-in-Charge of Saheed Nagar Police Station produced before this Court by the learned Addl. Government Advocate shows that there is no criminal antecedent against the appellant and on being released on bail the appellant is maintaining his livelihood peacefully. Therefore, considering the totality of the evidence of the witnesses this Court feels that the offence committed by the appellant is coming under Section 304, Part-I of I.P.C and not under Section 302 of I.P.C.

8. Accordingly, this Court sets aside the conviction of the appellant under Section 302 of I.P.C. and convict him for commission of offence under Section 304, Part-I of I.P.C. and sentence him to undergo imprisonment for a period of ten years. Since the appellant is on bail in pursuance of the order dtd.26.11.1996 passed by this Court in Misc. Case No.552 of 1996, the trial court is directed to take immediate steps to apprehend him to serve the rest of the sentence. It is needless to say that the period of sentence already undergone by the appellant be set off. The bail bonds of the appellant stand cancelled.

Appeal allowed in part.

2013 (II) ILR - CUT- 812

S. PANDA, J & DR. B. R. SARANGI, J.

CRLA. NO. 79 OF 2001 (Dt.14.08.2013)

ABDUL ALIF @ GUDU ……....Appellant

.Vrs.

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – Appreciation of evidence – Accused and deceased last seen together – This theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

In this case it appears from the evidence of P.W.5 that the deceased was seen in the company of the appellant and accused Afroz Ahammed on the night of occurrence as they had been to his betel shop where he had seen them together and he heard the firing sound of bullet which came from Manmohan ME School side around 11.30 to 12 mid night and on the next day morning he got the news that the deceased was lying dead in that school field – P.W.5 being a witness to the last seen theory and he having been examined on the next day morning of the occurrence his evidence cannot be discarded.

(Para 9)

CRIMINAL TRIAL – Appreciation of evidence – P.W.8 stated to be the only eye witness to the occurrence of murder – He disclosed the evidence before the police three months after the occurrence – His further evidence is that police instructed him to tell the fact before the Magistrate which he had seen and on that basis the Magistrate recorded his statement U/s.164 Cr. P.C. which is not in terms of the provision contained in Section 164 Cr. P.C. – Held, evidence of P.W.8 is not trust worthy, hence the same is liable to be discarded.

(Para 8)

Case laws Referred to:-

1.(2013)55 OCR (SC)-116 : (Goudappa & Ors.-V- State of Karnataka)
2.(2013)55 OCR (SC)-123 : (Ramswaroop & Anr.-V- State Madhya Pradesh).
3.(2008)14 SCC 667 : (Chattar Singh & Anr.-V- State of Haryana).

For Appellant - M/s. S.R. Mohapatra, D. Dash, A. Dash,

G.P. Panda, B. R. Mohanty,
Miss M. Sahoo, P.K. Nayak,
M. R. Mohanty, N.K. Das & S.K.Awasthy.
For Respondent - Mr. Zaffrulah, Addl. Standing Counsel.

DR. B.R.SARANGI, J. This appeal is directed against the judgment and order dated 27.02.2001 passed by the learned Addl. Sessions Judge, Jharsuguda in S.T.Case No. 283/25 of 2000 convicting the appellant of the offence under Section 302/34 IPC and sentencing him to undergo imprisonment for life.

2. The appeal was admitted on 30.04.2001 and Misc. Case No.157 of 2001, which was filed for grant of bail, was considered and by order dated 26.03.2002, the same was dismissed as not pressed. Thereafter, in Misc. Case No.162 of 2003, this Court considering the circumstances of the case, allowed the bail application and directed that during pendency of the appeal, the sentence passed against the appellant by the learned Addl. Sessions Judge, Jharsuguda in S.T.Case No. 283/25 of 2000 shall remain suspended and he shall be released on bail of Rs.10,000/- with two sureties each for the like amount to the satisfaction of the trial court and accordingly disposed of the said Misc. Case. After the appellant was released on bail on 22.07.2004, the appeal was posted to 07.08.2013 for hearing but none appeared for the appellant. Therefore, this Court by order dated 07.08.2013 was constrained to direct to cancel the bail and apprehend the appellant for hearing of the appeal and directed to put up this matter on 14.08.2013. When the matter was taken up on 14.08.2013, none appeared for the appellant. Therefore, finding no way out, this Court taking into account the LCR and the contentions raised in the appeal memo, took up this matter for final disposal.

3. The prosecution case, in short, is that on 15.09.1996 at about 9 P.M. deceased-Bhismadev Biswal, the son of the informant Bideshi Biswal (P.W.4) left the house for decorating “GANESH PUJA” Pendal. On the next day around 5.30 A.M., P.W.4 got information from Gopal Kadia (P.W.7), a grocery shop keeper, that the deceased had been killed by some persons and his dead body was lying in the play ground of Manamohan School. On receipt of the said information, P.Ws.4 & 7 proceeded to the spot and found the deceased lying dead. They also found that the deceased had one gunshot injury on his head and one bullet was lying there. P.W.4 lodged the information in writing before the OIC, Jharsuguda Police Station vide Ext.3 suspecting that the deceased was murdered. On receipt of the said information (Ext.3), the police took up investigation and on completion of

investigation getting prima facie materials against the present appellant and another accused Afroz Ahammed, filed the charge-sheet. Since accused Afroz Ahammed absconded and his attendance could not be procured, the case of the present appellant was split up and the same was committed to the court of Session for trial.

4. The accused-appellant took the plea of innocence and denied the alleged occurrence and has stated that the case has been falsely foisted against him.

5. In order to bring home the charge, the prosecution examined 11 witnesses, out of which P.W.4 is the informant, P.W.10 is the doctor, who conducted autopsy over the dead body of the deceased, P.W.11 is the I.O., P.W.8 is an eye witness to the occurrence, P.W.5 is another independent witness for the prosecution, who deposed that on the night of the occurrence the present appellant along with other accused Afroz Ahammed and deceased had come to his betel shop with liquor and had taken betel from his shop. P.W.1 is a seizure witness, P.W.2 is another witness, who speaks about the lying of the dead body of the deceased in the field of Manamohan School, P.W.3 is the mother of the deceased, P.W.6 is another witness for the prosecution who speaks that the accused persons along with the deceased had come to his egg shop on the night of occurrence, P.W.7 is the witness who informed the father of the deceased about the dead body of the deceased lying in the field of Manamohan School and P.W.9 is the Havildar, who had escorted the dead body of the deceased for post mortem examination to the District Headquarter Hospital, Jharsuguda. Prosecution has relied upon the documents which were marked as Exts.1 to 12. On the other hand, the appellant declined to examine any witness in his defence and has not filed any document denying the allegation.

6. The learned Addl. Sessions Judge, Jharsuguda after going through the evidence available on record and on thorough analysis of evidence, both oral and documentary, was convinced that the prosecution could be able to establish the guilt of the accused-appellant beyond all reasonable doubt.

7. Mr. Zafarullah, learned Additional Standing Counsel states that the deceased had received gunshot injury, which is a fatal blow and the appellant facilitated the other accused, namely, Afroz Ahammed, who gave the fatal blow and made no effort to prevent him from assaulting the deceased, thereby it leads to an irresistible and inescapable conclusion that the appellant shared the common intention with accused Afroz Ahammed to kill the deceased. Therefore, he is liable to be convicted under Section

302/34 IPC. In support of his contentions, he relies upon the cases of ***Goudappa & Ors. V. State of Karnataka***, (2013) 55 OCR (SC)-116 and ***Ramswaroop and another V. State of Madhya Pradesh***, (2013) 55 OCR (SC)-123. He also states that the conviction should be affirmed in the circumstances and no lesser punishment can be imposed as the offence committed by the appellant is grievous in nature.

8. To bring home the charge under Section 302/34 IPC and convict the appellant by imposing punishment of imprisonment for life, learned Addl. Sessions Judge relied upon the evidence of P.W.5, an independent witness, who deposed that on the night of occurrence the appellant along with the deceased and other accused Afroz Ahammed had come to his betel shop with liquor and had taken betel from his shop and the evidence of P.W.8, an eye witness to the occurrence, who stated that on the night of occurrence he along with the deceased, the appellant and accused Afroz Ahammed had proceeded together and the deceased had taken betel from the shop of P.W.5 and moved to Manamohan School field. In that field the deceased, accused Afroz Ahammed and the present appellant sat together and he sat at a little distance from them. He also deposed that the deceased, accused Afroz Ahammed and the appellant consumed liquor and talked among themselves. In course of talking a hitch ensued between accused Afroz Ahammed and the deceased and they fought with each other. While the deceased was escaping, the appellant caught hold of his hands and thereafter accused Afroz Ahammed brought out a revolver from his pant pocket and fired at the head of the deceased for which he fell down dead. This evidence of P.W.8 remained unshaken in the cross-examination. So far the conduct of P.W.8 is concerned after having escaped from the spot he could have brought this fact to the notice of any person to whom he could take into confidence or he could have intimated P.W.4 or any of the family members about the incident or he could disclose the same before the police immediately after the occurrence. He was examined almost three months after the occurrence as stated by the I.O., i.e., on 25.12.1996. No plausible explanation for such belated examination has been given. Evidence of P.W.8 is that out of fear he had not disclosed the fact and confined himself in his house as the accused persons had chased and targeted him to assault for the reason that he had seen the entire occurrence, i.e. killing of the deceased by the accused persons. But with regard to the delay in examination of P.W.8, the I.O. (P.W.11) has stated that while secretly collecting information about the case, he got information from one Lalan Yadav, who was examined by him on 25.12.1996 that P.W.8 had accompanied the deceased and the accused persons to Manamohan M.E. School field in the night of 15.09.1996 and prior to that no such information

was available with him regarding the same. In paragraph 7 of his cross-examination, it was elicited from P.W.8 that after the arrest of the appellant by the Police, the fear from his mind was wiped out and thereafter he gathered courage to disclose the matter before the police. This could only happen on 25.12.1996 while the occurrence took place on 15.09.1996, which is more than three months after such occurrence. This conduct of P.W.8 creates a doubt why he took such a long time to disclose the fact of commission of offence by the appellant either before the parents of the deceased or the police or any other person nearer to him. But the learned Addl. Sessions Judge, Jharsuguda has given his explanation justifying the conduct of P.W.8 stating that he is a man of outside the state as he belongs to the State of Chhatisgarh. It is quite natural that when such ghastly occurrence had taken place in his presence, he may be targeted by the accused persons thereby would not have dared to disclose the incident before others including the police. From the evidence of P.W.11, it is clear that police arrested the appellant on 27.12.1996 and recorded his statement under Section 164 Cr.P.C. and forwarded to the Court on 28.12.1996 at 1.30 P.M. The conduct of P.W.8, the only eye-witness to the occurrence*, is* doubtful and not that much trustworthy to consider for imposition of major penalty. In cross-examination, P.W.8 specifically stated that 4-5 months after the occurrence, the police picked him up from his house to the Police Station and kept him there and during that period Police searched for the appellant and accused Afroz Ahammed. But his further evidence is that police instructed him to tell the fact before the Magistrate which he had seen and on that basis the Magistrate recorded his statement under Section 164 Cr.P.C. which is not in terms of the said provisions as he has deposed on the instruction of police. Learned Addl. Sessions Judge, Jharsuguda has taken presumptive assumption and believed the statement of P.W.8. Therefore, the evidence of P.W.8, the so-called eye witness is not trustworthy, accordingly the same is discarded.

9. P.W.5 has specifically stated in his evidence that on the night of occurrence, the deceased, the appellant and accused Afroz Ahammed had come to his betel shop with liquor and the deceased had taken betel from him. The deceased had also taken three Wills Flake Cigarettes in his pocket. While the deceased taking betel and cigarette had told him not to close the shop till his return. He further stated that he along with Buti, Bikram Panda and one Chiyan were in his betel shop and around 11.30 to 12 mid night he heard the firing sound of a bullet from the field of Manamohan M.E. School. It thus appears from the evidence of P.W.5 that the deceased was seen in the company of the appellant and accused Afroz Ahammed on the night of occurrence and that he heard the firing sound of

bullet which came from Manamohan M.E. School side around 11.30 to 12 mid night**.** This evidence of P.W.5 is a strong piece of circumstantial evidence coupled with the fact that the accused was last seen together with the deceased. On scrutiny of the evidence of P.W.5, it is found that around 11.30 to 12 mid night, he heard that a firing sound of bullet came from the field of Manamohan M.E. School and by that time he had kept his betel shop open and thereafter closed the same between 12 to 12.30 A.M. in the night. But till he closed the betel shop, the deceased did not return and on the next day morning he got the news that the deceased was lying dead in the Manamohan M.E. School field. In cross-examination, he specifically admitted that police had come and examined him in the case on the next day morning of the incident. The police also asked him as to when accused Afroz Ahammed, the appellant and the deceased had come to his betel shop. The police had examined him thrice, i.e. for the first time on the next day of the incident, then 3-4 days after the occurrence, and then 11-12 days thereafter in order to ascertain whether the accused Afroz Ahammed, the appellant and the deceased had come to his betel shop. It is further stated by him that the appellant had come to his betel shop along with accused Afroz Ahammed carrying liquor with them and also they proceeded to Jhanda Chowk. Thereafter, he heard about firing shot sound between 11.30 to 12 midnight. This being the evidence available on record and P.W.5 being a witness to the last seen together and he having been examined on the next day morning of the occurrence, his evidence cannot be discarded. Thus, his evidence has got a corroborative value in view of the fact that subsequently 3-4 months after the occurrence P.W.8 the only eye witness was examined by the Police. He also narrated the same way as P.W.5 has stated. Even if the conduct of P.W.8 is doubted being an eye-witness to the occurrence but evidence of P.W.5 is unimpeachable in view of the fact that police on the next day morning examined him, who candidly stated that the appellant along with the deceased and accused Afroz Ahammed had been to his betel shop, where he had seen them together. At this juncture, it is necessary to refer to the decision of the apex Court in ***Chattar Singh and another V. State of Haryana***, (2008) 14 SCC 667 in which the apex Court observed as follows:

> "18. So far as the last-seen aspect is concerned it is necessary to take note of two decisions of this Court. In *State of U.P.* v. *Satish (2005) 3 SCC 114,* it was noted as follows: (SCC p. 123, para 22)
>
> "*22*. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of

the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2."

19. In *Ramreddy Rajesh Khanna Reddy* v. *State of A.P. (2006) 10 SCC 172,* it was noted as follows: (SCC p. 181, para 27)

"*27*. The last-seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."

(See also *Bodhraj* v. *State of J&K, (2002) 8 SCC 45*)

10. In the case in hand, it is the admitted fact that the deceased had met a homicidal death because of a bullet fired at his head. There is no dispute that it was a gunshot injury. P.W.10 who had conducted autopsy over the dead body of the deceased on 16.09.1996 found as follows:

11. (i) one entrance wound on right tempro parietal region about 6 cms. Above lateral part of eye brow. Margins of the wound were irregular and the length was 5 cms. X 4 cms. He found singeing of hairs and tattooing of the skin especially over the front and lower aspect of the wound.

(ii) He found one exit wound near left pepterion on the left side about 4 cms. Above upper border of left pina of 6 cms. X3 cms. Margins were irregular and skin margins evarted, no seging of hairs or tattooing of other phenomenan. Subcutaneous tissue extravassted with blood and clotted and not washable with water.

(iii) He found one flap of scalp and skull and dur a from upper border of entrance wound to a point about 2.5 cms. above the exit wound and extending posteriorily upto occiput and hanging there by a flap

of skull. Margins and tissue were abulsed and lacerated, fracture extended from left side up to the maxilla on interior fossa. The dimension of the flap was 17 cms. X 14 cms.

(iv) The track extended straight from entrance wound to exit wound surrounding brain abulsed and grossly lacerated and especially over right and left tempro parietal lones. The entire part of frontal lobe was intact and visible. The optic chiasma was intact and exposed. The white matter of brain over lacerated part was exposed.

P.W.10 opined that the injuries were ante-mortem in nature and death had been caused by injuries to the vital organ like brain resulting shock and hemorrhage and all the injuries are consistently fire arm injuries and were sufficient to cause death in ordinary course of nature. He has proved the post-mortem report marked as Ext.7. The death of the deceased was due to gunshot injury on the head is consistent. P.W.1 was a witness to the seizure of blood-stained earth and sample earth and P.W.2 is the peon of Manamohan M.E. School, who reported about the lying of a dead body in the school field. P.Ws.3 and 4, who are the parents of the deceased do not say anything about the occurrence and they were the post occurrence witnesses. On the basis of the information lodged by P.W.4, the investigation was taken up. Similarly, P.W.6 is a witness, who simply deposed that the dead body of the deceased was lying in Manamohan M.E. School field. But subsequently, he was declared hostile.

12. On the basis of the materials available on record, even if the evidence of P.W.8, who is so called eye witness to the occurrence, is discarded because of his conduct, relying on the evidence of P.W.5, who stated about the fact of last seen together, and applying decisions of the apex Court referred to supra and other corroborative evidence, we are of the opinion that the prosecution has successfully established its case against the appellant for commission of offence under Section 302/34 IPC beyond any reasonable doubt.

12. We are in full agreement with the sentence imposed by the learned Addl. Sessions Judge, Jharsuguda and there is no good ground to interfere with the same since the appellant has committed an offence punishable under Section 302/34 I.P.C.

13. Having regard to the above, we do not find any merits in the appeal. Accordingly, we confirm the conviction of the appellant under Section 302/34 I.P.C. and sentence imposed thereunder. Consequently, the appeal

fails and the same is dismissed. The bail bond stands cancelled. The appellants be apprehended to serve out the remaining period of sentence.

Appeal dismissed.

2013 (II) ILR - CUT- 820

S. PANDA, J & DR. B. R. SARANGI, J.

MATA NO.41 OF 2012 (Dt.27.08.2013)

MOUMITA ROYCHOUDHURY ……Appellant

.Vrs.

