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

W.A. NO.306 OF 2011 (With Batch) (Decided on 19.05.2011)

DR. CHITTARANJAN THATEI …. … Appellant.

.Vrs.

STATE OF ORISSA & ORS. ……Respondents.

EDUCATION – Admission of Candidates of in service quota in Post-Graduate Medical course – Spelling mistakes in key answers to the questions – Appellants unable to answer correctly – Learned Single Judge considering the same to be wrong answers referred 9 questions to the 2nd Expert Committee but erroneously not accepted the objections to 38 other questions – Discrimination under Article 14 of the Constitution – Held, in addition to the 9 questions other 38 questions be referred for the opinion of the 2nd Expert Committee appointed pursuant to the direction of the learned single Judge and revised merit ranking list be prepared for admitting the eligible Candidates.

(Para 15,21)

Case laws Referred to:-

1.1999 (I) OLR 292 : (Dr. Pranab Mohapatra & Ors.-V-State of Orissa & Ors.)

2. (2008) 4 SCC 273 : (Pankaj Sharma & Ors.-V-State of Jamu Kashmir & Ors.)

For Appellant - M/s. S.K.Padhi, Sr.Advocate
B.Routray, D.K.Mahapatra, B.B.Routray, P.K.Sahoo, S.Das, K.Mohanty, S.Jena & S.K.'Samal.

For Respondents - Mr. R.C.Mohanty (DMET & MCI)

For Appellant - M/s.A.K.Parija, Sr.Advocate , B.Mohanty, A.Pattnaik, S.Pattanaik, S.Pattanaik, Ms.Razvi.

For Respondents - Mr. R.C.Mohanty (DMET & MCI)

For Appellant - M/s.D.K.Mohapatra & A.Sahoo

For Respondent - Mr. R.C.Mohanty(DMET & MCI)

V.GOPALA GOWDA,CJ. Heard Mr. S.K. Padhi, Mr. A.K. Parija, Mr. J. Patnaik & Mr. B. Routray, learned Senior Advocates for the appellants in W.A.

Nos. 306, 309, 310, 313 of 2011 respectively and Mr. D.K. Moahapatra, learned counsel appearing for the appellants in W.A. Nos. 322 & 324 of 2011 and heard learned counsel Mr. R.C. Mohanty on behalf of the D.M.E.T. and Medical Council of India.

2. Writ Appeal Nos.309 and 310 of 2011 are filed by the appellants namely, the selected and admitted candidates of in-service quota in Post Graduate Medical Course. Being aggrieved with the common impugned judgment dated 27.04.2011 passed by the learned Single Judge in W.P.(C) Nos.7132, 8408, 8573, 8654, 8655, 8934, 9182, 9423 and 9595 of 2011, they have filed these appeals as they are aggrieved of the direction given to the Director, Medical Education and Training, Orissa-cum-Chairman, Post Graduate (Medical) Selection Committee, 2011 (in short, DMET) to re-evaluate 9 questions out of 63 questions in respect of which objections were raised and 3 questions and key answers were found to be not correct, and directed the DMET to award full marks to all the candidates who appeared in the entrance examination and accordingly, draw up the merit ranking list for the purpose of conducting counseling and admitting them in the respective subjects for which they are entitled to as per the prospectus.

3. The appellants in W.A. Nos.306 and 313 of 2011 are the writ petitioners, who are aggrieved with that portion of the judgment of the learned Single Judge in not referring the questions namely, 38 questions and key answers out of 63 questions except 9+3 questions and key answers by not accepting their objections regarding spelling/printing mistakes in the questions and key answers is not correct to that extent the appellants are aggrieved. Therefore, they pray in these appeals to send the 38 questions and key answers for opinion of the 2nd Expert Committee appointed by the D.M.E.T. contending that the reason assigned by the learned Single Judge in this regard in not accepting the same, they are affected. Therefore, they have also challenged that portion of the judgment of the learned Single Judge seeking the modification of the impugned judgment to include 38 questions and key answers and refer the same to the 2nd Expert Committee for its valuation.

4. In the appeals, namely, W.A.Nos.306 & 309 of 2011 arising out of W.P.(C) Nos.7132 and 8573 of 2011, five in-service candidates filed two Misc. Cases in Court today seeking permission of this Court to come on record to avail the benefit of direction issued by the learned Single Judge insofar as 9+3 questions out of 63 questions in respect of which they raised objections in the writ petitions and that must not only be confined to 41 seats which are left out, and it should be 80 seats, which are earmarked for the in-service candidates in the Post Graduate Course. As one of the intervenors, namely Dr. Nihar Ranjan Parida,

who has secured 10th rank as in-service candidate in respect of 12 questions and key answers the full marks are awarded as directed by the learned Single Judge his ranking along with other candidates will go up and he will get better choice of the subject, for the reason that the provisional admission of the candidates, who are appellants in W.A. Nos.306 and 309 of 2011 is subject to result of the writ petitions is the interim order passed by the learned Single Judge and that order is merged with the order passed on merits. Therefore, the benefit of that judgment should enure to the benefit of the first intervenor with regarding to choosing the subject in the course. Therefore, they wanted to come on record as additional respondents in the above referred appeals.