ABHIJIT CHATTARJEE ……Respondent

A. HINDU MARRIAGE ACT, 1955 – S.12 (1) (a)

Voidable Marriage - Impotence of husband – Marriage not consummated – Appellant-wife proved by convincing evidence that the respondent-husband is impotent and has subjected her to cruelty – The respondent-husband has not taken any step to have him medically examined by a competent medical officer to prove that he is not impotent – Held, since the marriage has not been consummated due to impotency of the respondent-husband, learned Judge, Family Court is justified in annulling the marriage by passing a decree of nullity. (Para 10)

B. HINDU MARRIAGE ACT, 1955 – S.12

Appellant claimed for compensation in the application U/s.12 of the Act – "Compensation" can be construed as "alimony" – Held, mentioning of compensation in the application U/s.12 of the Act, amounts to claim of permanent alimony by the appellant-wife U/s.25 of the Act. (Para 13)

C. HINDU MARRIAGE ACT, 1955 – S.25

Grant of permanent alimony U/s. 25 of the Act – Any Court exercising jurisdiction Under the Hindu Marriage Act, before granting permanent alimony is required to consider the following :

(a) that the order granting permanent alimony is made at the time of passing any decree under the Act, 1955 or at any time subsequent thereto,
(b) the income and other property of the applicant,
(c) the respondent's own income and other property,
(d) the conduct of the parties, and
(e) other circumstances of the case.

(Para 18)

D. HINDU MARRIAGE ACT, 1955 – S.25 r/w Section 107 C.P.C.

Grant of permanent alimony – Power of the High Court – Held, this court has the power U/s.25 of the Act to award permanent alimony just like the original Court. (Para 23)

Case laws Referred to:-

1.AIR 2011 SC 2748 : (Vinny Parmvir Parmar-V- Parmvir Parmar)
2.AIR 2012 SC 2586 : (Vishwanath Sitaram Agrawal-V- Sau. Sarla Vishwanath Agrawal)
3.AIR 2013 SC 114 : (U. Sree-V- U. Srinivas)
4.AIR 2001 MADRAS 147 : (D. Balakrishnan-V- Pavalamani)
5.AIR 2004 BOMBAY 283 : (Bhausaheb @ Sandu s/o.Raghuji Magar-V- Smt.Leelabai w/o Bhausaheb Magar)

For Appellant - M/s. Subhasis Sen, M. Ganguly, C. Nayak.
M/s. Gautam Mukherjee, Partha Mukherjee, S.D. Ray, A.C. Panda, S. Priyadarshini.
For Respondent - M/s. Er. Nagendra Kumar Mohanty, B.K. Mohanty, B.K. Mohapatra.
M/s. G.N. Rout, S.K. Das.

DR. B.R.SARANGI, J. Against the judgment and decree dated 24.03.2012 passed by the learned Judge, Family Court, Cuttack in Civil Proceeding No. 815 of 2007 annulling the marriage by decree of nullity subject to payment of permanent alimony of Rs.5,00,000/- against the respondent-husband and directing to pay the said amount within three months, the present appeal has been filed by the appellant- wife.

2. The wife-appellant filed an application under Section 12 of the Hindu Marriage Act, 1955 admitting the marriage with the respondent-husband on 20.06.2007 as per the Hindu rites and customs at Cuttack. At the time of marriage, it is stated that her parents have gifted to her as well as the respondent-husband articles as per Scheduled-A of the petition. The

appellant-wife also admitted that both the appellant and respondent were highly qualified at the time of marriage and she was serving as a Nursery Teacher at D.A.V. Public School, Shree Vihar Colony, Tulasipur, Cuttack and was getting a consolidated salary of Rs.5000/- and for the marriage, she left that job. The respondent has passed M.Sc. in Mathematics from IIT, Kanpur and has also done Post Graduate degree in Computer Science from Birla Institute of Technology and Science, Pilani, Rajastan. After completion of his study, he served as a software engineer for some time and thereafter opened his own software business at Delhi in the name and style of "Towards Vision Technology Private Limited" and from his business he is getting more than rupees one lakh per month. She further alleged that there has been no sexual cohabitation among them and therefore their marriage dated 20.6.2007 is voidable and is liable to be annulled by a decree of nullity. She has prayed that keeping in view her mental agony, life and future, the respondent-husband is liable to pay her a consolidated compensation of Rs.10,00,000/- and also liable to return all her articles as mentioned in scheduled-A of the petition.

3. The respondent-husband filed his written statement stating that after the marriage he never expressed his inability to perform sexual act with the appellant-wife. He alleged that the appellant-wife intentionally avoided to have sexual intercourse with him and always disliked him and humiliated him also. He further urged that no dowry had been given to him at the time of marriage and the description of articles mentioned in the scheduled-A of the petition is imaginary one, thereby her request to return the articles cannot be allowed. He further vehemently urged that under the matrimonial law there is no payment of compensation and as such, the appellant is not entitled to get such relief. According to him, the appellant-wife being a working lady having sufficient means, the prayer for decree of nullity annulling the marriage dated 20.6.2007 has to be unconditional.

4. In order to substantiate the contention, the appellant-wife has examined two witnesses, namely, P.W.1, she herself and P.W.2, her mother, Krishna Roychoudhury, whereas the respondent-husband has examined one witness, namely, O.P.W.1, he himself. The appellant, has relied upon the document, marked as Exts. 1 to 7 and 7/a, whereas the respondent relied upon the documents, marked as Exts. A to E.

5. From the materials available on record, it is found that after the marriage was solemnized, both the appellant and respondent went to the house of the respondent at Hazaribag, Jharkhand but in the fourth night their marriage could not be consummated as respondent-husband did not

establish physical relationship with the appellant-wife on that night. They stayed at Hazaribag from 22.6.2007 to 11.7.2007 in the house of the respondent-husband along with other family members and during the said period there was no physical relationship among them. However, the appellant-wife came to know from his family members that the respondent-husband is very shy and due to such shyness he was hesitant to keep physical relationship with her. On 11.7.2007, the appellant-wife came to the house of her parents for appearing in her 1st Year M.Sc. Examination. On 16.8.2007 while she was in the house of her parents, she heard the news of the death of her father-in-law and on 17.8.2007 she went to Hazaribag. After funeral ceremony was over, she came back on 28.8.2007 but during the period from 17.8.2007 to 28.8.2007 there was no physical relationship among them. For business purpose, the respondent-husband was staying at New Delhi in a rented house and after the examination was over the appellant-wife went to the house of the respondent-husband at Arjun Nagar near Sufderjung on 18.10.2007 and stayed with him till 1.11.2007. The appellant-wife felt that the respondent-husband was trying to dominate her and was not interested to keep any marital relationship including sexual relationship with her. This inflicted mental agony and shock on her and she suspected that the respondent-husband was impotent. At the same time, the respondent-husband was showing indifferent attitude towards sex and told that he has no sexual appetite or desire. In one occasion the appellant-wife forced him for cohabitation but the respondent-husband expressed his inability for the same thereby she became definite that the respondent-husband was lacking in capability for sex. Due to such conduct of the respondent-husband, the appellant-wife became harassed and she lost her mental balance and therefore, the marriage has not been consummated at all. Due to the illness of the grandmother of the appellant, she came to Cuttack immediately where she disclosed before her friends and close relations about the impotency of her husband and thereafter her parents also came to know about the same. On being contacted, the family of the respondent-husband reluctantly admitted about his impotency and requested her to tolerate it for the sake of their family prestige and also stated that impotency could be cured through treatment.

6. Learned counsel appearing for the respondent-husband stated that on perusing the application filed under Section 12 of the Act by the appellant-wife, it would be seen that neither there is any pleading nor any prayer for claiming permanent alimony. On the other hand, appellant-wife has claimed compensation of Rs. 10 lakhs, on consideration of which the learned Judge, Family Court has granted Rs.5 lakhs as permanent alimony, which is beyond the pleading. Therefore, he vehemently urged that the

appellant is not entitled to get any permanent alimony, save and except the compensation claimed in her application under Section 12 of the Act. He further urged that by granting such permanent alimony learned Judge, Family Court has exceeded his jurisdiction and therefore the impugned judgment to that effect cannot be sustained.

7. To the above contention, learned counsel for the appellant-wife states that though no relief has been sought in the application filed under Section 12 of the Hindu Marriage Act, 1955, hereinafter referred to as "the Act" though claim of compensation has been made but in effect the same amounts to relief for grant of permanent alimony and rightly the learned Judge, Family Court has passed the order granting permanent alimony of Rs.5 lakhs. However, he disputes with regard to the quantum of Rs.5 lakhs as permanent alimony keeping in view the status of the appellant-wife at par with the status of the respondent-husband. He has relied upon the judgments of the apex Court ***Vinny Parmvir Parmar v. Parmvir Parmar***, AIR 2011 SC 2748, ***Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal***, reported in AIR 2012 SC 2586 and ***U. Sree v. U. Srinivas,*** AIR 2013 SC 114.

8. In view of the aforesaid background of the case, the following questions arise for consideration in this case.

(i) Whether the marriage has been consummated between the appellant and the respondent?

(ii) Whether the decree of nullity annulling the marriage can be granted to the appellant?

(iii) whether the compensation claimed by the appellant can be equated with the claim of permanent alimony or not?

(iv) Whether the appellant is entitled to get any permanent alimony?

(v) To what order?

9. Marriage between the appellant and the respondent is not disputed. The appellant in her application under Section 12 of the Act, prays for a decree of nullity annulling the marriage dated 20.6.2007 on the ground that the respondent is impotent and their marriage has not been consummated since the date of their marriage. To such assertion, the respondent has neither denied specifically in his written statement nor has stated with regard to consummation of their marriage by sexual intercourse. On the other hand,

in paragraph-17 of the written statement filed by the respondent-husband it is stated that the appellant-wife on each and every occasion has avoided to have sexual intercourse with him. At the same time, respondent-husband has also admitted that he has no objection if a decree of nullity by annulling the marriage is passed.

10. The appellant-wife has proved by convincing evidence available on record that the respondent-husband by his conduct has subjected her to cruelty. That apart, the appellant-wife has not produced any document to prove the impotency of the husband- respondent. Because of that reason the marriage has not been consummated. The respondent has not taken any step to have him medically examined by a competent medical officer to prove that he is not impotent. Even from the oral evidence adduced by P.W.1 nothing has been elucidated to discard her testimony about the impotency of the respondent. In view of such position, since the marriage has not been consummated due to impotency of the respondent-husband, learned Judge, Family Court is justified in annulling the marriage by passing a decree of nullity on the application filed under Section 12 of the Act.

11. In course of hearing on a query being made by the Court to the counsel appearing for both the parties, it reveals that there is no possibility of reunion by the parties. Therefore, the order passed by the Judge, Family Court annulling the marriage by a decree of nullity is not required to be interfered with. Thus, questions no. (i) and (ii) are answered accordingly.

12. So far as the question No.(iii) is concerned, in order to answer this question, it would be profitable to deal with the dictionary meaning of 'compensation' and "permanent alimony".

"(1) The word "compensation" should be taken to mean the sum remaining after setting-off the gains from the amount of loss through the non-fulfilment of the contract. [Muralidhar Chatterjee v. International Film Co. Ltd., AIR 1943 P.C. 34:206 IC 1].

(2) The expression "compensation" ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damage in an action for the breach. The term "compensation" as pointed out in Oxford Dictionary, signifies that which is given recompense, an equivalent rendered damages, on the other hand, constiture the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term "Compensation"

etymologically suggests the image of balancing one thing against another. Its primary signification is equivalent, and the secondary and more common meaning is something given or obtained as an equivalent. [Mohamed Mozahara Ahad v. Mohamad Azimadin Bhauinya, AIR 1923 Cal.507 at 511].

(3) According to dictionary it means, "compensating or being compensated; thing given as recompense". In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. [Lucknow Development Authority v. M.K. Gupta, AIR 1994 SC 787].

(4) Though the word "compensation" is not defined in the Act or in the rules it is the giving of an equivalent or substitute of equivalent value. It means when you pay the compensation in terms of money it must represent, on the date of ordering such payment, the equivalent value, (Para 24) Rathi Memon v. Union of India, (2001) 3 SCC 714:2001 SCC (Cri) 1311:AIR 2001 SC 1333.

(5) The dictionary meaning of the word "compensation" is as under "

Black's Law Dictionary

"money given to compensate loss or injury."

Webster's Third New International Dictionary

"the act or action of making up, making good or counterbalancing rendering equal:"

P.Ramanatha Aiyar: Law Lexicon

"something given or obtained as an equivalent; … an equivalent given for property taken or for any injury done to another;"

The meaning of "permanent alimony reads as follows:-

"Alimony, signifies that allowance which a married woman sues for on separation from her husband.

As to construction and force of convenants in a Separation Deed. [See F. Stroud's Judicial Dictionary]

> (Alimonia), the allowance which is made to a woman for her support out of her husband's estate when she is under the necessity of living apart from him. This provision is allowed to the wife during the pendency of a suit for divorce or judicial separation as well to provide the wife with the means to obtain justice as for her ordinary subsistence (Matrimonial Causes Act, 1950. Section 19 and 20). When there has been a decree of judicial separation, alimony becomes a permanent allowance, and is continued during the whole period of separation (Section 20). Upon a decree of divorce, the relief granted to a wife is called maintenance (q.v.). Upon an application for alimony, the court requires on the part of the husband a statement both of his casual and of his certain income to be set forth (Matrimonial Causes Rules, 1957, Rule 48). The wife, although the guilty party, is sometimes allowed alimony, or a provision by way of alimony subject to conditions, but alimony pendente lite is normally refused where the wife has been guilty of adultery. As a rule, maintenance is fixed at about one-third of the joint incomes of husband and wife if there are not and a larger amount if there are children to be supported by the wife; in the case of alimony pendente lite, the usual rate is one-fifth. See also, the Matrimonial Causes (Property and Maintenance) Act, 1958. [See Earl Jowitt's The Dictionary of English Law, 2nd Ed. At 98-99].

13. Even though in the application filed under Section 12 of the Act, the appellant claims for compensation, in view of the analogy made in the foregoing paragraphs, the said 'compensation' can be construed as 'alimony'. Therefore, we do not have any hesitation to state that mentioning of compensation in the application under Section 12 of the Act amounts to claim of alimony by the appellant-wife. Thus, question no.(iii) is answered in favour of the appellant-wife.

14. Since there is no possibility of any reunion, what should be the just and proper permanent alimony that can be granted to the appellant to meet the situation. During pendency of this appeal, the appellant has filed Misc. Case No. 85 of 2013 under Order 41, Rule-27 read with Section 151 of the Code of Civil Procedure, 1908 by furnishing documents to be treated as additional evidence for determination of alimony. Apart from the same, Misc. Case No. 100 of 2013 has been filed under Order-6, Rule-17 of the Code of Civil Procedure, 1908 seeking amendment of the appeal memo where she has given enhanced figure claiming higher amount towards permanent alimony. To the said petitions, objection has been filed by the respondent-husband denying the contentions raised in both the misc. cases. However,

both the misc. cases are taken into consideration for determination of alimony in favour of the appellant.

15. Learned counsel for the respondent-husband relied upon the judgment passed in ***D. Balakrishnan v. Pavalamani,*** AIR 2001 MADRAS 147, ***Bhausaheb alias Sandu s/o Raghuji Magar v. Smt. Leelabai w/o Bhausaheb Magar***, AIR 2004 BOMBAY 283 and unreported judgment of the apex Court in ***Poonam v. Mahendra Kumar*** (CRLMP 18899 of 2009 disposed of on 16.11.2009, arising out of the judgment and order dated 19.03.2009 in CRM No. 24684 of 2008 of the High Court of Punjab & Haryana at Chandigarh). So far as the judgments of the Bombay and Madras High Courts are concerned, the courts have held that permanent alimony can be granted on making an application furnishing all details regarding his/her own income or other property whereas the apex Court in *Poonam (supra)* has held that no alimony can be granted to the women who deserted the husband. The judgment of the apex Court is not applicable in the present context in view of the fact that the question of deserting by the appellant to the respondent does not arise in the case in hand, rather it is otherwise.

16. From the materials available on record, it is found that in paragraph-19 of the evidence adduced by the appellant, she herself admitted that she is working in D.A.V. Public School, Tulasipur, Cuttack as a primary teacher from 19.6.2008 and stated that her monthly salary is Rs.3500/-, but she being an employee, cannot be deprived of getting permanent alimony. In paragraph-17 she has stated that she has not filed any documents to show the business of the respondent in the name and style of “Towards Vision Technology” rather she has only filed a document showing payment of income tax by the respondent. However, vide Ext.1 she has proved that the respondent is the Director of “Towards Vision Technology” but referring to Exts. 1 and 2 neither the appellant nor her mother during course of examination have stated that they have no knowledge about the information contained in Ext.1. Therefore, no importance can be attached to Ext.1. However, referring to Ext.7, the income tax return for the assessment year 2011-2012 of the respondent, the appellant has stated that the gross income of the respondent is Rs.13,72,750/- and he was paying tax of Rs.2,42,899/- whereas the respondent in paragraph-26 of his evidence during course of examination stated that his earning is Rs.30,000/- per month from “Towards Vision Technology” and he is working as a consultant of some other firms. In paragraph-25 of his evidence he has stated that he gets remuneration at times for his other jobs and he also pays money to those firms. In paragraph-3 of the evidence, the appellant has stated that

the respondent has completed his M.Sc. examination in Mathematics from IIT, Kanpur and he has also completed his Post Graduate Degree in Computer Science from Birla Institute of Technology and Science, Pilani, Rajastan, and being a qualified person, it cannot be said that he has no income.

17. Apart from the evidence available on record during pendency of the appeal, Misc. Case No.85 of 2013 has been filed by producing additional evidence providing income tax return and share valuation certificate of the respondent's company prepared by the Chattered Account. The same has been taken into consideration for determination of permanent alimony to be granted in favour of the appellant-wife.