5. Having regard to the undisputed fact that the petitioners had benefit of the judgment of the Single Judge in so far as 9+3 = 12 questions out of 63 questions and key answers in respect of which the objections regarding the correctness of the same was raised, which is accepted by the learned Single Judge, therefore, in our considered view they are proper and necessary parties to the proceedings. Accordingly, they are permitted to come on record.

Learned counsel for the appellants in W.A. Nos. 306 & 309 of 2011 are directed to implead them as additional respondents by suitably amending the cause title of the respective writ appeals. Registry is directed to register the said Misc. Cases. Accordingly, the Misc. Cases are allowed.

6. Insofar as the appellants in W.A. Nos.322 and 324 of 2011 are concerned, they are in-service candidates. They are questioning the impugned order as the learned Single Judge had not considered their case in the writ petitions. Their case is that the procedure for conducting entrance examinations by the DMET was not followed in setting the question papers in terms of the prospectus, their request has been rejected by the learned Single Judge and therefore, they have requested this Court to grant the relief as prayed by them and award 12 grace marks not only to those appellants, but also to other candidates who have taken the entrance examination. Insofar as the prayer of these appellants are concerned, the same is not accepted by the learned Single Judge by recording reasons in the impugned order. We are also concurring with the view of the learned Single Judge. Therefore, we do not propose to examine the correctness of the same for the reason that they have subjected to the jurisdiction of the entrance examination without raising objections in not following the procedure in setting the questions & key answers for the entrance examination. They did not raise any objection at the initial stage contending that setting up of the question and key answer papers is not in conformity with the prospectus, therefore, it will not be proper for this Court to interfere with the same at this stage as this aspect must have been weighed in the mind of the learned

Single Judge in not granting the relief to the above appellants. For the foregoing reasons, we do not find any reason to disturb that portion of the judgment of the learned Single Judge. Accordingly, the appeals in W.A. Nos.322 and 324 of 2011 are liable to be dismissed and accordingly, dismiss the same as there is no merit in the same.

7. It is brought to our notice by Mr. R.C. Mohanty, learned counsel for Medical Council of India and DMET that out of 80 seats reserved for various subjects in the P.G. Medical Course to the in-service candidates, 41 seats are available in the in-service quota. The said seats will be allotted to those candidates, who will secure the revised ranking on the basis of evaluation of the questions in relation to 9 questions pointed by the learned Single Judge and opinion rendered by the 2nd Expert Committee and also in respect of 3 questions, marks have already been awarded as per the direction of the learned Single Judge to the in-service candidates by preparing a revised merit ranking list.

8. Mr Padhi and Mr. B. Routray, learned Senior Advocates appearing on behalf of the appellants in W.A. Nos. 306 and 313 of 2011 submit that Dr. Chitta Ranjan Thatei and Dr. Nagendra Kumar Rajsamanta, appellants Nos.1 and 5 in the respective appeals have filed affidavits in which it has been stated as hereunder:

> "3. That, the present appellants do hereby undertake that they will not challenge the 39 seats and the subject allotted those 39 candidates of the in service quota in the P.G. Medical Selection, 2011. They will also not challenge to disturb the position of the candidates who have already taken admission in the event this Hon'ble Court directs from reassessment of the defective question to the expert committee and the same order will be confined to as against 41 seats lying vacant under the in service category."

9. The statement is made at the Bar by learned Senior Advocate Mr. Padhi and Mr. Routray stating that two affidavits filed by the two appellants, who have also stated on behalf of the other appellants and further submitted by them that the other appellants will file affidavits swearing to the facts as stated by the two appellants by Monday (23.05.2011). If the other appellants do not file their affidavits in the similar lines as that of the affidavits filed today by the aforesaid two appellants, the order that will be passed in relation to 38 questions will not enure to their benefit. The appellants who have filed affidavits today have given assurance to this Court that they will also file memo giving undertaking that they will see that the other appellants also would file their affidavits swearing the facts on the similar to the affidavits filed by the above two appellants by Monday. The

memos are taken on record and the Registry must receive the said memos and affidavits and shall place on record in these appeals.

10. In view of the said affidavits, the interest of the candidates who have already been selected and admitted in the respective subjects will not be disturbed. Therefore, the grievances of the appellants in W.A. Nos.309 and 310 of 2011 don't survive for consideration. Accordingly, the said appeals are disposed of as they cannot have any grievance insofar as the judgment passed by the learned Single Judge, as their selection and admission in the Post Graduate Course to the respective subjects is protected.

11. Our attention was invited by Mr. Padhi and Mr. Routray, learned Senior Advocate to paragraphs 12 and 13 of the impugned judgment, wherein it is indicated that 63 questions in respect of which objections have been raised category wise contending that the key answers to the said questions out of 300 questions in the key answer booklet furnished to them are found to be incorrect and on the basis of that, the candidates were mislead due to the printing/spelling errors in respect of key answers to the question Nos.247, 271, 246, 159, 84, 261, 03, 133, 76, 91, 110, 231, 18, 41, 179, 284, 60, 156, 186, 69, 191, 36, 169, 38, 67, 141, 216, 177, 278, 81, 57, 124, 137, 37, 138, 197, 224 and 280 and in other questions and key answers also there are printing mistakes, on account of which there was spelling mistake in the questions and key answers set out in the answer booklets furnished to the candidates, therefore, they were unable to answer the same correctly. It is contended by them that as per the Division Bench of this Court in the case of **Dr. Pranab Mohapatra & Ors v. State of Orissa & Ors.,** 1999 (I) OLR 292 (See paragraph 5,6 (3) and in the case of **Pankaj Sharma and Ors. v. State of Jamu Kashmir and Ors.** reported in (2008) 4 SCC 273. At paragraph 49 of the said decision the Supreme Court in the similar facts situation has made observation that :

> "…..In the absence of such record, it cannot be accepted that the printing errors/spelling mistakes in the question papers were duly rectified by actual announcements in the examination centres. Therefore, all the questions which have wrong spellings of the words used therein have to be treated as wrong questions. In all, there are 12 such questions in Sociology paper i.e. Q. 17, 37, 46, 53, 60, 72, 73, 83, 93, 97, 98 and 113 with printing errors/spelling mistakes. Out of these questions the Commission itself has deleted Q.113. In Q. 113 there was printing error in the word "Kwekiuti".
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> xxxxxx xxxxx xxxxxx

> "Therefore, with reference to the said facts situation, the stand taken by the Commission that the questions having major printing errors or those which had not been corrected by announcement were deleted is equally unacceptable."

12. Therefore, the learned Senior Advocates Mr Padhi and Mr. Routray submit that the decisions of this Court and the Apex Court referred to supra to the questions and key answers in respect of the cases of the appellants in W.A. Nos.306 and 313 of 2011, the learned Single Judge was not right in not accepting their case in total, only accepted twelve questions out of 63 questions holding that the above questions and key answers are not correct and therefore, the directions issued to the DMET to get the 9 questions revaluated by the 2nd Expert Committee and accordingly award marks in respect of those questions to all the candidates and prepare revised merit ranking list. By recording the reasons in the impugned judgment, particularly not accepting 38 questions at the last portion of the paragraph 14 at page 16 in the impugned judgment is contrary to the law laid down by the Supreme Court and this Court in the aforesaid cases. Therefore, they have requested this Court to add 38 questions out of 63 as required to be revaluated by the 2nd Expert Committee, which was constituted by the D.M.E.T. in pursuance of the direction of the learned Single Judge in the impugned judgment.

The said contention has been seriously contested by Mr. Mohanty, learned Counsel appearing for DMET contending that they have not complied with the provision under clause 10.17 of the prospectus and have not raised the objection within seven days from the date of putting all these questions and answers in the website. Therefore, they are not diligent in questioning the action of the DMET in setting the questions and key answers in the answer scripts. Therefore, they are not entitled for the relief prayed for in their appeals. The learned Single Judge by recording valid and cogent reasons at paragraph 14 of the impugned judgment has rejected their case in respect of 38 questions. Therefore, he submits that there is no substantial question of law involved in their appeals as the learned Single Judge by consciously applying his mind with reference to rival and legal contentions and examining the documents which are made available before him after perusal of the evaluation of the marks and the evaluation made by the Expert Committee, the learned Single Judge was satisfied that the printing mistakes in respect of certain questions and key answers have been pointed by the appellants/petitioners in the writ petitions which were accepted but those questions (38 in numbers) were not referred to the 2nd Expert Committee, as he was not satisfied with the observations raised in respect of those questions and answers. Therefore, the learned Counsel submits that the writ appellants in W.A. Nos.306 and 313 of 2011 are not entitled to the relief as there is no merit in the said appeals.

13. With reference to the aforesaid rival and legal contentions, we are required to answer the following points that would arise for our consideration:

(i) Whether the printing mistakes in 38 questions out of 63 questions and key answers are understandable by the candidates at the time of answering those questions as held by the learned Single Judge in the impugned judgment are legal and valid ?

(ii) Whether for non-consideration of 38 questions by the learned Single Judge in view of the law laid down by the Division Bench of this Court and the Supreme Court, referred to supra, relied by the learned Senior Advocate for the appellants, the substantial question of law would arise in W.A. Nos.313 and 306 of 2011 on that ground, this Court can interfere with the appeals filed by the unsuccessful candidates insofar as the aforesaid questions and key answers are concerned ?

(iii) What order ?

14. The aforesaid two points are required to be answered in favour of the appellants in W.A. Nos.306 and 313 of 2011 for the following reasons:

The aforesaid points are answered keeping in view the legal position and observation made by the Division Bench of this Court as well as the law laid down by the Supreme Court in the cases referred to supra upon which reliance has been rightly placed by both the learned Senior Advocates appearing on behalf of the appellants. The relevant portion of paragraph 49 of the decision of the Supreme Court is extracted in paragraph-9 of this judgment for proper appreciation of the legal contention urged by learned Senior Advocate. The Division Bench of this Court and the Supreme Court in similar facts situation, rejected the stand and defence taken by the learned counsel for the DMET and held that the printing mistake is a spelling mistake in the key answers which are certainly wrong answers to the questions.