18. In view of the materials available on record, since there is no possibility of any reunion between the parties, this Court has to grant permanent alimony to settle the dispute for all times to come. As it transpires from the record even in this proceeding the appellant has not filed any separate application seeking permanent alimony and maintenance. Even if no separate application has been filed, the Court can take into consideration the contention raised by the appellant at the time of hearing. Therefore, in order to consider this aspect for grant of permanent alimony, reference is made to Section 25 of the Act, which reads as follows:-

> "Section 25. Permanent alimony and maintenance:- (1) Any Court exercising jurisdiction under this Act, may at the time of passing any decree or at time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the appellant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant (the conduct of the parties and other circumstances of the case), it may seem to the Court to be just and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
>
> (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

> (3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

A perusal of the above provision makes it clear that any Court exercising jurisdiction under the Hindu Marriage Act, before granting permanent alimony under Section 25 of the Act, is required to consider the following:

(a) that the order granting permanent alimony is made at the time of passing any decree under the Act, 1955 or at any time subsequent thereto,

(b) the income and other property of the applicant,

(c) the respondent's own income and other property,

(d) the conduct of the parties, and

(e) other circumstances of the case.

In the light of the language used in Section 25 of the Act, there is no dispute that it would be open to either party to claim permanent alimony and maintenance even before this Court. The powers of the appellate court are also indicated in Section 107 of the Code of Civil Procedure which provides that the appellate court shall have the same powers as are conferred on the original court. This too was based on the principle that the power which was available to the original court could be exercised by the appellate court also. It is clear from Section 107 of the Code of Civil Procedure as well as the language used in Section 25 of the Act, the appellate court viz., this Court has same powers as are conferred on the original Court.

19. The apex Court in ***Vinny Parmvir Parmar v. Parmvir Parmar***, AIR 2011 SC 2748 held as follows:-

> "…….It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The

> court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

20. In ***Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal***, reported in AIR 2012 SC 2586 the apex Court while granting permanent alimony has observed that the amount that has already been paid to the respondent-wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent-wife has sustained herself without spending the said money.

21. In ***U. Sree v. U. Srinivas,*** AIR 2013 SC 415, the apex Court while dealing with Section 25 of the Act has observed as follows:-

> "…….. while granting permanent alimony, no arithmetic formula can be adopted as there can not be mathematical exactitude. It shall depend upon the status of the parties their respective social needs, the financial capacity of the husband and other obligations."

In the said judgment the apex Court has also observed that

> "…….. it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man made misfortune……"

22. During pendency of this appeal, admittedly the appellant filed Misc. Case No. 63 of 2013 under Section 24 of the Hindu Marriage, Act, 1955 for payment of interim maintenance and litigation expenses but no order has been passed in the said Misc. Case.

23. In view of the fact and law discussed above, this Court has the power under Section 25 of the Act to award permanent alimony just like the original court. The respondent being the Director of a company, taking his

social status and income on the basis of income tax return, share valuation certificate and the balance sheet of the company into consideration, it would be just and proper to award a sum of Rs.15 lakhs towards the permanent alimony in favour of the appellant-wife, though she has claimed compensation of Rs.10 lakhs and also return of her articles as mentioned in Schedule-A of the petition. Accordingly, we direct the respondent to pay a sum of Rs.15 lakhs within a period of two months.

24. At the same time, we do hereby hold that since the marriage has not been consummated due to impotency of the respondent-husband, learned Judge, Family Court is justified in annulling the marriage by passing a decree of nullity on the application filed under Section 12 of the Act.

25. With the above observation and direction, the appeal is disposed of.

Appeal disposed of.

2013 (II) ILR - CUT- 832

B. N. MAHAPATRA, J.

W.P.(C) NO. 917 OF 2012 (Dt.15.03.2013)

BASUDEV MAHAKUD, E. E.(ELECTRICAL) ……..Petitioner

.Vrs.

NATIONAL SEEDS CORPORATION LTD. ……Opp.Party

A. ELECTRICITY – Whether Grievance Redressal Forum (GRF) has jurisdiction to classify/reclassify the consumer from the Category "General Purpose" to the category of "Allied Agricultural Activities"? – Held, the GRF has jurisdiction to classify/re-classify a consumer so as to bring the consumer from one category to another.

(Para 15)

B. ELECTRICITY – Whether the term "Horticulture" as appearing in Clause 80 (5) (ii) of the OERC Distribution (Conditions of Supply) (5th Amendment) Code, 2009 includes Tissue Culture, which is a modern

scientific way of plant breeding within the ambit and scope of Horticulture – Held, "Horticulture" includes "Tissue Culture".

(Para 18)

For Petitioner - M/s. D.R. Ray & B. K. Jena.

For Opp.Party - M/s. Bhaktahari Mohanty, D.P. Mohanty, R.K. Nayak, T.K. Mohanty, P.K.Swain, M. Pal.

B.N. MAHAPATRA, J. The present writ petition has been filed at the instance of the Executive Engineer (Electrical), Bhubaneswar Electrical Division, At-Rasulgarh, Bhubaneswar with a prayer to set aside the order dated 28.11.2011 passed by the Grievance Redressal Forum, Bhubaneswar in C.C. Case No.80 of 2011 (BED) on the ground that the impugned order is illegal, result of arbitrary exercise of power and without jurisdiction.

2. Petitioner's case in a nutshell is that opp. Party-National Seeds Corporation Ltd. represented by its Area Manager, IDCO, Plot No.150, Mancheswar Industrial Estate is a consumer under the petitioner having Consumer No.272 LI. Initially it availed contract demand of 12 KW. Subsequently, it filed application for enhancement of Contract Demand (for short, 'CD') by following the due procedure as prescribed under the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Code, 2004 (for short, "Code, 2004"). Considering such application, permission was granted for enhancement of the load from 12 KW to 107 KW/119 KVA. To this effect an agreement was executed between the parties on 10.06.2009 for supply of power on enhanced load imposing terms and conditions incorporated in the agreement. Opp. Party availed the power supply on enhanced CD on and from 18.06.2009 and also used to pay the bills as charged by the petitioner in accordance with the agreement under the General Purpose Tariff (hereinafter referred to as "GPT"). Though opp. Party is continuing to pay the electricity dues under GPT category since the date of charge regularly without any objection, but all of a sudden after gap of quite a long period opposite party filed an application on 20.04.2011 before the petitioner requesting to change the tariff category of High Tension from GPS to Allied Agro Industrial Activities. In the said petition, Opp. Party stated that production of Tissue Culture Plant is defined as Allied Agro Industries by the Department of Scientific and Industrial Research, Ministry of Science and Technology. Apart from the above, it was also contended by opp. party before the petitioner that its laboratory comes under Allied Agro Industry Activity as per the Tariff Notification dated 18.03.2011 effective from 01.04.2011. Accordingly, opp. Party contended for change of classification from "GPS" category to the category of "Allied Agro Industrial

Activities". On consideration of agreement executed between the parties and the notification of Regulatory Commission published in the Orissa Gazette Notification dated 19.10.2009 vis-à-vis the purpose of utilization of power, the petitioner arrived at a conclusion that the laboratory of the Opp. Party does not come under the category of Allied Agro Industrial Activities. The decision of the petitioner was intimated to Opp. Party vide letter No. 4919 dated 2.5.2011 under Annexure-3. Upon receipt of the letter dated 2.5.2011 along with Gazette Notification, opp. Party filed a representation before the Chairman-cum-Chief Executive Officer of the petitioner claiming the same relief. Since no communication was made to Opp. Party from the Chairman-cum-Executive Officer, opp. Party filed a complaint petition seeking the said relief from Grievance Redressal Forum (for short, "GRF") which has been registered as C.C. Case No. 80 of 2011 (BED). After hearing both the parties, the GRF passed the impugned order dated 28.11.2011 under Annexure-5 directing respondent no.2 (the present petitioner) to reclassify the present consumer in the category of Allied Agricultural Activities under Regulation 80 (5) (ii) of the OERC Distribution (Conditions of Supply (5th Amendment) Code, 2009 from the date of consumer's application subject to fulfillment of other departmental formalities by the complainant. Hence, the present writ petition.

3. Mr. D.R. Ray, learned counsel appearing on behalf of the petitioner submitted that the impugned order passed by the GRF is without jurisdiction and therefore, the same is a nullity and void. The impugned order is a glaring instance of usurpation of jurisdiction by the GRF being not conferred upon it under the relevant provision of law and Regulation to decide such issues. The order being contrary to the statutory provision is not binding upon the petitioner. The GRF has no jurisdiction to decide the matter as the relief sought for by Opp. party is within the exclusive domain of the Orissa Electricity Regulatory Commission (for short, "Commission"). The order passed by the GRF is a result of non-application of mind. In the instant case, neither any deficiency(s) has/have been committed by the petitioner nor there is any contravention of the Act, Rule or Regulation so as to confer jurisdiction upon the forum below to sit over the matter. The power of classification/categorization of consumer is within the exclusive domain of the Commission as provided under Section 62 of the Electricity Act, 2003. Therefore, learned forum below has usurped its jurisdiction to pass the impugned order. It is settled position of law that if an Act provides to do certain work in a particular manner, the same has to be done in that manner or not at all. The Electricity Act, 2003 confers power upon the Commission for recovery of charges in accordance with such tariff fixed from time to time, which is essentially the duty of the Commission in accordance with the

provisions of the Act. Therefore, the same power cannot be exercised by any other authority, court or forum. The finding of the G.R.F. that opposite party comes under the allied agricultural tariff is contrary to the statutory provision of law inasmuch as law provides conditions to differentiate the consumer under a particular category. Learned forum below has been swayed away by the argument advanced by opposite party without keeping in mind the maximum profit earned by Opp. party by utilizing the electric energy which has become a costly affair now-a-days. It is further submitted that the tariff notification is made in each year inviting public attention to file their grievance, but opp. party did not choose it's prudence to file any complaint before the Commission for its classification under the alleged class of consumer. He cannot raise such point after declaration of such tariff classification. The GRF has committed grave mistake to take note of the documents which are not at all relevant for the purpose of present classification. Opp. party by doing its business in plantlets unlike other businessmen in the State, cannot by any stretch of imagination be considered as a consumer under the Allied Agricultural Activities. In this context, the GRF has given a go bye to the very intention of the Commission. In support of his contention the petitioner relied upon the decision rendered in Case Nos. 140, 141, 142 and 143 of 2009 dated 20.3.2010 and the letter of the Deputy Director, Horticulture dated 20.01.2012 and judgment of the Hon'ble Supreme Court in *Maheswari Fish Seed Farm vrs. T.N. Electricity Board and another,* (2004) 4 SCC 705. Concluding his argument, Mr. Ray submitted to allow the writ petition.

4. Mr. D.P. Mohanty, learned counsel appearing for Opp. party submitted that in the year 2003, The Electricity Act, 2003 was enacted. The power of the Commission is defined in the Act. In the year 2004 as per the provision of Sec. 181 (i), (t), (v), (w) & (x) of the Act, the Orissa Electricity Regulatory Commission framed a Regulation known as "Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004" which came into force in May 28, 2004, i.e., the date of publication of the Code in the Orissa Gazette Extraordinary. In the year 2009, the OERC in exercise of power conferred on it under sub-sections (5), (6) and (7) of Section 42 read with Clauses (r) and (s) of Sub-section (2) of Section 181 of the Electricity Act, 2003 framed Regulations, namely, "OERC (Grievances Redressal Forum and Ombudsman) Regulations, 2004" which was notified on 17.5.2004 in the Orissa Gazettee Extraordinary. Clause 2(d) of the above Regulations defines 'complaint' to mean an application filed with the Forum seeking redressal of grievances of any nature, whatsoever, including any defect or deficiency in the electricity service, subject to the provision of the Act. Clause 4(2) of the above Regulations provides that the Forum shall duly

comply with the procedure as laid down by the Commission from time to time. Clause 15 of the Regulations inter alia provides that the Commission may from time to time issue orders/circulars with regard to implementation of these Regulations. Circular dated 19.10.2004 issued by the OERC prescribes procedure to be followed by GRF while deciding the complaint and also stipulates the jurisdiction of the Forum, the nature of the complaint etc. wherein the GRF has jurisdiction and power to classify and reclassify the consumer. Section 62 of the Act does not prescribe for classification or categorization of the consumer.

5. It is not at all correct to say that the classification/ categorization of consumer is within the exclusive domain of OERC. The present dispute does not relate to fixation of tariff. On the other hand, it relates to change of category from "General Purpose" to "Allied Agricultural Activities". It is not necessary on the part of Opp. Party to approach the Commission by way of filing any objection for reclassification of the category.

6. Mr.Mohanty further submitted that opp. party-National Seeds Corporation Ltd., a Government of India Undertaking is engaged in production of banana plantlets (seedling) under controlled environmental conditions for supply to farmers of the State at subsidized rates. Opp. party has been producing high grade banana plantlets (seedlings) by adopting modern technology of plant tissue culture for supply under "National Horticulture Mission Programme". Opp. Party-Laboratory comes under the category of Allied Agricultural Activities as per the amended Regulation 80(5)(ii) of the Code, 2004. In the instant case, the petitioner committed deficiency in service by not considering the grievance of Opp. Party to change its category from "General Purpose" to "Allied Agricultural Activities".

7. On the rival contentions of the learned counsel for both parties, the following questions fall for consideration by this Court:

(i) Whether the Grievance Redressal Forum (CESU), Orissa , Bhubaneswar has the jurisdiction in terms of Circular No.19 dated 19.10.2004 issued by the OERC to classify/reclassify the consumer so as to bring the consumer from the category "General Purpose" to the category of "Allied Agricultural Activities"?

(ii) Whether Circular No.19, dated 19.10.2004 relied upon by the GRF is contrary to the statutory provision of law as contended by the petitioner-licensee?

(iii) Whether the term "Horticulture" as appearing in Clause 80(5)(ii) of the OERC Distribution (Conditions of Supply) (5th Amendment) Code, 2009 includes Tissue Culture?

(iv) What order?

8. Question Nos. (i) and (ii) being inter-linked, they are dealt with together

Facts which are not in dispute are that Opp. Party-National Seeds Corporation Ltd., Bhubaneswar is producing Tissue culture banana plantlets under the control of environmental conditions being utilized in the farmers' field of the State at subsidized rates under the National Horticulture Mission Programme. For the aforesaid purpose, Opp. Party–Seed National Corporation set up a Tissue Culture Laboratory over Plot No.150, Mancheswar Industrial Estate, Bhubaneswar and the said Tissue Culture Laboratory is a consumer of Central Electricity Supply Utility of Orissa. On 26.10.2009, the OERC amended Regulation 80 of the Code by way of inserting the Regulation 80(5)(ii), wherein one new category was created as "Allied Agricultural Activity" for the purpose of Horticulture. Pursuant to such amendment, Opp. Party made a request to the Executive Engineer (Electrical), BED, CESU to change its category from "General Purpose" to "Allied Agricultural Activity". Since the Executive Engineer turned down the request of the opposite party it filed a representation before the Commission. As the Commission did not consider the representation, finding no way out, the opp. Party Company filed an application before the GRF, Bhubaneswar, who passed the impugned order.

9. The petitioner-licensee's case is that the impugned order passed by the GRF is not sustainable in law basically on two grounds i.e. (i) it has no jurisdiction to reclassify opposite party so as to bring it from category of General Purpose to the category of Allied Agricultural Activities; (ii) Tissue culture does not come within the purview of Horticulture appearing under Clause 80(5) (ii) of OERC Code, 2009.

10. Undoubtedly creation of classification/re-classification of consumer is within the exclusive domain of the Regulatory Commission as provided under Section 62 of the Electricity Act, 2003. Section 62 of the Electricity Act, 2003 empowers the appropriate Commission to determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distributing company. The tariff or any part thereof shall not be amended ordinarily more frequently than once in any financial year. However, if the generating company or any licensee recovers excess amount from the consumer, the same shall be recoverable by the person

who has paid such excess amount along with interest equivalent to bank rate. Therefore, under the provision of Section 62 of the Electricity Act power is vested with the appropriate Commission to determine the tariff for different categories of consumers. But once the classification or reclassification of consumer is made and tariff is fixed for each category, the GRF has the power to decide which consumer is coming under which particular category. This emanates from the following provisions of the Regulations, 2004.

11. Regulations 4 and 15 of the Regulation, 2004 read as follows:

> "*Regulation 4* ***: Functions of proceedings of the Forum***
>
> (1) Xxx
>
> (2) The forum shall duly comply with the procedure as laid down by the Commission from time to time.
>
> *Regulation 15*: ***Issue of Orders/Circulars -*** Subject to the provisions of the Act and these Regulations, Commission may from time to time, issue Orders and Circulars with regard to the implementations of these Regulations."

12. The aforesaid provisions clearly indicate that the Orissa Electricity Regulatory Commission is empowered under Regulation 15 to issue Orders and Circulars with regard to implementation of the Regulations relating to the Grievances Redressal Forum. In pursuance of such authority, the Commission by its Circular No. GRF-1/2004 issued on 19th October, 2004 provided the jurisdiction of the GRF. A reference to the said Circular will make the position clear. Under Clause No.2.3 of the Circular, the Grievance Redressal Forum has been duly authorized to classify/re-classify the consumer exercising its statutory jurisdiction. The same may be quoted below for instant reference.

> "2.3 Subject to the provisions of the Electricity Act, 2003, Rules, Regulations, Notifications made there under, the Forum shall generally dispose of the complaints relating to defects or deficiencies in Electrical services as defined in relevant Regulations."
>
> Few examples of the nature of the complaint are illustrated below:
>
> Xxx xxx
>
> (viii) Classification/Re-classification of Consumer

13. In view of the above provisions in the Rules and Regulations, it can be safely concluded that the Grievances Redressal Forum has the jurisdiction to classify/re-classify the Consumers so as to bring a consumer from one category to another as has been done in the present case.

14. Needless to say that creation of classification/re-classification, fixation and determination of tariff is one thing and classification as to which particular consumer comes under which category is another thing and both are of two different and distinct aspects. While the former is within the exclusive domain of Commission, the latter is within the jurisdiction of GRF.

15. In view of the above, this Court is of the opinion that the GRF has jurisdiction to classify/re-classify a consumer so as to bring the consumer from one category to another.