15. Therefore, the reason given by the leaned Single Judge, in the impugned order in so far as 38 questions are concerned out of 63 questions in our considered view, is contrary to the decisions of the Supreme Court and the Division Bench of this Court referred to supra as those decisions are aptly applicable to the facts situation of the case of the appellants. Therefore, that portion of judgment of the learned Single Judge which is at paragraph-14 of the said judgment in relation to non-acceptance of objections raised by them in relation to 38 questions referred to in the judgment and not referring the same to the 2nd Expert Committee for its evaluation is not tenable in law. Therefore, we are required to accept the legal contention urged on behalf the appellants and the

same must be accepted as it is well founded in view of the decisions referred to supra upon which they have rightly placed reliance. Therefore, it would be just and proper for us to include these 38 questions in addition to 9 questions referred to the 2nd Expert Committee which was directed by the learned Single Judge to be constituted. Non-consideration of 38 questions in the light of the decisions referred to supra by the learned Single Judge certainly is not sustainable in the eye of law. The substantial question in these appeals would certainly arise for the reason that the learned Single Judge erroneously not accepted the objections to the 38 above questions. Therefore, we have to answer point no.2 in favour of the appellants. Accordingly, Writ Appeal Nos.306 and 313 of 2011 are allowed.

16. Insofar as the contentions raised by the learned counsel for DMET and MCI is that the appellants are not availing the privilege given in Clause 10.17 of the prospectus, by not raising objections to the questions and key answers within seven days, and they were uploaded to the Website. This contention cannot be accepted for the reasons that we have already answered Point Nos.1 and 2 for non-consideration of 38 questions by the learned Single Judge even though as undisputedly there were printing and spelling mistakes in the key answers given by the paper setters. Therefore, the technical contention urged by the learned counsel cannot be accepted for the reasons that there is infringement of a substantive right of the candidates as they were unable to answer to the questions on account of fact of spelling mistake and on account of wrong printing, which has occurred in the key answers to the questions thereby prejudice is caused to them. The 300 questions were required to be answered by the candidates, wherein each question is to be answered within 47 seconds. Negative marks would be awarded if the wrong answer is given in the examination by a candidate. Apart from that, by not raising objection till the selection process is completed, the appellants have not lost their right as the last date for admission to the P.G. Medical Course is the relevant fact to be taken into consideration by the learned Single Judge, which cannot be found fault with by this Court as the learned Single Judge has rightly interfered with the arbitrary and unreasonable action of the DMET in giving wrong questions and key answers in the answer booklets, which has resulted in injustice to the appellants in the said appeals and other candidates. Therefore, this Court has granted relief rejecting the contention urged on behalf of the DMET that Clause 10.17 of the prospectus is not complied with by them as we are concurring with the view taken by the learned Single Judge in exercising his power and granting the relief to the appellants in respect of 9+3 questions and key answers. In addition to the said questions we also further include 38 questions referred to supra for the opinion of the 2nd Expert Committee appointed pursuant to the direction of the learned Single Judge to evaluate the same afresh by it and on the out come of its opinion, the DMET shall proceed in the matter to prepare the merit ranking list.

17. For the reasons stated supra, the writ appeals in W.A. Nos. 306 and 313 of 2011 must succeed to the extent that 38 questions out of 63 questions, which are referred to supra, shall be referred to the 2nd Expert Committee for the purpose of re-evaluation and upon their evaluation the marks shall be awarded not only to the appellants, but also to all other candidates depending upon the opinion that will be furnished by the 2nd Expert Committee.

18. On the basis of such merit ranking list which shall be prepared after receipt of the opinion of the 2nd Expert Committee in relation to 38 questions along with 9 questions of which already the opinion is rendered and 3 questions as pointed out by the learned Single Judge and award of marks permitted on the basis of ranking admission to the left out 41 seats (in-service candidates) by conducting counseling and allot seats to the candidates as per the merit and subject wise which are available in accordance with law. Steps should be taken to consider the case of the candidates belonging to in-service category.

19. It is also needless to give direction to the DMET insofar as the intervenor Dr. Nihar Ranjan Parida in the above appeals is concerned, since there is an interim order in the writ petitions stating that the admission of the candidates on the basis of ranking list prepared which was challenged in the writ petition by him and others is concerned, 9 + 3 and other 38 questions as ordered in this appeals are required to be revaluated and marks to be awarded to all the candidates that may be taken care of and if the 1st Intervenor-applicant gets more marks then the DMET may allot an appropriate subject to the said intervenor on the basis of revised ranking list that will be published as he is entitled for that. Insofar as other four intervenors are concerned, their cases may be considered against 41 seats in-service quota, which are lying vacant on the basis of directions issued by the learned Single Judge and in respect of other questions ordered by this Court in the above appeals.

20. The submission of learned counsel Mr. Mohanty is that a general candidate namely, Dr. Pitambar Behuria who is a respondent in W.A. No.310 of 2011 was having the highest marks amongst the appellants and respondents of the writ appeal and 68th rank in the first merit list, but has not taken admission as a seat in Medicine was not available to him at that point of time, but as five seats in Medicines are available out of 41 seats for in-service category, he can be admitted to the discipline of medicine and this may be considered accordingly. The submission is placed on record.

21. The 2nd Selection Committee which was appointed pursuant to the order of the learned Single Judge must evaluate the 38 questions referred to in this judgment as expeditiously as possible well in advance before the dead line fixed

by the Medical Council of India for selection and admission to the P.G. Medical Courses, the same shall be obtained by DMET on the basis of their opinion the mark shall be awarded to all the candidates and prepare the revised merit ranking list and further proceed in the matter for admitting the eligible candidates in 41 seats of in-service candidates in accordance with law.

22. With the above observation and directions, all the writ appeals are disposed of.

A copy of this judgment be given to Mr. R.C. Mohanty, learned Counsel for compliance of our directions

Writ appeals disposed of.

2011 (II) ILR- CUT- 540

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

W.P. (C) NO.79 OF 2008 (Decided on 23.08.2011)

PHULA NAIK & ORS. ……Petitioners.

.Vrs.

G.M., EAST COST RAILWAY & ORS. … ... ..Opp.Parties.

RAILWAY ACT, 1989 (ACT NO. 24 OF 1989) – S.124.

Death due to unmanned level crossing of the Railways – No fault liability of the passenger who expires in a railway accident has been fixed at Rs.4 lakh U/s. 124 of the Railway Act read with the Railway Accidents and untoward incidents (compensation) Rules, 1990 – No discrimination between passenger and non passenger who died in railway accident – Victim lost his life in the accident due to the negligence on the part of the Railway Administration – Held, petitioners are entitled to get compensation of Rs.4,00,000/- with 6% interest from the date they have filed the writ petition till realization.

(Para 14,15)

Case laws Referred to:-

1.AIR 2000 SC 2306 : (State of Bihar-V-Kameswar Prasad Singh)
2.AIR 1980 SC 1354 : (N.K.V. Bros.(P) Ltd.-V-M.Karumai Ammal & Ors.)
3.AIR 1963 Assam 117 : (Swarnalata Barua-V- Union of India & Ors.)
4.1983 SC 1086 : (Rudul Sah-V-State of Bihar & Anr.)
5.AIR 1992 SC 2069 : (Smt. Kumari-V-State of Tamil Nadu & Ors.)
6.1997(II) OLR 69 : (Parikhita Bhera & Anr.-V-The Divisional Railway Manager,South Eastern Railway, Khurda Division).

For Petitioners - M/s. Jatindra Kumar Mohapatra & R.N.Das.
For Opp.Parties - M/s. A.K.Mishra, S.K.Ojha, N.R.Pandit, H.M.Das, A.K.Sahoo & B.Panda(for O.P.No.1)

V.GOPALA GOWDA, C.J. The petitioners (Ist petitioner is the mother and others are the younger brothers and sister of the deceased represented by mother-guardian-Ist petitioner) have filed this writ petition for the death of the deceased Pradeep Naik who died on account of railway accident claiming compensation to the tune of Rs.4 lakhs, which is the minimum liability of the Railway authority to a passenger as per Section 124 of the Railways Act, 1989, urging various facts and legal contentions.

2. The brief facts as stated in the petition is that on 13.8.2006 at about 6.30 P.M. while the deceased Pradeep Naik came to purchase the household articles to the nearby market situated in his village within ½ kilometer from his house by walking and at the time of crossing the railway line, the Sambalpur-Bhubaneswar Up Express dashed against him and dragged him to Bar No. 111/3-4, which is about 200 meters away from the place of accident as a result he died at the spot. Accordingly the younger brother of the deceased lodged an F.I.R. in the Hondapa Police Station as per Annexure-1.It is further stated that the railway line passes through the village Gundurimunda dividing the village in two parts crossing the busy Panchayat Road. The Road touches either side of the railway line and thousands of people are crossing the railway line every day for marketing, going to their work places and children use the road for going to school.

3. It is stated that the residents of the village were using the said road as their path and they have approached the Station Master on several occasions for installation of check gate and to appoint a guard to avoid danger and save the valuable lives of the persons and also domestic animals which are died while crossing due to the railway accident. Despite their request, no steps have been taken by the authorities due to their carelessness.

4. The railway line not only divides the village and the Panchayat Road but also the railway line has diversion at that spot for which passing of train cannot be seen from a distance of 200 metres due to residential houses on account of which many valuable lives of human beings and animals are lost. On account of the railway accident which have been taken place and in the instant case on account of not providing manned railway gate and posting of guard, the railway accident took place on 13.8.2006. Due to the death of the deceased, F.I.R. (Annexure-1) was lodged, on the basis of which an enquiry was conducted by the O.I.C., Hondapa P.S. and an U.D.G.R. Case no. 11/2006 was registered and report was submitted to the S.D.M., Athamallick. Post-mortem was conducted by the Medical Officer of Government Hospital, Hondapa who opined that the death was caused due to shock of external-internal hemorrhage due to grievous injuries on vital organs. From the report of the O.I.C., Hondapa P.S., it is revealed that the railay accident occurred due to negligence on the part of the railway authority, resulting in the death of the deceased. The copies of the report submitted by the O.I.C., Hondapa P.S. and the post-mortem report are annexed as Annexures 3 & 4 respectively.