16. Question no.(iii) is as to whether the term "Horticulture" as appearing in Clause 80(5)(ii) of the OERC Code, 2009 includes "Tissue Culture". Neither the Electricity Act nor any of the Rules and Regulations framed thereunder defines the term 'Horticulture'. Consequently, it is necessary to refer to the general meaning from different academic sources and encyclopedia. Opposite party has got the literature down loaded from the website of *Wikipedia*, the free encyclopedia of the World Wide Web net work. Perusal of the said literature reveals that Tissue Culture is a modern scientific way of plant breeding within the ambit and scope of Horticulture. The Tissue Culture is basically the horticultural activities. The GRF in its order observed that the terminology "Tissue Culture" is responsible for production of plant seedling which undergoes further cultivation by the farmers receiving the same at the subsidized rate. Besides, flower-plants are also raised in opposite party's Laboratory. Thus, the GRF held that opposite party is indulged in agricultural activities. Therefore, this Court is of the view that the term 'Horticulture' includes 'Tissue Culture' It may be relevant to refer to the certificate issued by the Scheme Officer functioning in the office of the Director of Horticulture, Odisha, Bhubaneswar, which reads as follows :

> "TO WHOM IT MAY CONCERN
>
> This is to certify that National Seeds Corporation Ltd. Bhubaneswar is producing tissue Culture Banana plantlets which are being utilized in the farmers' field of the State under National horticulture Mission Programme."

17. In its order, GRF observed that the certificate issued by the Government Officer is an authority on the subject and technically competent to form an opinion in the matter, which clearly suggests that 'Tissue Culture'

is instrumental in the production of banana plantlets. The GRF held that there is no doubt that the Tissue Culture' has all the trappings of 'Horticulture' with identical activities and accordingly, it is held that the present dispute hardly attracts Section 181 of the Act requiring further definition of 'Horticulture' by the OERC so as to cover 'Tissue Culture' in the Regulation.

18. In view of the above, this Court is of the opinion that the 'Horticulture' includes 'Tissue Culture'. Thus, it is not a fit case where interference of this Court in exercise of extraordinary power under Article 226 of the Constitution of India is called for.

19. In the result, the writ petition is dismissed.

Writ petition dismissed.

2013 (II) ILR - CUT- 840

S. C. PARIJA, J.

W.P.(C) NO. 18342 OF 2013(Dt.13.08.2013)

THE MANAGEMENT
OF M/S. MIDEAST
INTEGRATED STEEL LTD. .....Petitioner

.Vrs.

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

CIVIL PROCEDURE CODE, 1908 – O-14, R-2

Preliminary issue – Labour dispute – A mixed question of law and facts can not be adjudicated upon as a preliminary issue under order-14, rule -2 CPC.

In this case the petitioner-management prayed to take up three issues first which involves question of facts and requires adjudication on the basis of evidence to be adduced by the parties – Held, the Industrial Tribunal is justified in rejecting the application filed by the management – There is no infirmity in the impugned order calling for interference by this Court.

Case laws Referred to:-

1.AIR 1975 SC 1900 : (The Cooper Engineering Ltd.-V- Shri P.P. Mudhe)
2.AIR 1999 SC 1508 : (Tara & Ors.-V- Director, Social Welfare & Ors.)
3.AIR 2001 sc 329 : (Hussan Mithu Mhasvadkar-V- Bombay Iron & Steel Labour Board & Anr.)
4.AIR 1984 SC 153 : (D.P. Maheshwari -V- Delhi Administration & Ors.).

For Petitioner - M/s. Durga Prasada Nanda
For Opp.Parties - -

Heard learned counsel for the parties.

This writ petition has been filed by the Management challenging the order dated 19.07.2013, passed by the Industrial Tribunal, Bhubaneswar in I.D. Case No.45 of 2011 (Annexure-6), rejecting the petitioner's application for deciding three issues as preliminary issues first before hearing on the other issues.

The case of the petitioner-Management in brief is that a reference was made by the State Government to the Industrial Tribunal, Bhubaneswar, for adjudication of the following dispute:

> "Whether the action of Management of M/s. MESCO steels Ltd. in terminating the services of Sri Sahadev Mohapatra w.e.f. 10.7.2006 is legal and/or justified ? If not to what relief Sri Mohapatra is entitled to ?"
>
> After submission of the statement of claim by the workman-opposite party no.2 and written statement filed by the petitioner-Management, learned Tribunal framed the following issues:

"i) Whether the reference is maintainable ?

ii) Whether the 2nd party is coming within the purview of Sec.2(s) of I.D. Act ?"

iii) Is there any termination w.e.f 10.7.2006 ?"

iv) Whether the action of the management of M/s. MESCO steels Ltd. in terminating the service of Sri Sahadev Mahapatra w.e.f 10.07.2006 is legal and/or justified ?

v) What Relief ?"

After framing of the issues when the matter was ready for hearing, the petitioner-Management filed an application to decide issue nos.(i) to (iii) as preliminary issues first, as the same relates to the question of jurisdiction and maintainability.

Learned Tribunal, considering the application of the petitioner-Management and objections raised by the workman, has passed the impugned order holding therein that as all the three issues which the Management seeks to be taken up first as preliminary issues involves question of facts and requires evidence to be adduced, the same cannot be allowed. Learned Tribunal has further hold that hearing on the three issues as preliminary issues would amount to piecemeal trial of the case.

Learned counsel for the petitioner submits that as the issue nos. (i) to (iii) relate to maintainability of the dispute and also with regard to jurisdiction of the learned Tribunal to adjudicate the same, the three issues should have been taken up first as preliminary issues before hearing on the other issues. In this regard, learned counsel for the petitioner-Management has relied upon the decisions of the apex Court in the case of ***The Cooper Engineering Limited –Vrs– Shri P.P. Mudhe,*** AIR 1975 SC 1900, ***Tara and others –Vrs– Director, Social Welfare and others***, AIR 1999 Supreme Court 1508 & ***Hussan Mithu Mhasvadkar –Vrs– Bombay Iron and Steel Labour Board and another***, AIR 2001 Supreme Court 329.

The concept of taking up preliminary issues first before deciding the other issues is embodied under Order 14 Rule 2 C.P.C., which provides that where issues both of law and of facts arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court or a bar to the maintainability of the suit. For that purpose, the Court may, if it thinks fit, postpone the settlement of other issues until after the preliminary issue has been determined.

It is now well settled in law that a mixed question of law and facts cannot be adjudicated upon as a preliminary issue under Order 14 Rule 2 C.P.C. The jurisdiction to try issues of law apart from the issues of facts may be exercised only where in the opinion of the Court, the whole suit can be disposed of on the issues of law alone.

In the present case, the petitioner-Management has sought for trial of the issue nos.(i), (ii) and (iii) as detailed above, as preliminary issues, which undoubtedly involves question of facts and therefore evidence would be necessary to adjudicate the same. Therefore, learned Tribunal was fully justified in rejecting the prayer of the petitioner-Management. Piecemeal trial

of the labour dispute raised by the workman in the instant case is neither warranted nor desirable.

The desirability of deciding certain issues as preliminary issues by the Industrial Tribunal while adjudicating labour disputes came up for consideration before the apex Court in the case of ***D. P. Maheshwari –Vrs– Delhi Administration and others***, AIR 1984 Supreme Court 153. The Hon'ble Court has observed as under:

> "xx xx xx. There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Art.226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Art. 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Art.136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeyings up and down. It is also worthwhile remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Art. 136 is preliminary supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."

In view of the discussions made above and keeping in view the fact that three issues which the petitioner-Management seek to be taken up first as preliminary issues involves question of facts and requires adjudication on

the basis of evidence to be adduced by the parties, the decisions relied upon the petitioner-Management has no application to the facts of the present case.

For the reasons as aforestated, I do not find any infirmity or illegality in the impugned order, so as to warrant any interference.

Writ petition being devoid of merits, the same is accordingly dismissed.

Writ petition dismissed.

2013 (II) ILR - CUT- 844

B. K. PATEL, J.

F.A.O. NO. 381 OF 2012 (Dt.30.07.2013)

MAKAR GOCHHI & ANR. …….Appellants

.Vrs.

UNION OF INDIA ……..Respondent

RAILWAYS ACT, 1989 – S.124-A

Untoward incident – Application for compensation – Application dismissed by the Tribunal on the ground that applicants failed to establish that the deceased was a bona fide passenger – Hence this appeal.

In this case claimants adduced cogent evidence that the deceased died due to accidental fall while travelling in the train after purchasing ticket – So burden lies on the railways to prove that the deceased was not a bona fide passenger – No rebuttal evidence placed by the railways – Held, the incident was an untoward incident in terms of Section 123 (c) of the Act – Hence the impugned order is set aside and the respondent is held to be liable to pay compensation of Rs.4,00,000/- with 8% interest P.A. to the appellants -claimants from the date of filing of the claim application till payment.

(Paras 13,14)

Case laws Referred to:-

1.2013 (I) OLR 365 : (Ghanashyam Patra & Ors.-V-Union of India &Anr.).
2.2010 ACJ 566 : (Union of India-V- Hari Narayan Gupta & Anr.)

For Appellant - M/s. Ramprasad Mohapatra, D.Mohapatra, S.Parida.
For Respondent - M/s. D.K. Sahoo, S.K. Pradhan, K.K. Sahu.

B.K. PATEL, J. This appeal is directed against the order dated 29.6.2012 passed by the Member (Technical), Railway Claims Tribunal, Bhubaneswar Branch (for short 'the Tribunal') dismissing Case No.OA/15/2009 filed by the appellants, who are parents of deceased Sanatana Gochhi (hereinafter referred to as 'the deceased'), claiming compensation for the death of the deceased.

2. Case of the claimants in the original application is that on 18.11.2008 the deceased along with co-villager A.W.2 boarded 1019 Konark Express train at Pune to travel to Bhubaneswar after purchasing train tickets. In course of journey the deceased accidentally fell down from the running train near Chebrol railway station due to sudden jerk, and push and pull of passengers and was seriously injured. He was taken to the Government Hospital, Elluru for treatment where he succumbed to the injuries. In connection with the death of the deceased railway police registered a case and conducted enquiry, in course of which inquest and post mort examinations were held, and submitted final report. On the basis of such pleadings, it is asserted that death of the deceased having occurred due to untoward incident in terms of Section 123(c) of the Railways Act (for short 'the Act'), applicants are entitled to compensation.

Respondent-railway resisted the claim by filing written statement. It is pleaded that the deceased was not a *bona fide* passenger of the train. It is averred that the occurrence leading to death of the deceased does not amount to an untoward incident in terms of provision under Section 123(c) of the Act. It is specifically pleaded that since railway ticket was not found in the person of the deceased, purchase of the train ticket is a concocted story.

3. On the basis of the rival pleadings, Tribunal framed the following issues:

(1) Whether applicants are sole dependents of the deceased?

(2) Whether the deceased was a *bona fide* passenger?

(3) Whether the incident was an untoward incident?

(4) Whether the applicants are entitled to get any compensation?

(5) What relief?

4. In order to substantial their case claimants examined deceased's father as A.W.1 and deceased's co-passenger as A.W.2. Claimants relied also upon documents prepared in course of enquiry by the police. No evidence was adduced on behalf of the Respondent-railway.

5. On appraisal of evidence on record, the Tribunal answered issue no. (1) in favour of the claimants holding that the applicants were dependants of the deceased. However, in answering other issues the Tribunal held that the applicants have failed to establish that the deceased was a *bona fide* passenger in possession of valid ticket or that the deceased died on account of accidental fall from the Konark Express, and dismissed the original application.

6. In assailing the impugned judgment it was submitted by the learned counsel for the appellants that claimants adduced oral as well as documentary evidence in support of their claim for compensation under section 124-A of the Act. No rebuttal evidence was adduced from the side of the railway. F.I.R., inquest report and final report establish accidental fall of the deceased from Konark Express. In absence of any rebuttal evidence, finding of the Tribunal that claimants have failed to prove that the deceased died due to accidental fall while travelling in the train as a *bona fide* passenger is not sustainable. It was argued that in view of nature of evidence of A.W.2, which finds support from documentary evidence, the claimants are entitled to compensation. In support of the contentions, learned counsel for the appellants relied on decisions in **Ghanashyam Patra and others –vs- Union of India and another** : 2013(I)OLR 365; **Union of India –vs- Leelamma and others**: 2010 ACJ 566 and **Union of India –vs- Hari Narayan Gupta and another**: 2008 ACJ 822.

7. Learned counsel for the respondent supported and defended the impugned order. It was submitted that no ticket was seized from the deceased during his hospitalization or at the time of inquest. It is for the claimants to prove that the deceased was a *bona fide* passenger. Claimants having failed to explain as to why deceased's train ticket was not seized in course of enquiry by police, there is no infirmity in the impugned order.

8. From the rival contentions raised on behalf of the parties it is apparent that the question raised in this appeal is as to whether the Tribunal has

properly appreciated the materials on record, more particularly evidence of A.W.2. In dealing with the question it is to be borne in mind that the deceased who was a resident of Cuttack district in the State of Orissa was a victim of the accident in Andhra Pradesh while travelling in Mumbai-Bhubaneswar Konark Express.

9. In **Union of India –vs- Hari Narayan Gupta and another** (supra) it has been held by Rajasthan High Court as follows:

> "Of Course, section 101 of the Evidence Act places the burden of proof on the person, who desires any court to give judgment as to any legal right or liability dependent on the existence of the facts, which he asserts. But in the case of the railway accident where a passenger has died, the claimants would find it extremely difficult, if not impossible, to prove certain facts, which are beyond their reach and control. Since the claimants may not know whether the deceased had purchased a valid ticket or not, they would not be in a position to prove the fact that the deceased was a *bona fide* passenger. However, since the Railways appoints ticket collector on its behalf to check the valid ticket of the passengers, the Railways has a mechanism for finding out and discovering whether the deceased was a *bona fide* passenger or not. Since the passenger is presumed to be innocent, a legal presumption can be drawn that he had followed the law and that he had, indeed, purchased a valid ticket prior to boarding the train. Considering the fact that there is an equal presumption in favour of the Railways that the railway officers would have discharged his duty of checking the ticket, in a *bona fide* manner, it can be presumed that the ticket collector would have examined whether the deceased possesses a valid ticket or not. Therefore, the Railways has means through which they can easily prove that deceased was not a *bona fide* passenger. However, the burden of proof lies on the railway administration to lead evidence and to prove that the deceased was not a *bona fide* passenger."

10. In **Union of India -vs- Leelamma and others** (supra) it has been pointed out by the Kerala High Court that when claimants assert that the deceased had purchased train ticket, burden of proof lies on the railways to prove that the deceased was not a *bona fide* passenger.

11. This Court also in **Ghanashyam Patra and others –vs- Union of India and another** (supra) has taken similar view upon reference to two decisions of the Andhra Pradesh High Court. It was observed:-

"In Union of India v. B.Koddekar and others: 2003 ACJ 1286 placing reliance on the decision of the Madhya Pradesh High Court in Raj Kumari v.Union of India: 1993 ACJ 846 it was held that burden does not lie on the dependents of the deceased to prove that the deceased was a *bona fide* passenger and the burden is on the railway administration to prove that the deceased was a ticketless traveler or was not a *bona fide* passenger.

In Union of India,South Central Railways v.Kurukundu Balakrishnaiah and others: 2004 ACJ 529 upon reference to number of judicial pronouncements it was held that burden lies on the Railways to prove the plea that legal representative of the victims of untoward incident are not entitled to compensation on any of the defences available to Railway in the statute so as to disentitle the claimants to claim compensation."

12. In the present case, claimants specifically plead in their original application that the deceased boarded the train after purchasing ticket bearing No.23649154 dated 18.11.2008. In support of such contention appellants/claimants filed the train ticket before the Tribunal. That apart, claimants examined A.W.2 who was travelling with the deceased. It is the specific evidence of A.W.2 that he purchased two train tickets at Pimpri railway station from Pimpri to Bhubaneswar on 18.11.2008 and boarded the train along with the deceased. From Pimpri they came to Pune where they boarded Konark Express train. On 19.11.2008 near Chebrol Railway Station the deceased fell down from the running train. The assertion of A.W.2 with regard to purchase of tickets for himself and the deceased has not been assailed during his cross-examination. It is not disputed that police registered Elluru G.R.P.S.Case No.156 of 2008 in connection with the deceased's death upon receipt of information from hospital. Inquest witnesses opined that the deceased, while travelling by Konark Express (down line) on 19.11.2008 at about 4.10 P.M. when the train was passing through Chebrol, accidentally fell down from the train. He was shifted to government hospital in an ambulance. In the final report submitted by police there is specific mention of the tickets which A.W.2 had purchased for himself and the deceased.

13. In spite of oral evidence of A.W.2 and documents prepared in course of enquiry conducted by police substantiating the plea of purchase of tickets placed on record on behalf of the claimants, railway has not placed any rebuttal evidence. However, the Tribunal appears to have embarked upon a scathing criticism of not only evidence of A.W.2 but also contents of

documents prepared by the police in course of enquiry upon reference to extraneous factors without bringing such factors to the notice of the claimants by way of cross-examination. As burden was on the railway to disprove the claimants' assertion that the deceased accidentally fell from the Konark Express while travelling as *bona fide* passenger, in absence of any evidence adduced by the railway, there is no scope to discard the evidence of A.W.2 which finds support from the documents prepared in course of inquiry by police. Claimants are found to have adduced cogent evidence in support of their assertion that the deceased died due accidental fall while travelling in the train after purchasing ticket. The impugned order is liable to be set aside.

14. In view of the above, the FAO is allowed. The impugned order passed by the Tribunal is set aside. The respondent is held to be liable to pay compensation of Rs.4,00,000/- (Rupees four lakhs only) along with interest at the rate of eight per cent per annum to the appellants-claimants from the date of filing of the claim application till payment. Compensation amount along with interest shall be deposited with the Tribunal within a period of two months from today upon which the Tribunal shall direct deposit of seventy per cent of the amount in the names of the appellants-claimants in fixed deposit and release the balance amount to them.

Appeal allowed.

2013 (II) ILR - CUT- 849

B. K. NAYAK, J.

CRL.REV. NO. 763 OF 2012 (Dt.03.04.2013)

KANHU CHARAN DASH ……Petitioner

.*Vrs.*

STATE OF ORISSA (VIG.) …….Opp.Party

ODISHA PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2008 – CLAUSE-11

Violation of Clause-11 (i) (b) of the PDS (Control) Order, 2008 would occur where even, after payment of cost of the commodities and on demand the wholesaler/storage agent failed to supply the commodities immediately – Unless there is material to show that the storage agent or the wholesaler deliberately refused or failed to supply the commodities on demand for which price has already been paid, there cannot be any violation of Clause-11 (i) (d) of the PDS (Control) Order, 2008.

In this case the statement of the retailers show that the petitioner has neither refused nor deliberately failed to supply the rice and sugar to the retailers but the same was caused due to the difficulties of the retailers regarding transportation etc., they failed to lift the entire quantity issued in their favour – Held, it can not be said that the petitioner has violated Clause-11(i) (b) of the PDS (Control) Order, 2008 and therefore he cannot be charged U/s.7 of the EC Act – Impugned order is set aside and the petitioner is discharged from the charge leveled against him. (Paras 12,13,14)

For Petitioner - Mr. Prasanna Ku. Mishra.
For Opp.Party - A.S.C. (Vigilance Department).

Heard learned counsel for the petitioner and learned Additional Standing Counsel for the Vigilance Department. Perused the record.

2. Order dated 24.11.2012 passed by the learned Chief Judicial Magistrate, Gajapati, At-Paralakhemundi in G.R. Case No.23 of 2011 rejecting the petitioner's application for discharge has been assailed in this criminal revision.

3. On the basis of F.I.R. dated 24.05.2011 lodged by DSP, Vigilance, Berhampur, Berhampur Vigilance P.S. Case No.23 of 2011 corresponding to Vigilance G.R. Case No.23 of 2011 of the court of Chief Judicial Magistrate, Gajapati, At-Paralakhemundi has been registered against the petitioner for alleged commission of offence under Section 7 of the Essential Commodities Act.

4. Allegations in the F.I.R. are that the petitioner is the Sales Assistant-cum-godown Assistant-in-charge of the Departmental Storage Centre, R. Udayagiri. On receipt of information about bungling in distribution of essential commodities to the retailers, the vigilance team made a surprise check of the departmental godown on 03.06.2010 in presence of ACSOs

Sadar, Paralakhemundi and Inspector of Supplies, Kashinagar. The petitioner-Sales Assistant was present in the godown and on being asked he produced the registers and records maintained in the godown. It is further alleged that on verification of Tally Register, Stock Register, Issue Register and Sale Register for BPL rice, AAY rice, APL rice, Arnapurna rice, SC & ST rice, wheat and levy sugar, it was found that there was 551.38 quintal of rice and 21.30 quintal of sugar as per book balance. But on physical verification of stock, it was found that there was 576 quintals of rice and 41.55 quintals of sugar in the stock. Thus, there was 24.62 quintals of excess rice and 10.25 quintals of excess sugar than the book balance. It is further alleged that on a preliminary inquiry it was found that Sri Jayashreeram SHG, retailer for Nuagarh G.P. was issued with 93.5 quintals of rice on 1.6.2010 for distribution. But the SHG took only 80 quintals of rice leaving the balance 13.5 quintals of rice in the godown. Similarly, MD Lamps, R. Udayagiri was issued with 191.05 quintals of rice on 02.06.2010. But actually, Sri Dash has given only 180 quintals of rice leaving the balance 11.05 quintals of rice in the godown. On 03.06.2010, the petitioner has shown issue of 10.25 quintals of sugar to MD, Lamps, R. Udayagiri, but he has not made delivery of the same to the LAMPS. It is, therefore, alleged that the petitioner was issuing less quantity of PDS Commodities to the retailers although he is showing issue of full quota of the same in the issue registers, for which there was 24.62 quintals of excess rice and 10.25 quintals of excess sugar found in the godown over and above the book balance, which was kept for the purpose of black marketing. It is alleged that the petitioner as such violated Clause-11 of the Orissa Public Distribution System (Control) Order,2008 (in short 'the PDS (Control) Order,2008') by retaining the excess stock showing false distribution and as such he is liable under Section 7 of the Essential Commodities Act.

The petitioner filed a petition before the court below to discharge him but by the impugned order, the learned Chief Judicial Magistrate, Gajapati, At-Paralakhemundi has rejected the said petition, mainly on the ground that the question of violation of Clause-11 of the PDS (Control) Order,2008 is the matter for trial and, therefore, there is no justifiable ground to discharge the accused.

5. Learned counsel for the petitioner submits that Clause-11 of the PDS (Control) Order, 2008 contains different sub clauses, such as (1)(a) to (1)(l) and (2)(a) to (2) (e) and nothing has been shown as to which sub clause of Clause-11 has been violated. It is also his submission that the retailers, who were issued with quota, could not lift the entire quota issued in their favour because of their transportation and labour problem, as evident from the statements of such retailers and that they infact lifted those balance

quantity on the very next day, i.e., 04.06.2010 and, therefore, there is no material on record with regard to black marketing of PDS commodities or violation of any provision of clause-11 of the PDS (Control) Order,2008. It is, therefore, his submission that there being no prima facie case of any violation of Clause-11 of the PDS (Control) Order,2008 by the petitioner no charge can be framed against him and, therefore, the rejection of his petition for discharge is unsustainable.

6. The learned Standing Counsel for the Vigilance Department submits that the violation alleged against the petitioner relates to Clause-11 (1) (b) of the PDS (Control) Order, 2008 and that since the petitioner showed issue of the commodities in the register but actually retained part of such rice and sugar, he has prima facie violated Clause-11 (1) (b) of the PDS (Control) Order,2008, and therefore, there is no infirmity in the impugned order.

7. Clause 11 of the PDS (Control) Order,2008 prescribes the responsibilities and duties of wholesaler/sub wholesaler/storage Agent. Sub clause (1) (b) of Clause-11 reads as under :

> "(1)The Wholesalers, including Sub-Wholesalers and Storage Agents shall be responsible to:
>
> (a) xxx xxx
>
> (b) supply the Public Distribution System commodities to the retailer or Sub-wholesaler as the case may be, immediately on demand and subject to the prepayment of cost of commodities and production of tally register etc. as per prescribed procedure;"

It is evident that the wholesaler and Store Agent shall be responsible to supply the Public Distribution System Commodities to the retailer or sub-wholesaler as the case may be, immediately on demand and subject to payment of cost of commodities and as per prescribed procedure.

8. Admittedly, the Tally Register, Stock Register, etc. showed distribution of 93.5 quintals of rice to Sri Jayashreeram SHG, retailer on 01.06.2010 but the SHG took 80 quintals leaving a balance of 13.5 quintals of rice in the petitioner's godown. Similarly the MD LAMPS, R. Udayagiri lifted only 180 quintals of rice as against issue of 191.05 quintals leaving a balance of 11.05 quintals of rice in the godown of the petitioner. The MD LAMPS, R. Udayagiri also was shown to have been issued 10.25 quintals of sugar on 03.06.2010, but the same had not been lifted from the godown by the time of visit of the vigilance team on that day.

9. The statement of Mimansa Kumar Satpathy, the Sales Assistant, LAMPS R.Udayagiri recorded on 24.05.2011 by the Investigating Officer reveals that on 02.06.2010 he paid money for issue of 191.05 quintals of rice and that was reflected in the register, but he lifted 180 quintals leaving the balance 11.05 quintal due to transportation problem and so also on 03.06.2010 though 10.25 quintals of sugar was issued, the same was not lifted from the D.S.C. on that day because of labour and transportation problem and that he lifted the said balance rice and sugar from the Storage Centre on 04.06.2010.

10. Similarly, the statement one Surendra Dalei, the Secretary of Sri Jayashreeram SHG reveals that as against the issue of 93.5 quintals of rice on 01.06.2010 he and the President of SHG could be able to carry only 180 bags, i.e., 80 quintals of rice because of want of space in the vehicle, leaving the balance 13.5 quintals of rice in the godown of the petitioner and in fact he lifted the same later. His statement also reveals that on 01.06.2010 the petitioner asked them to take away the balance 13.5 quintals of rice early. Similarly, the statement of Rabindra Subudhi, the President of Sri Jashreeram SHG reveals that as against the issuance of 93.5 quintals of rice on 1.6.2010 he lifted only 80 quintals (160 bags) on that day and the petitioner told them to take away the balance soon and that the balance 13.5 quintals was taken later by the Secretary of the SHG.

11. From the aforesaid statements of the retailers, it is clearly revealed that they were unable to lift the entire quantity of rice and sugar issued in their favour because of transportation and labour problem and that the petitioner himself requested them to take away the balance soon.

12. Violation of Clause-11 (1)(b) of the PDS (Control) Order,2008 would occur where even after payment of cost of the commodities and on demand the wholesaler/storage agent failed to supply the commodities immediately. Unless there is material to show that the storage agent or the wholesaler deliberately refused or failed to supply the commodities on demand for which price has already been paid, there cannot be any violation of Clause-11 (1) (b) of the PDS (Control) Order,2008.

13. The statements of the material witnesses, i.e., the retailers, who were issued with the rice and sugar, as seen above, go to show that the petitioner has neither refused nor deliberately failed to supply the rice and sugar to the retailers. On the contrary, it is because of the difficulties and inconvenience of the retailers regarding transportation etc., they failed to lift the entire quaintly issued in their favour. Rather the petitioner advised them to lift the balance left by them in godown soon.

14. Having regard to the circumstances as aforesaid, it cannot be said that the petitioner has violated Clause-11 (1) (b) of the PDS (Control) Order,2008 and, therefore, he cannot be charged under Section 7 of the E.C. Act. Accordingly, the impugned order is set aside and the petitioner is discharged from the charge leveled against him. The CRLREV is thus, allowed.

Revision allowed.

2013 (II) ILR - CUT- 854

B. K. NAYAK, J.

CRL.REV. NO. 1236 OF 2009(Dt.06.05.2013)

SMITA SINGH .....Petitioner

.Vrs.

BISHNU PRIYA SINGH & ORS. .....Opp.Parties

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 –S.29

Appeal – Orders which scuttle the rights of the applicants to get relief under the Act or bring the proceeding to an end at the threshold must be held to be appealable U/s.29 of the Act – Held, the order impugned in this revision being appealable U/s.29 of the Act the Criminal Revision is dismissed and liberty is given to the petitioner to challenge the said order in appeal. (Paras 9,10)

Case laws Referred to:-

1.1 (2008)DMC 365 : (Chithrangathan-V- Seema)
2.AIR 2009 (NOC) 507 (UTR) : (Manish Tandon-V- Richa Tandon & Ors.)

For Petitioner - M/s. Himanshu B. Dash.
For Opp.Parties - M/s. Purusottam Chuli.

Heard learned counsel for the petitioner and learned counsel for the opposite parties.

2. The petitioner has filed Criminal Misc. Case No.6 of 2009 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short "the Act") in the court of the learned S.D.J.M. (Sadar), Cuttack seeking certain reliefs against the present opposite parties. Opposite party no.5 is the husband of the petitioner, whereas, the other opposite parties, who are all women, are the in-laws of the petitioner. The opposite parties filed a petition before the learned S.D.J.M.(Sadar), Cuttack to exclude opposite party nos.1 to 4 from the category of respondents on the ground that they being women relatives of the husband of the petitioner, they cannot be added as respondents. The said petition was allowed by order dated 26.10.2009 which is impugned in this criminal revision.

3. At the very out-set, learned counsel for the opposite parties raises objection to the maintainability of this criminal revision stating that the impugned order is appealable under Section 29 of the Act.

Learned counsel for the petitioner, on the other hand, contends that an appeal lies against any order which is passed under any of the provisions of the Act and that the present order, being not one under any of the provisions of the Act, is not appealable.

4. Learned counsel for both the parties rely on some decisions of different High Courts in support of their respective contentions.

5. The Kerla High Court in the case of **Chithrangathan** v. **Seema**; **1 (2008) DMC 365** examined the question of maintainability of revision against an ad interim order passed under Section 23(2) of the Act and held that the order impugned was appealable under Section 29 of the Act and revision was not maintainable.

The Kerla High Court also in W.P.(C) 19032 of 2008 between **Girijan** v. **Subhadra**, decided on 25.6.2008, examined the question with reference to an interim order and held that the order impugned was appealable under Section 29 of the Act.

In **AIR 2009 (NOC) 507 (UTR)** (**Manish Tandon** v. **Richa Tandon and others**), it has been held that the word 'order' used in Section 29 of the Act connotes all types of orders passed by the Magistrate irrespective of its description and nature which has been made appealable and, therefore, the petition under Section 482, Cr.P.C. would not be maintainable.

6. The Bombay High Court in Criminal Writ Petition No.2218 of 2007 in the case of **Mr. Abhijit Bhikaseth Auti** v. **State of Maharashtra and another** disposed of on 16.9.2008 examined the question whether an order

passed by the Magistrate in a proceeding under the Act refusing partly to grant interim relief was appealable or not and held that an appeal would lie against any final order passed by the Magistrate under Section 12 of the Act and all interim orders passed under Section 23 of the

Act, but no appeal under Section 29 of the Act, would be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties.

7. Relying on the decision of the Bombay High Court referred to above, learned counsel for the petitioner submits that the present impugned order, being a procedural order, which does not decide any rights or liabilities of the parties, cannot be made appealable under Section 29 of the Act. He further submits that appeal lies only against orders contemplated in different provisions of the Act and copies whereof have been served free of cost on the parties as per Section 24 of the Act.

8. Section 29 of the Act, which provides for appeal, runs as under:

> "29. **Appeal** - There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later."

Section 24 of the Act provides as follows:

> "24. **Court to give copies of order free of cost** – The Magistrate shall, in all cases where he has passed any order under this Act, order that a copy of such order, shall be given free of cost, to the parties to the application, the police officer-in-charge of the police station in the jurisdiction of which the Magistrate has been approached, and any service provider has registered a domestic incident report, to that service providers.

9. Apparently, the provision for appeal under Section 29 of the Act is not restricted to order passed under any specific provision of the Act. Right to appeal under Section 29 of the Act is also not confined only to those orders in respect of which copies are served in accordance with the provisions of Section 24 of the Act. Section 29 of the Act refers to service of copy of order only for the purpose of deciding the question of limitation of thirty days for filing of an appeal from the date of service of copy of the order. In other words, mere non-service of copy of an order would not take away the right of appeal.

Questions whether the Magistrate has jurisdiction to entertain a proceeding under the Act; whether a proceeding is maintainable under the Act; or whether a person can be impleaded as a respondent in the proceeding so that relief can be granted to the aggrieved person against such respondent are matters which must be decided by the Magistrate when such question is raised before proceeding to consider about granting of relief to the aggrieved person. These are matters not merely relating to procedure, but they are so fundamental that the determination of rights and liabilities of the parties in the proceeding depends on the decision of such questions. The right to proceed against a person is inherent and has direct nexus with the question to seek relief from him under the provisions of the Act. If a Magistrate decides that a person proceeded against under the Act cannot be impleaded as a respondent within the meaning of the Act, the whole proceeding has to be dropped. Such orders which scuttle the rights of the applicants to get relief under the Act or bring the proceeding to an end at the threshold must be held to be appealable under Section 29 of the Act.

10. Therefore, this Court is of the view that the order impugned in the present criminal revision is appealable under Section 29 of the Act. The Criminal Revision is therefore dismissed but liberty is given to the petitioner to challenge the order in appeal before the learned Sessions Judge. Question of delay in filing the appeal shall be dealt with by the appellate court keeping in view the pendency of this revision before this Court. Revision dismissed.

Revision dismissed.

2013 (II) ILR - CUT- 857

S. K. MISHRA, J.

W.P.(C) NO. 6435 OF 2012 (Dt.21.08.2013)

PRADEEP KU. SAHANI & ORS. …….....Petitioners

.Vrs.

SANJUKTA HOTA & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-22, R-3

Appellant filed an application for substitution proposing to implead the legal heirs of respondent No.3 – Inadvertently or by over sight or on account of some doubt as to who are the heirs of respondent No.3, he excluded to implead certain legal heirs in that petition – No fraud or collusion – Omission to bring on record some of the heirs is not fatal – Held, the appeal shall not abate as the remaining legal heirs have substantially represented the estate of the deceased-respondent No.3. (Paras 4,6)

Case law Referred to:-

AIR 1967 SC 49 : (Dolai Maliko & Ors.-V- Krushna Chandra Patnaik & Ors.)

For Petitioners - M/s. Sisir Kumar Purohit, R.C. Pattnaik, A.K.Das.
For Opp.Parties - M/s. Sanjeev Udgata, S.B. Udgata, Ashutosh Mishra (for O.P.No.1).

S.K.MISHRA, J. The order dated 02.03.2012 passed by the learned Addl. District Judge, Sambalpur in F.A.O. No.11 of 2011 is called in question in this writ petition.

2. The plaintiff in Civil Suit No.7 of 2011 has preferred an appeal under Order XLIII, Rule 1 of the Code of Civil Procedure, 1908, hereinafter referred as the "Code" for brevity. During pendency of the appeal, respondent no.3 Kulamani Biswal expired on 20.04.2011 leaving behind his legal heirs. On 05.07.2011, the plaintiff filed an application for substitution of the said deceased-respondent. Copies of the said petition were served on the contesting respondents, but none has filed any written objection to the same. Hence, on 17.08.2011, the learned Addl. District Judge, Sambalpur allowed the substitution petition and directed the appellants to file consolidated appeal memo.