5. It is the case of the petitioners that the death of the deceased Pradeep Naik was due to the accident caused on account of the negligence and carelessness on the part of the railway authorities as they have not paid any attention to install the check gate at the level crossing spot which is connected with the busy road and divides the village into two parts. The railway authorities failed to perform their statutory duties to save the valuable lives of the human beings and animals. Therefore, they are before this court claiming compensation as the petitioners, the mother, brothers and sister of the deceased. It is further stated that they are fully dependant upon the income of the deceased as he was the only earning member of the family. It is further stated that the deceased was hale and healthy and energetic person. He was working as a driver of the heavy vehicles and was earning Rs. 6,000/- per month. After the death of the deceased, the petitioners have been suffering a lot financially and mentally. Since the railway authorities did not take any step to pay the compensation, the petitioners have approached this Court by filing this writ petition seeking for compensation of Rs. 4,00,000/- which is just and reasonable compensation to compensate the loss of the death of an earning member of the family of the petitioners.

6. Counter-affidavit is filed on behalf of the opposite parties swear by Senior Divisional Manager, East Coast Railway, Sambalpur at paragraph-4 traversing the petition averments he has stated that on the basis of the enquiry from Station Diary, Boinda, it is revealed that on 13.8.2006 at about 18.51 hours one male person was run over under train No.2894 (Sambalpur-Bhubaneswar Express) at unmanned level crossing, Km. 111/2-3 and dragged upto Km. 111/3-4. The unfortunate accident occurred due to lack of minimum prudence and non-following of the safety rules by the deceased at the time of crossing. Therefore, it is stated that the deceased is fully responsible and not the Railway as no negligence can be attributed against it. In view of the aforesaid stand taken by the opposite party-Railway, he has prayed for dismissal of the writ petition stating that it is neither maintainable either on facts and/or on law. Further it is stated that the nature of the claim made by the petitioners also cannot be adjudicated by this Court in a writ petition as their being disputed questions of complicated facts. It is further stated that the petitioners has got alternative remedy for which the writ petition is not maintainable and prayed for dismissal of the same. It is further stated that the writ petition is barred by limitation. The railway incident, if any purely because of the laches of the deceased and further denied the averments made at para-5 of the writ petition as they are not true. It is further stated the people of the village Gundurimunda and nearby villages have not approached the Railway

authority for installation of check gate and to appoint a guard. No such record is available nor any representation is received by the Railway authority. Further it is stated that as per the railway norms, the unmanned level crossing involved in the case, which is of 'C' class, does not qualify for manning as TVUs is very less i.e. 942 (as per census of April, 2007). All prescribed safety measures have been provided such as level crossing indication Boards, speed breakers, caution boards for the road users as "stop, look out for trains before crossing" written in three languages (Oriya, Hindi and English) for better understanding and clear observance by the road users. Whistle boards are also provided along the track on either side of the level crossing to give advance indication to train drivers to train drivers to continuously blow whistle in approach of level crossing. Hence it is stated that the accusation that Railway authorities have taken no safety steps and due to the carelessness of the railway authorities, the accident occurred, is not correct at all and the said claim of the petitioners is denied. Further with reference to the allegations made at para-7 of the writ petition, it is stated that the allegations leveled by the petitioners against the Railway authorities as it has not taken any effective steps to install a check gate and engage a guard at an unmanned level crossing check gate, is not correct and denied specifically. Further it is stated that the alleged representation is only an after thought. In order to deny the claim of the petitioners with reference to the averments made in paragraph-8 of the writ petition, it is stated that all the train drivers strictly follow the prescribed safety rules at an approaching manned and unmanned level crossing gate to whistle continuously to pre-warn the road users regarding the approach of train. Therefore, the allegations made by the petitioners in the writ petition that the Sambalpur-Bhubaneswar Express passed in high speed without blowing horn and dashed the deceased, is not correct and the same is denied specifically. So also the averments made in paragraphs 9 & 10 of the writ petition are denied as incorrect.

In view of the aforesaid stand taken by the Senior Divisional Manager, East Coast Railway, Sambalpur, learned counsel for the Railway authorities has prayed for dismissal of the writ petition stating that the petitioners are not entitled to the compensation, as claimed.

7. With reference to the aforesaid rival legal contentions raised at the Bar, the questions that fall for consideration by this Court are as follow:

(i) Whether the writ petition is maintainable in law ?

(ii) Whether the petition is liable to be dismissed on the ground of delay, laches and limitation ?

(iii) Whether the accident occurred on account of negligence on the part of the Railway Administration by not providing sufficient protection at the level crossing and without deploying guard or putting check gate as required under Section 18 of the Railway Act, 1989 ?

(iv) Whether on account of not providing safeguard to the level crossing by the Railway Administration, the petitioners are entitled to compensation as claimed ?

(v) What order ?