3. On 22.02.2012, after a lapse of about six months, the respondent nos. 6, 7 and 11 have filed an application to direct that the appeal has abated. It was contended by the respondents that the petition filed by the plaintiff on 13.12.2011 is not maintainable. The legal obligation of the plaintiff is to effect substitution of the deceased-respondents. The respondents further plead that the claim of the plaintiff is based on landlord and tenant relationship among the defendant nos. 1, 2 and with Kulamani Biswal. Hence, it is presumed that the plaintiff is aware about the L.Rs. of the

defendant late Kulamani Biswal and for that awareness, the plaintiff has filed the substitution petition in support of an affidavit. The petitioner further pleaded that the substitution petition supported by an affidavit has been filed stating falsehood. Hence, it is not maintainable. Similarly, the petition has been filed by the respondent no.1, 2, 3(a) to 3(e). The basic objection to the substitution already made as per the direction of the Court is that all the L.Rs. of the deceased- respondents no.3 have not been brought into record. Hence, the appeal should abate.

4. The Supreme Court in **Dolai Maliko and others v. Krushna Chandra Patnaik and others,** AIR 1967 SC 49 has held that if any legal heir proposed to be substituted in the petition, but the petitioner excludes the names of other legal heirs in absence of fraud or collusion, the proceeding should not abate. The Supreme Court has further held that unless there is fraud or collusion or there are other circumstances, which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs, who have applied for being brought on record, should not be held to represent the entire estate including the interests of the heirs not brought on record. The Supreme Court further held that this is not to say that where heirs of an appellant are to be brought on record, all of them should not be brought on record or all of them should be deliberately left out. But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased appellant is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which have been referred above exits.

5. Admittedly, opposite party no.1 filed an application for substitution on 05.07.2011. It was asserted that Kulamani Biswal died on 20.04.2011. So the petition for substitution is within time. Learned Addl. District Judge has also recorded on 17.08.2011 that the respondents have not filed any objection to the petition for substitution. On that basis, the petition was allowed. There is no reason to hold that the present petitioners i.e. the contesting respondents before the court below were not given adequate opportunity of showing cause in the hearing by the learned Addl. District Judge.

6. In that view of the matter, this Court comes to the conclusion that when the appellant files an application for substitution proposing to add all the legal heirs as per her knowledge, but because of lack of knowledge regarding other legal heirs, inadvertently excludes to implead certain legal heirs in the petition, in that case, the suit or appeal shall not abate as the

remaining legal heirs have substantially represented the estate of the deceased-respondent.

7. Therefore, this Court comes to the conclusion that the writ petition is devoid of merit and the same is dismissed. Pending Misc. Case No.5671 of 2012 is also disposed of as infructuous.

Writ petition dismissed.

2013 (II) ILR - CUT- 860

S.K. MISHRA, J.

W.P.(C) NO. 11696 OF 2013 (Dt.12.9.2013)

ARUN KUMAR …….Petitioner

.Vrs.

N. NIRMALA DEVI & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – S.2(2)

Decree – Order rejecting Plaint – Order is a decree U/s.2 (2) C.P.C. and is appellable – Writ Petition challenging the order rejecting plaint – Held, alternative and efficacious remedy being available to the petitioner the present writ petition is not maintainable.

(Para 3)

Case laws Referred to:-

41(1975) CLT 231 : (Satyabadi Hota-V- J. Mishra)

For Petitioner - Mr. S.P. Mishra, Sr. Advocate and
M/s. S.S. Rao, B. K. Mohanty, S. Patra,
N. B. Patnaik & S. Sailaja.

For Opp.Parties - Mr. C. Ananda Rao, Sr. Advocate,
M/s. S.K. Behera & S.K. Parida.

S.K.MISHRA, J. In this writ petition, the petitioner being the plaintiff in Title Suit No. 6 of 2004 of the court of Civil Judge (Senior Division),

Rayagada has assailed the order dated 30.04.2013 passed by the said court in the aforesaid suit rejecting the plaint filed by the plaintiff in exercising jurisdiction under Order VII, Rule 11 read with Order II, Rule 2 of the Code of Civil Procedure, 1908, hereinafter referred as the "Code" for brevity.

2. The facts of the case are not disputed. The plaintiff filed Civil Suit No.26 of 2003 in the court of the Civil Judge (Senior Division), Rayagada. The plaint was returned to the plaintiff on 26.03.2004. Thereafter, on the selfsame cause of action the suit, out of which the present writ petition arises, is filed. It is submitted by the learned counsel for the petitioner that the plaintiff has withdrawn the earlier suit under Order XXIII, Rule 1 of the Code with liberty to file a fresh suit thereof. The defendants after appearance filed an application under Order VII, Rule 11 read with Order II, Rule 2 of the Code. That petition was allowed and the plaint was rejected as the plaintiff is precluded from instituting the present suit.

3. Mr. C. Ananda Rao, learned Senior Advocate appearing for the opposite parties urged before the Court that the order impugned is a decree in view of the definition given in Sub-section (2) of Section 2 of the Code and therefore, the writ application is not maintainable and the appeal is maintainable.

Sub-Section (2) of Section 2 of the Code defines the 'decree' as follows:

> "(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include –
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

In interpreting this provision, this Court in **Satyabadi Hota v. J.Mishra,** 41 (1975) CLT 231 has held that an order rejecting a plaint on

whatever ground, is a decree, as defined under Section 2 (2) of the Code and is appealable. This being the case, since alternative and efficacious remedy is available to the petitioner, the present writ application is not maintainable.

Hence the writ application is dismissed as not maintainable. However, the petitioner may pursue the forum of appeal, if so advised. Pending Misc. Case No.10993 of 2013 is also disposed of.

Writ petition dismissed.

2013 (II) ILR - CUT- 862

C. R. DASH, J.

CRLMC NO. 2507 OF 2010 (Dt.03.09.2013)

KAMAL PRASAD BONDIA ……Petitioner

.Vrs.

STATE OF ORISSA …….Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of order taking cognizance of the offence U/s.13 (2) read with Section 13 (1) (d) of the P.C. Act and Section 120-B I.P.C.

In this case prosecution has been launched against the petitioner on the misconceived notion that M/s. Bondia Flour and Oil Mills was liable to pay sales tax on receipt of 21 wagons of wheat and the petitioner being the agent has conspired to evade tax – Held, no offence U/s.120-B I.P.C. is made out against the petitioner and for that matter no offence is made out against him U/s.13 (2) read with Section 13 (1) (d) of the P. C. Act, 1988 – The impugned proceeding so far as the present petitioner is concerned is quashed. (Para 14)

Case law Referred to:-

(2010) 46 OCR (SC) 75 : (K. Neelaveni-V- State Rep. by Insp. Of Police & Ors.)

For Petitioner - M/s. S.K. Mund, H.K. Mund, A.R.Mohanty, A.K. Dei & J.B. Sahu.
For Opp.Party - Mr. Prasanna Kumar Pani, Addl. Standing Counsel (Vigilance).

C.R. DASH, J. In this petition under Section 482, Cr.P.C., the petitioner has impugned the order dated 22.12.2007 passed by learned Special Judge (Vigilance), Sambalpur in C.T.R. Case No.84 of 2007 taking cognizance of the offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and Section 120-B, I.P.C. as against the petitioner and others.

2. Compendium of relevant facts for disposal of this Criminal Misc. Case is as follows :-

On 02.08.2000 and 03.08.2000, the petitioner being the agent of M/s. Bondia Flour and Oil Mill, Jharsuguda had received 21 wagons of wheat weighing 12,204 quintals at Railway Goods Shed, Jharsuguda. The wheat in question was purchased and transported from M/s. Maa Durga Edible Products Pvt. Ltd, Chiranjilal Satya Narayan and Kedarnath Hariram, all of Uttar Pradesh. M/s. Bondia Flour and Oil Mills Pvt. Ltd. had paid a sum of Rs.85,02,883/- (rupees eighty-five lakh two thousand eight hundred eighty-three) to the above firms vide Demand Drafts issued at Punjab National Bank, Jharsuguda Branch. On 28.09.2004, the F.I.R. was lodged by Inspector Vigilance, Jharsuguda alleging therein that M/s. Bondia Flour and Oil Mills, Jharsuguda did not pay Sales Tax of Rs.3,40,115/-(rupees three lakh forty thousand one hundred fifteen) nor reflected any payment of Sales Tax towards wheat in the Sales Tax Return filed in the said period. It is also alleged that some of the officials such as the Assistant Commercial Tax Officer, Inspector of Commercial Tax and a Peon of the department along with the present petitioner hatched a criminal conspiracy for evasion of tax and thereby mis-conducted themselves as public servant. On the basis of the aforesaid F.I.R., Sambalpur Vigilance P.S. Case No.37 of 2004 was registered for alleged offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, Section 120-B, I.P.C. and Section 25 of the Sales Tax Act. Investigation was taken up. After completion of investigation, charge-sheet was filed against the Assistant Commercial Tax Officer and the petitioner for the aforesaid offence. After submission of charge-sheet learned Special Judge (Vigilance), Sambalpur by the impugned order dated 22.12.2007 took cognizance of offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988

and Section 120-B, I.P.C. On consideration of materials on record, learned Special Judge (Vigilance) thought it proper not to take cognizance of offence under Section 25 of the Sales Tax Act.

3. In this petition under Section 482, Cr.P.C., extraordinary jurisdiction of this Court has been invoked to quash the order of cognizance dated 22.12.2007 passed by the learned Special Judge (Vigilance), Sambalpur on the following grounds :-

> (I) The consignment of wheat having been purchased from outside the State of Odisha, M/s. Bondia Flour and Oil Mills was not liable to pay Sales Tax on sale turn-over of wheat till its first sale (first point sale) inside the State. In view of such fact, there was no occasion for evasion of sales tax by bringing the consignment from the Railway Goods Shed and there was no scope for any conspiracy;
>
> (II) The Sales Tax liability, if any, being of the firm M/s. Bondia Flour and Oil Mills, the petitioner was not liable to pay any sales tax, as he was only the agent of the firm to receive the goods from Railway Goods Shed. As such, the petitioner being the agent is in no way criminally liable for any wrongful act of the proprietor of the Mill or the Firm M/s. Bondia Flour and Oil Mills.

4. Oppugning the contentions raised by Mr. H.K. Mund, learned counsel for the petitioner, Mr. P.K. Pani, learned Addl. Standing Counsel, Vigilance Department submits that in view of the Explanation to Section 8 of the Orissa Sales Tax Act, 1947, the petitioner having received the consignment of wheat inside the State of Odisha dispatched from outside, such receipt of goods inside the State itself shall be treated as first point of Sale and the petitioner being the agent of M/s. Bondia Flour and Oil Mills is liable to pay tax on the cost of the consignment.

It is further submitted that, the petitioner though the agent, having conspired with the sales tax Officials to bring the consignment out of the railway goods shed, the action of the petitioner being an offence under Section 16-B of the Orissa Sales Tax Act, 1947 read with Rule 94-B of the Orissa Sales Tax Rules and Section 25 of the Orissa Sales Tax Act, the petitioner is the only private person criminally liable.

5. Learned Addl. Standing Counsel for the Vigilance Department having relied on the Explanation to Section 8 of the Orissa Sales Tax Act, 1947 to substance his contention that, on receipt of the consignment of wheat in the

State of Odisha, M/s. Bondia Flour and Oil Mills is deemed to have received the goods on sale in the first point and he is therefore liable to pay tax, it is apposite to reproduce the explanation for ready reference, which reads as follows :

> "Explanation- Where in a series of sales, tax is notified to be levied at the first point, such point, in respect of goods dispatched from outside the State of Orissa shall mean and shall always be deemed to have meant the first of such sales effected by a dealer liable under the Act after the goods are actually taken delivery of by him inside the State of Orissa."

Section 8 deals with powers of the State Government to notify points at which goods may be taxed or exempted.

It is an admitted fact at the Bar and a fact without any dispute that sales tax levy in Odisha is a single point levy. Tax can be levied by selecting a particular point in the series of sales starting from producer/ manufacturer / importer / commission agent till it reaches the consumer. Still for the goods declared under Section 3-B, point of levy of tax is on the first point of purchase by the dealer liable to pay tax inside the State.

A cursory reading of the aforesaid Explanation to the Section makes it abundantly clear that the first point sale in respect of goods prescribed under the Section shall always be deemed to be the first point of such sale effected by dealer, who is liable to pay tax under the Act after he has actually taken delivery inside the State of Odisha. It seems learned Addl. Standing Counsel for the Vigilance Department is labouring under misconception to contend that on receipt of the goods inside the State of Odisha on its purchase from outside, M/s. Bondia Flour and Oil Mills is deemed to have received the goods inside the State of Odisha on sales. M/s. Bondia Flour and Oil Mills here in the present case have received the consignment of wheat inside the State of Odisha on 02.08.2000 and 03.08.2000 on purchase from different dealers in Uttar Pradesh. There is nothing on record to show as to whether M/s. Bondia Flour and Oil Mills had procured the consignment for its own consumption or for onward subsequent sale by itself to different dealers or consumers. The tax rates under Orissa Sales Tax Law clearly show that wheat is taxable at the first point of sale and the rate of tax was 4% at the relevant time.

6. The basis of initiation of the present proceeding is that M/s. Bondia Flour and Oil Mills, Jharsuguda did not pay tax of Rs.3,40,115/- nor it reflected any payment of sales tax towards wheat in Sales Tax Return filed in the said period. The basis of allegation by the Vigilance Department itself

is misconceived, in as much as M/s. Bondia Flour and Oil Mills having received the consignment of wheat in the State of Odisha from Uttar Pradesh, had not yet effected any sale and the taxable event had not yet reached to reflect the sales tax in the return filed by it. Further, there is nothing on record to show whether the aforesaid consignment of wheat had been brought by M/s. Bondia Flour and Oil Mills for its own consumption. Looking from the aforesaid perspective, it is clear that the Vigilance Department labouring under misconception has built the edifice of the prosecution case on the basis that, as M/s. Bondia Flour and Oil Mills, Jharsuguda did not pay sales tax of Rs.3,40,115/- nor reflected any payment of sales tax towards wheat in the said period in the return filed by it, has evaded the tax. In view of such fact, the very basis of accusation therefore is misconceived and the prosecution lunched has no legs to stand.

7. It is strenuously submitted by Mr. Pani, learned Additional Standing Counsel (Vigilance Department) that the petitioner having contravened Section 16-B of the Orissa Sales Tax Act, 1947 and Rule 94-B of the Rules made thereunder, he is to be held to have conspired with the Sales Tax Officials to take the consignment of wheat from the railway goods shed without paying any tax and it is to be further held that by the conspiracy between the Sales Tax Officials and the petitioner, the tax having been evaded, they must be held to have put the state to loss.

Learned counsel for the petitioner, on the other hand, submits that the petitioner having received the goods on behalf of M/s. Bondia Flour and Oil Mills as their agent, neither he is liable to pay tax nor he has conspired with any Sales Tax Officer to evade tax.

8. Before addressing the point raised by learned counsels for the parties, it is apposite to reiterate here that the basis of the prosecution allegation is evasion of tax. The same allegation has come to be reiterated by Mr. Pani, learned Additional Standing Counsel (Vigilance Department), so far as the contravention of Section 16-B of the Act and Rule 94-B of the Rules made thereunder is concerned. It is emphatically submitted by Mr. Pani, learned Additional Standing Counsel (Vigilance Department) that the Goods Register of the Railway Receipt Unit Office of the ACTO maintained post-dated revealed that 21 wagons of wheat imported from Roja Junction to Jharsuguda Railway Goods Shed on 02 and 03.8.2000 has been received by the petitioner, but no Sales Tax has been collected by the Sales Tax Officials from the consignment of wheat, though Sales Tax have been collected from other items on that day.

I have already discussed that the consignment of wheat having been purchased from outside the State of Odisha, the taxable event shall not

come till it is sold by the consignee in the of State of Odisha after its receipt by the consignee, i.e., M/s. Bondia Flour and Oil Mills. If the consignee had brought the consignment of wheat for its own consumption, no Sales Tax shall be leviable on consumption of wheat by the company and Sales Tax can only be leviable on by-product of the wheat when such by-product is dispatched to market for sale. In that view of the matter, there was no occasion for collection of tax in respect of the consignment of wheat at the Railway Receipt Unit, Jharsuguda on taking delivery of the wheat either by M/s. Bondia Flour and Oil Mills Ltd or their agent. Therefore, the allegation of the Vigilance Department to the effect that Sales Tax has not been collected on consignment of wheat as shown in the entry of Goods incoming Register of Railway Receipt Unit, Jharsuguda, is totally misconceived.

9. I do not dispute the claim of Mr. Pani, learned Additional Standing Counsel (Vigilance Department) to the effect that there has been contravention of Section 16-B of the Act and Rule 94-B of the Rules made thereunder. Orissa Sales Tax Act, 1947 being a self-contained Code, such contravention could have been taken care of by the Sales Tax Department by taking resort to provision for penalty in Section 16-C of the Act or by taking resort to lunching of prosecution under Section 25 of the Act or the Officers concerned could have been proceeded with departmentally. But no case for prosecution under the Prevention of Corruption Act is made out for such contravention on the misconceived ground that there was conspiracy to evade tax.

10. Coming to the last contention, it is submitted by Mr. Pani, learned Addl. Standing Counsel (Vigilance Department) that, during investigation, evidence came out that Sri Kamal Prasad Bondia (present petitioner) was the representative / agent of Radhakrishna Bondia, the proprietor of M/s Bondia Flour and Oil Mills Pvt. Ltd., Jharsuguda, and all the payments made against the consignment in question was arranged by the present petitioner through Drafts of Punjab National Bank, Jharsuguda. Further, it came to light and an admitted fact that the present petitioner had received all the 21 wagons of wheat from Mr. A. Narayan Rao, the Chief Goods Supervisor, Railway Receipt Unit, Jharsuguda on 02.08.2000 and 03.08.2000, as revealed from the statements given by Mr. A. Narayan Rao.

It is emphatically submitted by Mr. Pani, learned Addl. Standing Counsel (Vigilance Department) that, as per Section 16-B of the Orissa Sales Tax Act and Rule 94-B of the Rules made thereunder, the petitioner was liable to pay tax at the railway station by making a written declaration in Form-XXXIV in duplicate duly signed by such Sales Tax Authority as per the rule.

11. I have already discussed the contention of Mr. Pani, learned Addl. Standing Counsel (Vigilance) regarding Section 16-B of the Orissa Sales Tax Act and Rule 94-B of the Rules made thereunder. It is submitted by Mr. H.K. Mund, learned counsel for the petitioner, that the petitioner being the agent of M/s. Bondia Flour and Oil Mills, Jharsuguda, he was not liable to pay any sales tax, and his duty was to receive the goods for or on behalf of the proprietor.

12. It is not in dispute that, Sales Tax Authority is entitled to impose sales tax in accordance with the relevant Act and Rules, upon a person, who carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to the Principal. A clearing or forwarding agent like the petitioner or a person transporting goods on behalf of the dealer does not carry on the business of selling goods and does not have, in the customary course of the business, authority to sell goods belonging to the dealer, whose goods he books or receives. There has to be a reasonable and proximate connection between the transaction of sale and the clearing or forwarding agent or person transporting the goods before the Sales Tax Authority can, in exercise of the power, levy sales tax. From the materials on record, there is nothing to show that in the present case there was such close and direct connection between the transaction of sale of goods by the dealer and the clearing or forwarding agent or the agent who booked or received such goods or a person, who transports such goods like the petitioner. The petitioner being, therefore, a simple agent acting on behalf of the proprietor, cannot be held to have any sales tax liability and he cannot be held to have conspired with the Sales Tax Authority to transport the goods without complying the relevant provisions, as he was acting under the instruction of the Principal (proprietor).

13. Hon'ble the Supreme Court in the case of **K. Neelaveni *vrs.* State Rep. by Insp. Of Police & Ors.,** (2010) 46 OCR (SC) 75 has held that, while considering the application for quashing of charge-sheet, the allegations made in the F.I.R. and the materials collected during the course of investigation are required to be considered. Truthfulness or otherwise of the allegation is not fit to be gone into at this stage, as it is always a matter of trial. Considered in the light of the aforesaid dictum of the Hon'ble Supreme Court, the entire facts on record makes it clear, as discussed supra, that the prosecution has been launched against the petitioner on the misconceived notion that M/s. Bondia Flour and Oil Mills was liable to pay sales tax on receipt of 21 wagons of wheat, and the petitioner being the agent had conspired to evade tax.

14. Taking into consideration the materials on record in its entirety and the discussion supra, I am of the considered view that, no offence under Section 120-B, I.P.C. is made out against the petitioner, and for that matter no offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 is also made out against the petitioner. Accordingly, the proceeding so far as the present petitioner is concerned, is quashed.The CRLMC is accordingly allowed.

Application allowed.

2013 (II) ILR - CUT- 869

B. K. MISHRA, J.

W.P.(C) NO.1159 OF 2011 (Dt.31.05.2013)

LALITA DASHI .....Petitioner

.Vrs.

ACHYUTANANDA DAS & ORS. .....Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-1, R-10

Impletion of party – In this case the Opp.Party No.1-intervener, prima facie, appears to have direct interest in the subject matter of litigation – "Direct interest" means direct in the issues between the plaintiff and the defendant – A person is legally interested in the question involved in the suit only if he can show that it may lead to a result that may affect him legally, that is curtailing his legal rights – Held, the learned District Judge has rightly allowed the prayer for impletion of O.P.1 as a defendant in the suit, calling for no interference by this Court. (Para 4)

For Petitioner - M/s. Samir Ku. Mishra, J.Pradhan, P. Prusty, D.K. Pradhan.
For Opp.Parties - M/s. A.P. Bose, Mr. R.K. Mahanta, (Opp.Party No.1).

B.K.MISRA, J. In this writ petition, the petitioner challenges the correctness of the order of the learned District Judge, Puri passed in Civil

Suit No.6-380 of the 2009-2008 dated 14.12.2010 under Annexure-3, where in the learned District Judge, Puri has allowed the prayer of one Achyutananda Das, namely, the present opposite party No.1 to be impleaded as a defendant in the suit.

2. I have heard Mr. Mishra, learned counsel appearing for the petitioner as well as Mr. Bose, learned counsel appearing for the opposite party No.1 and also perused the impugned order at Annexure-3 along with the materials on record including the petition filed by opposite party No.1 in the court below under Order-1, Rule-10 of the C.P.C. praying therein to implead him as a defendant in the suit.

3. The dispute in the court below is with regard to the genuineness of the 'will' alleged to have been executed by Guru Adhikari Sri Krushnananda Das. The intervener petitioner claims to be a disciple of late Guru Adhikari Sri Krushnanda Das and the said 'Guru' being satisfied with his conduct and service executed a 'Will' in his favour on 05.03.1999. It is also the case of the intervener petitioner that in the guise of executing a Power of Attorney, some of the devotees including the present writ petitioner-Lalita Dashi got a cancellation deed in respect of the 'will' executed by Guru Adhikari Sri Krushnananda Das. It is the case of the writ petitioner that on 17.9.2001 on a "Biswakarma Puja" day late Guru Adhikari Shri Krushnanda Das executed a fresh deed of will in her favour in presence of the witnesses and the said will is the last will and after the death of the Guru she approached the Court for grant of Letters of Administration in her favour.

4. On careful consideration of the case of the rival parties in my humble view, to set at rest the controversises involved in the suit with regard to the wills in question, the impletion of the intervener petitioner is absolutely necessary as he is a necessary party since prima facie he appears to have direct interest in the subject matter of litigation, It is needless to reiterate the settled position of law that "Direct Interest" means direct in the issues between the plaintiff and the defendant, A person is legally interested in the question involved in the suit only if he can show that it may lead to a result that may affect him legally, that is curtailing his legal rights. Thus considering the nature of dispute with regard to the wills in question the learned District Judge, Puri has rightly allowed the prayer of the opposite party No.1 to implead him as a defendant in the Probate Proceeding, namely, C.S. No.6-380 of 2009-2008. I do not find any illegality in the said order at Annexure-3.

5. Thus, when there is nothing to interfere with the impugned order at Annexure-3, the order in question calls for no interference. Accordingly, the writ petition being devoid of merit stands dismissed. No costs.

Writ petition dismissed.

2013 (II) ILR - CUT- 871

DR. A. K. RATH, J.

MACA NO. 149 OF 2011 (Dt.24.07.2013)

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

.Vrs.

CHITTARANJAN MALLICK & ORS. ……Respondents

MOTOR VEHICLES ACT, 1988 – S.168

Compensation – Death of a child studying in Class-II – Parents are claimants – Deceased not earning at the time of accident – Compensation can be awarded as the deceased had a prospect to earn and the parents had a reasonable expectation of pecuniary benefit if the child had lived – Grant of just and reasonable compensation, which should neither be a bonanza nor a source of profit nor a pittance - Held, this Court modified the award from Rs.2,56,000/- with 7% interest to Rs.2,00,000/- with 7.5/- interest. (Para 12)

Case laws Referred to:-

1.(2001)8 SCC 197 : (Lata Wadhwa & Ors.-V- State of Bihar & Ors.)
2.(2003)7 SCC 484 : (State of Haryana-V- Jasbir Kaur).
3.(2006)13 SCC 60 : (New India Assurance Co.Ltd.-V- Satender & Ors.).
4.(2007)11 SCC 120 : (Kaushlya Devi-V- Karan Arora & Ors.).
5.2009(3) TAC 1 (SC) : (R. K. Mallik & Anr.-V- Kiran Pal & Ors.)

For Appellant - M/s. Mahitosh Sinha, P.R. Sinha & P.R. Mahali.

For Respondent - M/s. A.K. Mohanty & B. Rout, For R-1 & 2.

DR. A.K.RATH,J. This appeal by insurer is directed against the judgment/award dated 27.12.2010 passed by the learned Member, 3rd M.A.C.T., Bhubaneswar in MACT Case No. 267/220 of 2009-07 whereby and whereunder the learned tribunal awarded an amount of Rs.2,56,000/- as compensation and directed the insurer to pay the same to the claimants along with simple interest @ 7% per annum from the date of filing of the claim petition i.e. 21.6.2007 till the date of payment.

2. Facts, in very brief, are as follows:

On 27.05.2007 while the son of the claimants was returning to his home from Tangi-Patharabandha along with his grand parents in an auto

rickshaw bearing registration No. OR 02 AL 0422, the left side rear tyre of the said auto rickshaw was burst, for which the same dashed against the backside of a gas tanker bearing registration No. HR 51 BA 0127, which was standing near a hotel at Lachanga Chawk. As a result of the said accident he succumbed to injuries on the spot. Thereafter the claimants filed an application under section 166 of the Motor Vehicles Act, 1988 before the tribunal.

3. Pursuant to issuance of notice, opposite party no.1, the owner of the offending vehicle entered appearance and filed a written statement denying the liability. Opposite party no.2, insurer of the auto rickshaw also filed a written statement denying the liability.

4. On the basis of the inter se pleadings of the parties, the learned tribunal struck three issues. To substantiate the case, the petitioners had examined one witness and on their behalf six documents were exhibited. Neither any witness was examined nor any document was exhibited by the opposite parties.

5. On a threadbare analysis of the evidence on record, both oral and documentary, and pleadings of the parties, the learned tribunal came to a conclusion that the accident occurred due to rash and negligent driving of the auto rickshaw. Having held so, the learned tribunal awarded an amount of Rs.2,56,000/- (rupees two lakhs fifty-six thousand) to the claimants and directed the insurer to pay the same amount with interest at the rate of 7% per annum from the date of filing of the claim application to the claimants.

6. Mr. M.Sinha, learned counsel appearing for the appellant insurer submitted that the award is high and excessive in as much as the learned tribunal committed an error in applying multiplier 18. Mr.Sinha further submitted that the deceased was a minor and non-earning member and in such a contingency the annual dependency ought to have been calculated by taking notional income of the deceased at Rs.15,000/- per annum. Per contra, Mr. A.K.Mohanty, learned counsel appearing for the respondents/claimants supported the award.

7. From the evidence on record, it is evident that the deceased was seven years old and was studying in Class-II at the time of accident. Thus, the sole question that hinges for consideration of this Court is as to what should be just compensation, when a minor dies in a motor vehicle accident. Assessment of compensation for loss of human life is a very difficult task. It

becomes baffling when the deceased is a child. No amount of compensation can wipe out tears from the eyes of the parents.

8. The Hon'ble Supreme Court in the case of **Lata Wadhwa and others v. State of Bihar and others**, (2001) 8 SCC 197, while computing compensation made distinction between deceased children falling within the age group of 5 to 10 years and age group of 10 to 15 years. In paragraph-11 of the said judgment their Lordships held that the compensation amount for the children between age group of 5 to 10 years should be Rs. 1.5 lakhs, to which conventional figure of Rs.50,000/- should be added and thus, the total amount would be Rs.2.00 lakhs. The tribunal constituted under the M. V.Act, 1988 as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be "just and reasonable". The compensation must be "just" and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. In the case of **State of Haryana v. Jasbir Kaur**, (2003) 7 SCC 484, the Hon'ble apex Court in paragraph – 7 of the judgment held as follows:-

> "7. It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense 'damages' which in turn appears to it to be 'just' and reasonable. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be 'just' and it cannot be bonanza; not source of profit; but the same should not be pittance. The courts and tribunals have a duty to weight the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar and special features, if any. Every method or mode adopted for assessing compensation has to be considered in the back ground of' 'just' compensation which is the pivotal consideration. Though by use of the expression 'which appears to it to be just' a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The

expression 'just' denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just."

9. The Hon'ble apex Court in the case of **New India Assurance Company Limited V. Satender and others**, (2006) 13 SCC 60 held as under:-

> "9. There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendor of the stars, beyond the reach of monetary tape-measure. The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be age of parents.
>
> 10. In case of the death of an infant, there may have been no actual pecuniary benefit derived by his parents during the child's lifetime. But this will not necessarily bar the parents' claim and prospective loss will find a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of *Taff vale Rly. V. Jenkins and Lord Atkinson* said thus:
>
> ".....all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact- there must be a basis of the fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from the.(See **Lata Wadhwa v. State of Bihar**)

10. The Hon'ble apex Court in the case of **Kaushlya Devi v. Karan Arora and others**, (2007) 11 SCC 120, while dealing with the awarded

amount in case of death of a minor in paragraph-12 held as follows:-

> "12. In case of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

11. In **R.K.Mallik and another v. Kiran Pal and others**, 2009 (3) T.A.C. 1 (S.C.), the Hon'ble Supreme Court held that the real problem that arises in the cases of death of children is that they are not earning at the time of accident. Their Lordships further held that under no stretch of imagination it cannot be said that the parents, who are the claimants have not suffered any pecuniary loss.

12. Applying the principles enumerated in **Lata Wadhwa and Satender** supra to the facts of the present case, this Court feels that a sum of Rs.2,00,000/-(rupees two lakhs) would meet the ends of justice. The same shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till the date of payment. The award is modified to the extent above. The appellant is directed to deposit aforementioned amount within three months before the tribunal. There shall be no order as to costs.

Appeal disposed of.

2013 (II) ILR - CUT- 875

DR. B. R. SARANGI, J.

CRLMC. NO. 190 OF 2002 (Dt.16.08.2013)

NIRANJAN NAYAK ……..Petitioner

.Vrs.

SASANKA SEKHAR BISWAL …… Opp.Party.

A. CRIMINAL PROCEDURE CODE, 1973 – S. 197

Sanction - Complaint Case against the petitioner – Magistrate took cognizance against him for the offences U/ss.294, 323 & 506 I.P.C. – Order challenged on the ground of lack of sanction.

In this case the act alleged was committed while the petitioner was in due discharge of his official function – No. sanction has been obtained prior to taking such cognizance – Held, proceeding in the complaint case is liable to be quashed. (Paras 13,15)

B. CRIMINAL PROCEDURE CODE, 1973 – S.482

Complaint Case – Complaint case filed on false and frivolous allegations against the petitioner – Held, the proceeding in the complaint case should be quashed. (Paras 14,15)

Case laws Referred to:-

1.(2006)34 OCR (SC) 469 : (SankaranMoitra-V- Sadhna Das & Anr.)
2.AIR 1967 SC 776 : (P. Arulswami-V- State)
3.(2009)44 OCR=2009(Suppl.II) OLR 317 : (Biswanath Hota & Ors.-V- State of Orissa & Anr.).
4.(2009)44 OCR 247- (2009)Supp-II OLR 594 : (Sri Debasis Panigrahi-V- State of Orissa & Ors.)
5.2009(Supp.1)OLR 193 : (Tapas Kumar Rath-V- Harekrushna Pradhan).
6.AIR 2008 SC 1992 : (Anjani Kumar-V- State of Bihar & Anr.)
7.2011(Supp.II)OLR 1011 : (Sri Sankarsana Behera-V- State of Orissa).
8.2011(II)OLR (SC) 871 : (Chittaranjan Das-V- State of Orissa).

For Petitioner - Mr. K.C. Kar.
For Opp.Party - M/s. S.R. Mohapatra, B. R. Mohanty, B.K. Raj.

DR. B.R.SARANGI, J. The petitioner, who was working as Block Development Officer, Pattamundai, in this application under Section 482, Cr.P.C. assails the order dated 22.7.2002 passed by the learned J.M.F.C., Pattamundai in ICC Case No. 59 of 2002 taking cognizance of the offence under Sections 294, 323, 506, IPC against him.

2. Opposite party, being the complainant, lodged a complaint on 16.7.2002 alleging that on 10.7.2002 at 11 A.M. he went to the office of the

petitioner requesting the latter to issue work order in his favour for execution of the road work of his village under EAS (FDR) scheme pursuant to the recommendation made by the Palli Sabha and the petitioner demanded a sum of Rs.2,000/- from the complainant for issue of such work order. On his protest, it is alleged that the petitioner scolded him and coming out of the chair, pushed him and drove him out of the room.

3. On the basis of the complaint lodged, two of the covillagers have been examined, who have made parrot-like statements in support of the complainant and on consideration of the same, by order dated 22.7.2002 learned J.M.F.C., Pattamundai took cognizance of the offence under Sections 294, 323, 506, IPC against the petitioner in ICC Case No. 59 of 2002.

4. Mr.Kar, learned counsel appearing for the petitioner states that the learned Magistrate should not have taken cognizance of the offence on the basis of the complaint lodged by the opposite party on the ground that sanction as required under Section 197, Cr.P.C. has not been obtained prior to taking of cognizance. The complaint made against him is absolutely false and frivolous inasmuch as the offence so alleged, if taken into consideration in its totality, would indicate that in course of due discharge of his official function the complainant questioned, why he did not issue the work order. The complainant and two others, who are his co-villagers, obstructed him from discharging his official business and shouted when he was in his work.

5. On the above mentioned facts, now it is to be considered as to whether the act so alleged was committed in due discharge of his official function, and whether sanction under Section 197, Cr.P.C. is required or not.

6. The apex Court in the case of ***Sankaran Moitra* v. *Sadhna Das and another***, (2006) 34 OCR (SC) 469, has held that prosecution hit by provision under Section 197 Cr.P.C. cannot be launched without the contemplated sanction. It is a condition precedent though the question as to applicability of Section 197 Cr.P.C. may arise not necessarily at the inception but even at a subsequent stage.

7. Referring to the case of **P.Arulswami v. State**, AIR 1967 SC 776, this Court in ***Biswanath Hota & Ors Vrs. State of Orissa & another (2009) 44 OCR 765=2009(Suppl.II)OLR 317*** has held that Section 197 Cr.P.C. has been implanted in the Code of Criminal procedure to protect the responsible public servants against the institution of vexatious criminal proceeding for offences alleged to have been committed by them, while they are acting or purporting to act as public servants. The Legislature has implanted the same

in the statute to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without any reasonable cause. But the protection has certain limits and is available only when the alleged act done by the public servant appears to have a reasonable connection with the discharge of the official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty , a public servant acted in excess of his duty, but there is a reasonable connection between the act complained of and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of protection available to him under Section 197 Cr.P.C.