8. To answer the above points, we have carefully examined the facts and rival legal contentions urged in the above writ petitions. As can be seen from the provisions of Section 18 of the Railway Act, 1989, the Railway Administration has the statutory obligation to provide sufficient safeguards to the level crossing by putting railway check gate and keeping it closed at the time when train is due to pass at the level crossing area. In the instant case, had the Railway Administration taken the precautionary measure either by putting a railway gate and keeping it closed at the time the train was due to pass, or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that had happed in this case, could have been avoided. Therefore, this Court draws an adverse inference against the Railways that there is negligence on the part of the Railway Administration in not taking sufficient precautionary measures by posting guard or installing a check gate and to keep the same closed at the time while the train was due to pass through that level crossing. Non-compliance with the aforesaid statutory obligations by the Railway Administration. Therefore, we have to hold that by itself amount to negligence as they have failed to discharge their statutory duty we reject the contentions urged by the learned counsel for the Railways that there are serious questions of disputed facts and due to carelessness on the part of the deceased, the alleged accident occurred on the fateful day resulting in his death and, therefore, writ petition can not be entertained by this Court can not resolve the disputed questions of fact and record a finding on the relevant contentious issue by conducting a roving enquiry. For the above reasons, we hold that the writ petition is maintainable in law.

9. In the decision of the Apex Court in the case of ***State of Bihar v. Kameswar Prasad Singh***, AIR 2000 SC 2306 at paragraph-11 it has been held :

> "11**.** Power to condone the delay in approaching the court has been conferred upon the courts to enable them to do substantial justice to parties by disposing of matters on merits. This Court in Collector, Land Acquisition, Anantnag v. Mst. Katiji (1987) 2 SCR 387 : (AIR 1987 SC 1353) held that the expression "sufficient cause" employed by the legislature in the Limitation Act is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice — that being the life-purpose for the existence of the institution of courts. It was further observed that a liberal approach is adopted on principle as it is realised that:
>
> "1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
>
> 3. 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
>
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."

We conclude on this aspect, saying that on the ground of delay, laches and limitation this writ petition can not be rejected for more than one reason :

(i) The Railway Administration should have paid the compensation as per the provisions of Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990;

(ii) There is no limitation prescribed under the Constitution of India to exercise this Court's discretionary and judicial review power when it feels great injustice is caused to the petitioners as their fundamental rights are flagrantly violated on account of negligence on the part of the Railway Administration in not providing check gate and posting the guard to man the same;

(iii) Awarding just compensation to the legal representatives of the deceased is relatable to social justice which concept is recognised under Article 41 of the Directive Principles of the State Policy which is interrelated to the fundamental rights of the petitioners as stated supra;

(iv) The relief regarding the award of interest can be moulded for granting from the date of filing this petition.

10. While deciding the questions that arise for consideration similar to the present case in a batch of cases in W.P.(C) No.3214 of 2010 and W.P.(C) Nos.1455, 1456 and 1457 of 2008, disposed of on 10.2.2011, this Court has referred to the various provisions of the Railways Act, 1989 and relied upon the decision of the Apex Court and other High Court. One such decision is, *N.K.V Bros. (P) Ltd. v. M. Karumai Ammal and others*, A.I.R.1980 SC 1354, upon which reliance is placed by the learned counsel for the petitioners, the Apex Court has made certain observations, the relevant portion of which is extracted as hereunder :

> "…….Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of *res ipsa loquitur*. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by transport operators getting away with thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour.

> Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practiced by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposal so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard……"

10. Further, reliance is placed on the decision of the High Court of Assam in ***Swarnalata Barua v. Union of India and others***, *AIR 1963 Assam 117,* wherein it has been held that there is an obligation on the part of the Railway Administration to ensure that whenever a railway passes over a thoroughfare, adequate warning should be given to the public about passing of the train at the time they pass so that accidents may be avoided. This duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the Railway Administration in the matter of running their railways. It is not disputed that had the Railway Administration taken the precautionary measure of either putting up of a railway gate and keeping it closed at the time the train was due to pass or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that happened in this case could not have happened and the deceased could not have died in the Railway accident.

11. Having answered the point nos. 1 to 3 in favour of the petitioners, and against the Railway Administration, we are required to answer the point no.4 with regard to compensation in favour of the petitioners with the following reliefs.

12. Under Section 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, the no fault liability of the passenger who expires in a railway accident has been fixed at Rs. 4.00 lakh. In the instant case, the victim lost his live in the accident due to the negligence on the part of the Railway Administration in not putting gates at the level crossing and the general public are allowed to cross the railway

line without providing precautionary measures as indicated above. Reliance is also placed on a decision of the apex Court in ***Rudul Sah v. State of Bihar and another***, AIR 1983 SC 1086 wherein the apex Cout has observed that in appropriate cases, the court discharging Constitutional duties can pass orders for payment of money in the nature of compensation. Consequent upon deprivation of the fundamental right to life and liberty of a petitioner the State/Railway Administration must repair the damage done by its officers to the petitioner's right.

13. The apex Court in the case of ***Smt. Kumari v. State of Tamil Nadu and others***, AIR 1992 SC 2069, the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same view has been taken by this Court in ***Parikhita Behera and another v. the Divisional Railway Manager, South Eastern Railway, Khurda Division,*** 1997 (II) OLR, 69, wherein it is observed that jurisdiction under Articles 226 and 227 of the Constitution can be invoked and direction for payment of compensation can be given if there is deliberate act of negligence on the part of the Railway Administration.