8. A Division Bench of this Court relying upon various earlier judgments of the apex Court as well as this Court in **Sri Debasis Panigrahi v. State of Orissa and others**, (2009) 44 OCR, 247 =(2009) Supp.II OLR, 594, has held that the Magistrate may not take cognizance where he finds the allegations are absurd and inherently improbable or it requires prior sanction of the competent authority.

9. This Court in ***Tapas Kumar Rath Vrs Harekrushna Pradhan*** 2009(Supp.1) OLR 193 has held that before protection under Section 197 Cr.P.C. is claimed, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official capacity. If on facts it is prima facie found that the act or omission for which the accused was charged has reasonable connection with discharge of his duty then it must be held to be official, to which applicability of Section 197 Cr.P.C. cannot be disputed. What a Court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the need and requirements of situation.

10. In **Anjani Kumar v. State of Bihar and another**, AIR 2008 SC 1992, the apex Court has held that once it is established that the act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. It is further observed that if it is prima facie found that the act or omission for which the accused was charged has a reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of Cr.P.C. cannot be disputed. Relying upon the said judgment this Court in **Sri Sankarsana Behera v. State of Orissa**, 2011 (Supp.II) OLR 1011 has quashed the order of cognizance passed against the petitioner in the said case.

11. The apex Court in **Chittaranjan Das v. State of Orissa**, 2011(II) OLR (SC), 871 has held that sanction is a device provided by law to safeguard public servants from vexatious and frivolous prosecution. It is to give them freedom and liberty to perform their duty without fear or favour and not succumb to the pressure of unscrupulous elements. It is a weapon at the hands of the sanctioning authority to protect the innocent public servants from uncalled for prosecution but not intended to shield the guilt.

12. Now question comes what is the duty of the Magistrate in a complaint case. The said question has been considered in *Tapas Kumar Rath (supra)* taking into account Sections 200, 202, 203 and 204 Cr.P.C. read with Rule 21 of the General Rules and circular Orders of the High Court of Judicature, Orissa (Criminal), Volume-1, wherein this Court has held as follows:

> "Rule 21 of the General Rules and circular Orders of the High Court of Judicature, Orissa (Criminal), Volume-1 prescribes that examination of the complainant under Section 200 of the Cr.P.C. should be a thorough and intelligent enquiry into the subject matter of a complaint to enable the Magistrate to find out whether the complainant is really aggrieved, or whether it would amount to abuse of the process of the Court and harassment to the accused. In course of inquiry under Section 202 of the Cr.P.C. the Magistrate may, if he thinks fit, take evidence of witness on oath. Proviso to Sub-section 2 of Section 202 of the Cr.P.C. provides that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and to examine them on oath. Before issuance of process, the Magistrate taking cognizance of an offence has to arrive at the opinion that there is sufficient ground for proceeding against the accused which means that the Magistrate has to be satisfied regarding existence of prima facie case before issuing process. For that purpose, the Magistrate is required to examine the complaint petition, initial statement of the complainant and the statements of the witnesses examined on oath. The Magistrate is required to judicially consider the desirability to terminate the proceeding under Section 203 of the Cr.P.C. or to proceed against all or some of the accused persons under Section 204 of the Cr.P.C. upon reference to materials on record."

13. In view of the above mentioned provisions of law governing the field and taking into consideration the factual aspects alleged in the complaint petition, it is the admitted case that the petitioner was discharging his duties of Block Development Officer, Pattamundai on the date of occurrence, i.e. on

10.7.2002. The complainant has also stated that while the petitioner was discharging his duties, he entered into his official room and asked for issuance of work order in his favour pursuant to the recommendation made by the Palli Sabha in presence of two of his co-villagers. But he alleged that the petitioner demanded a sum of Rs.2000/- for issuance of such work order, as a result he protested and the petitioner scolded him, thereby there was altercation of words, which has culminated in filing of the complaint petition against the petitioner. On perusal of the complaint petition as well as the statement given by the witnesses, which are parrot-like, on which basis cognizance has been taken by the Magistrate, it would appear that the act alleged was committed while the petitioner was in due discharge of his official function. Before cognizance was taken, sanction as required under Section 197, Cr.P.C. has not been taken. Therefore, cognizance so taken by the learned Magistrate without prior sanction under Section 197, Cr.P.C. in the complaint case has to be quashed.

14. It is urged that the complainant has filed complaint to wreak vengeance against the petitioner even though he was not present in the office on the date of alleged occurrence. In course of hearing, it has been brought to the notice of the Court that on the date of occurrence, i.e. on 10.7.2002, the petitioner was not present in the office, rather he was present on the very same day at 10 A.M. in the District Crime meeting held at Kendrapara to which he was a signatory and whose name finds place at Sl.No.31 in Annexure-1 to his affidavit filed in Court on 2.8.2013 and Therefore, it is proved that the complainant has filed false and frivolous allegations against the petitioner.

15. In view of the aforesaid facts and circumstances, the complaint so filed by the complainant-opposite party being frivolous one, the initiation of the proceeding in ICC No. 59 of 2002, cannot be sustainable. Apart from the same, assuming that the petitioner was present on the date of occurrence, the proceeding also cannot be initiated against him as the act alleged is in due discharge of his official function, is protected under Section 197, Cr.P.C. and no sanction has been obtained prior to taking cognizance by the learned J.M.F.C., Pattamundai. Therefore, on both the counts, the proceeding in ICC No. 190 of 2002 is hereby quashed. CRLMC is allowed.

Application allowed.

2013 (II) ILR - CUT- 881

DR. B. R. SARANGI, J.

CRLMC. NO. 1395 OF 2004 (Dt.23.08.2013)

SUDHIR KUMAR PANDA ……..Petitioner

.Vrs.

STATE OF ORISSA …….Opp.Party

PENAL CODE, 1860 – S.153-A

Offence U/s. 153-A – Proof – Person must be promoting feeling of enmity, hatred or ill will "between different" religious or racial or linguistic or regional groups or castes and communities and it is necessary that at least two such groups or communities should be involved.

In this case the alleged news item sends only a message that there is allegation of formation of some Muslim organization and there is demand from the side of the Shiv-sena by cautioning the higher authorities to save from further riot which does not tend to promote hatred between different sections of the public so merely inciting the feeling of one community or group without any reference to any other community or groups cannot attract the provision of Section 153-A I.P.C. – Moreover there is no mensrea attributable to such publication – Held, the article published does not make out a case which would fall within the mischief of Section 153-A I.P.C. - So allowing the proceeding to continue will amount to abuse of the process of the Court – The proceeding including the order taking cognizance are quashed.

(Paras 13,14)

Case laws Referred to:-

1.1997 CRI. L.J. 4091=(1997)7 SCC 931 : (Bilal Ahmed Kaloo-V- State of A.P.)
2.1995 CRI. L.J. 1316 : (Joseph Bain D'Souza & Anr.-V- State of Maharastra & Ors.)
3.(2007)37 OCR (SC) 499 : (Manzar Sayeed Khan-V- State of Maharashtra & Anr.).
4.AIR 1988 SC 775 : (Ramesh Chotalal Dalal-V- Union of India & Ors.)
5.AIR 1947 Nagpur 1 : (Bhagvati Charan Shukla-V- Provincial Government).

For Petitioner - M/s. Dayananda Mohapatra, D.K. Sahoo,

M. Mohapatra, S.K. Swain.
For Opp.Parties - Addl. Standing Counsel.

DR. B.R.SARANGI, J. The petitioner has filed this application under Section 482, Cr.P.C. with a prayer to quash the entire proceeding as well as the order dated 02.12.2003 passed by the learned S.D.J.M., Bhadrak in G.R. Case No. 1050 of 2001 arising out of Bhadrak Town P.S. Case No. 0154 of 2001 taking cognizance of the offence under Sections 153-A of the Indian Penal Code, in short, 'Code'.

2. The prosecution case, in short, is that the petitioner is a News Reporter in local daily 'Kalantar'. A news item has been published in the said news paper on 27.9.2001 stating that the local Muslims of Bhadrak were raising fund for Taliban Government. Consequent upon such publication, it is alleged that there was resentment between two groups in the locality leading to communal disharmony for which the petitioner is responsible. With this allegation F.I.R. was lodged by the A.S.I. of Police. On completion of investigation, charge-sheet was filed against the petitioner for commission of offence under Section 153-A, I.P.C and basing upon which cognizance was taken on 02.12.2003.

3. Mr. Dayananda Mohapatra, learned counsel appearing for the petitioner strenuously urged that the news item published in local daily 'Kalantar', does not make out a case under Section 153-A of the Code. He further urged that on perusal of the said news item, it would appear that there is neither any wording of incitement or causing disorder in the news item published nor the writing is couched in intemperate, undignified and wild language having a tendency to insult the feelings or the deepest religious convictions of any section of the people and more so, the editors were not against the Muslim community as a whole but against the anti-national elements in them and as such, there is no malicious intention causing any disorder of public peace and harmony in publication of such news item. Therefore, the cognizance taken under Section 153-A of the Code is unsustainable and seeks for quashing of the same. To substantiate his contention, he has relied upon the judgment of the Supreme Court in **Bilal Ahmed Kaloo v. State of Andhra Pradesh** reported in 1997 CRI. L.J. 4091=(1997) 7 SCC 931 and of the Bombay High Court in **Joseph Bain D' Souza and another v. State of Maharastra and others** reported in 1995 CRI.L.J. 1316.

4. Mr.Mohapatra, learned counsel for the petitioner has relied upon a judgment of the apex Court in **Manzar Sayeed Khan v. State of**

Maharashtra and another, (2007) 37 OCR (SC), 499 stating that the apex Court has been pleased to quash the FIR which was filed on the allegation of commission of offence under Section 153-A, IPC. In the said judgment, the apex Court made a reference to Bilal Ahmed (supra) and observed that merly inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two Sections. Mr.Mohapatra further urged that the order of taking cognizance suffers from non-compliance of the sanction granted under Section 196, Cr.P.C.,and therefore the entire proceeding in the interest of justice, equity and fair-play.

5. Mr.Zaffrulah, learned counsel for the State could not initially rebut the contention reised by Mr.Mohapatra, with reference to the sanction as required under Section 196, Cr.P.C. when the case was reserved for judgment. Thereafter the matter was listed for delivery of judgment and just before delivery, Mr. Zaffrulah produced the case diary from it transpired that the Government in Home Department has granted sanction prior to taking congence .Therefore, though the matter was on the Board on 2.8.2013 for delivery of judgment, the same was not delivered and the matter was directed to be listed under the heading “to be mentioned” for seeking clarification from the parties. Accordingly, the matter was taken up on 16.8.2013 on which date this Court made a query from the counsel appearing for the parties whether sanction as required under Section 196 is required before taking cognizance of the offence alleged under Section 153-A, IPC.

6. Mr.Mohapatra, learned counsel appearing for the petitioner states that to his knowledge sanction has not been obtained before taking cognizance. Per contra, Mr.Zaffrulah, learned counsel for the State produced the case diary. On perusal of the same, it reveals that Letter No. 1085/SR dated 30.11.2003 of Superintendent of Police, Bhadrak along with Government sanction from the Home Department, Orissa, Bhubaneswar vide order no.51500 dated 24.11.2003 was received. Thus, it is clear that sanction has been granted on 24.11.2003 and thereafter, charge-sheet was filed on 30.11.2003 and cognizance was taken on 2.12.2003. In view of such position, the contention raised that before taking cognizance on 2.12.2003, no sanction has been obtained by the Court fails, thereby the argument advanced by Mr.Mohapatra to this extent cannot be accepted.

7. In order to appreciate the contention of Mr. Mohapatra, learned counsel for the petitioner, Section 153-A, IPC is quoted below:-

"153-A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony-

(1) Whoever –

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion , race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or …….

shall be punished with imprisonment which may extend to three years, or with fine, or with both."

8. The objects and reasons of enactment of Section 153-A, IPC is quoted below:

"In order effectively to check fissiparous communal and separatist tendencies, whether based on grounds of religion, caste, language or community or any other ground, it is proposed to amend section 153-A of the Indian Penal Code so as to make it a specific offence for any one to promote or attempt to promote feelings of enmity or hatred between different religious, racial or language groups or castes or communities. The Bill also seeks to make it an offence for anyone to do any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which is likely to disturb public tranquility.

Clause 2.- Promoting enmity between different groups on grounds of religion, race language, etc., is made an offence under Section 153-A of the Indian Penal Code. It is proposed to include therein promoting enmity between different groups on grounds, such as place of birth, or residence as well. It is also proposed to widen the scope of the provision so as to make promotion disharmony or feelings of ill-will an offence punishable thereunder. Clause (b) of the said section provides for the punishment for doing acts prejudicial to

> the maintenance of harmony between different groups. That provision is also proposed to be widened so as to include acts prejudicial to the maintenance of harmony between different regional groups as well. It is also proposed to provide for enhanced punishment and a minimum punishment for any such offence committed in place of worship. The section is being substituted by this clause to achieve the purpose.
>
> Clause 2.- The Committee are of the opinion that having to the enhanced punishment of imprisonment up to five years provided in sub-section (2) of clause 2, the provision for minimum punishment of imprisonment of two years may be omitted. Accordingly, the words 'which shall not be less than two years but' in sub-section (2) of proposed section 153-A have been omitted."

9. On perusal of the provision of Section 153-A of the Code read with objects and reasons, it is clear that the same has been enacted to prevent various classes from coming into conflict by mutual abuse and recrimination and is intended to prevent breaches of public tranquility, which might result from exciting feelings of enmity between different religious, racial or language groups or castes or communities. As it reveals from the news item published, it does not satisfy the ingredients of Section 153-A of the Code so as to bring home the charge against the petitioner for the said offence. More specifically, in a criminal case mens rea plays a vital role and on perusal of the article published, I find that it does not make out a case that the intention is to cause disorder or incite people to violence which is the sine qua non of the offence under Section 153-A of the Code, the prosecution has to prove the existence of mens rea in order to succeed in the case. Specifically mens rea or malicious intention on the part of accused to commit offence of promoting disharmony amongst different religions is essential under Section 153-A, IPC.

10. On bare reading of the entire writings, it would app-ear that the news item does not tend to promote hatred between different sections of the public. Therefore, the news item which has been published does not make out a case to come under the purview of Section 153-A of the Code, save and except it sends only a message that there is allegation of formation of some Muslim organization and there is demand from the side of the Shiv Sena by cautioning the higher authorities to save from further riot, that itself cannot constitute an offence under Section 153-A of the Code as alleged. Apart from the same, the judgment of the apex Court in Bilal Ahmed (supra), clearly indicates that Section 153-A, IPC covers a case where a person by

"words, either spoken or written, or by signs or by visible representations" promote or attempts to promote such feeling. Merely inciting the feeling of one community or group without any reference to any other community or groups cannot attract the provisions of Section 153-A, IPC. In Joseph Bain D' Souza and another (supra) articles were published in the news paper 'Samna' in the form of editorial after fall of Babri Masjid and riot took place in the area predominantly occupied by Muslims. Whether the said article came within the ambit and purview of Section 153-A and Section 153-B of the Code was under consideration by this Court. The Bombay High Court held that the Court will have to read the article as a whole and not out of the context. The Court cannot go into the motive of writing those articles because motive is irrelevant. The articles when read as a whole must fall within the mischief of Section 153-A and Section 153-B of the Code and if after reading of the articles, Court comes to the conclusion that the same are likely to promote ill-will, spite and hatred amongst the communities, then the said articles or editorials will come within the mischief of Section 153-A and Section 153-B of the Code. In the said article published, reference was made in respect of holy Koran which according to the editor, not only belongs to the Muslims but also to the whole community. In the said editorials, appeal was also made to the Muslims to forget the past and to join the mainstream of public life in India. It is true that in some of these articles due to the emotional outburst high-flown and caustic language was used but this per se will not fall within the mischief of Section 153-A and Section 153-B of the Code.

11. Referring to the case of Manzar Sayeed Khan(supra) and also the provisions contained in Section 153-A, IPC, it clearly covers a case where a person by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities or acts prejudicial to the maintenance of harmony or is likely to disturb the public tranquility. The gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153A of IPC. The prosecution has to prove prima facie the existence of mens rea on the part of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published. The matter complained of within the ambit of Section 153A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here

and there and connect them by a meticulous process of inferential reasoning.

12. After due analysis the apex Court in para-15 and 16 has observed as follows:

> "15. In ***Ramesh Chotalal Dalal V. Union of India and Ors.*** (AIR 1988 SC 775), this Court held that TV serial "Tamas" did not depict communal tension and violence and the provisions of Section 153A of IPC would not apply to it. It was also not prejudicial to the national integration falling under Section 153B of IPC. Approving the observations of Vivian Bose, J. in ***Bhagvati Charan Shukla V. Provincial Government*** (AIR 1947 Nagpur 1), the Court observed that the effect of the words must be judged from the standards of reasonable, strong minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. It is the standard of ordinary reasonable man or as they say in English Law, "the man on the top of a calpham omnibus."

13. Again, Bilal Ahmed (supra), it is held that the common feature in both the Sections, viz., Sections 153A and 505(2), being promotion of feeling of enmity, hatred or ill-will "between different" religious or racial or linguistic or regional groups or castes and communities, it is necessary that at least two such groups or communities should be involved. Further, it was observed that merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two Sections.

14. In view of such position, looking at the article published, it does not make out a case which would fall within the mischief of Section 153-A of the Code and as such, there is no mens rea attributable to such publication. More so, the petitioner himself is a journalist and he knows the dos and don'ts of the publication very well. That apart the G.R. case is of the year 2001 and in the meantime 12 years have elapsed. Therefore, I am of the considered opinion that since no case under Section 153-A of the Code is made out against the petitioner pursuant to the news item published, allowing the proceeding to continue will amount to abuse of the process of the Court. Therefore, ends of justice will be better served if the proceeding and the order of cognizance dated 02.12.2003 passed in G.R. Case No.1050 of 2001 pending in the file of learned S.D.J.M., Bhadrak are

quashed. Accordingly, the same are hereby quashed. The Criminal Misc. Case is allowed.

Application allowed.