14. In this regard, the undisputed fact is that in the accident the deceased Pradeep Naik died. Under Section 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs. 4.00 lakh. The same amount can be awarded to the petitioners for the reason that there cannot be any discrimination between passenger and non-passenger who died in railway accident. Keeping the aforesaid decision in view, in awarding the compensation, Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 provides for a compensation for no fault liability to the passenger who expires in railway accident is Rs. 4,00,000/-.

15. In view of the above, the petitioners are entitled to compensation for the death of the deceased in the accident. Hence non-grant of the compensation to the petitioners by the railway administration is not sustainable in law. Hence we answer the point No.3 in affirmative by awarding compensation of Rs. 4,00,000/-to the petitioners since the son of the petitioner no.1 and the brother of the minor petitioners died in the railway accident. The petitioners are also entitled to get interest @ 6% per annum on the compensation amount from the date of claim made with the opposite

parties i.e. from 2.1.2008 the date on which they have filed this writ petition till realization. Out of the awarded amount of Rs.4,00,000/-, Rs. 1,00,000/- shall be deposited in a fixed deposit in any local nationalized bank and Rs. 50,000/- each shall be deposited in fixed deposit in each of the remaining petitioners in any nationalised bank in favour of petitioner no.1 for five years and shall not be disbursed till they attain majority. The rest amount of Rs. 1,00,000/- shall be computed and disbursed to the petitioner no.1 within four weeks from the date of receipt of the certified copy of this judgment. This amount shall be exclusively spent for the welfare of the minor children and their education and to maintain herself and the family members. The petitioners are entitled to draw the interest that would be earned on the deposit amount as directed above, for the welfare of the minor children and maintenance of the first petitioner.

The writ petition are allowed to the aforesaid extent.

Writ petition allowed.

2011 (II) ILR- CUT- 550

V.GOPALA GOWDA, CJ.

M.A. NO.302 OF 1995 (Decided on 24.06.2011)

BALARAM PANDA ……Appellant.

.Vrs.

M/S. NATIONAL INSURANCE CO. LTD. & ANR. ……Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – Ss. 163-A, 166.

Injuries suffered by minor aged about 8 years – Amputation of right leg below knee – Tribunal awarded Rs.30,000/- for injuries and Rs.10,000/- towards treatment with a conclusion that under fixed deposit Rs.30,000/- would be Rs.2.25 lac after a lapse of 18 years – Hence this appeal.

Permanent disability suffered by the minor who has lost an important organ of his body – He can not walk, run and perform his normal routine work – He has lost happiness of his life and has lost marital love and enjoyment and he requires an assistant throughout his life for walking, squatting, sitting and to attend his day to day normal work.

Held, it would be just and proper to grant reasonable compensation of Rs.2,50,000/- with 9% interest per annum from the date of filing of the claim petition till the date of realization.

(Para 7 & 9)

Case laws Referred to:-

1.(2009) 15 SCC 54 : (Priya Vasant Kalgutkar-V-Murad Shaikh & Ors.)
2.(2001) 8 SCC 197 : (Lata Wadhwa-V- State of Bihar)
3.ILR 2004 KAR 2471 : (K.Narasimha Murthy-V-The Manager, M/s.Oriental Insurance Co.Ltd., Bangalore & Anr.)

For Appellant - M/s. A.Mohanty & M.K.Patnaik
For Respondent - M/s. M.Sinha & P.R.Sinha (for R-1)

V.GOPALA GOWDA, C.J. This Miscellaneous Appeal is filed by the claimant as he is aggrieved by the judgment and award passed by the Third M.A.C.T., Puri in M.A.C.T. Misc. Case No.140 of 1993 in awarding

inadequate compensation of Rs.40,000/- with 9 % interest urging various facts and legal contentions.

2. The brief fact of the case is stated for the purpose of appreciating the correctness of the compensation awarded towards the injury of amputation of the claimant's right leg below the knee plus Rs.10,000/- hospital expenses total Rs.40,000/-.

3. The undisputed facts are that the claimant being represented by his father Padma Charan Panda claimed compensation of Rs.2,00,000/- on different heads for loss of compensation, mental shock, physical pain, loss of pleasure in life, loss of health and expenses incurred for medical treatment, special diet, accommodation etc. The injured was a boy of 8 years on the date of accident, i.e., 16.1.1993 and prosecuting his study in Class-III in Baseli Sahi U.P. School.

4. It is the case of the claimant that while he was sitting on the verandah of his house in Harachandi Sahi on Lokanath Temple Road, a truck bearing registration No.ORP-6857 came in a high speed loaded with chips though the road was very narrow and in order to negotiate a bend it swerved to its further right but unfortunately the driver of the offending truck lost control over the steering as a result of which the right side bumper of the offending vehicle dashed against the boy causing severe bleeding injury to his right leg. In fact, the boy's right leg below the knee joint was completely chopped off at the spot. Immediately thereafter the injured boy was shifted to District Headquarters Hospital, Puri for his treatment, where he was admitted as an indoor patient. But, as his condition became serious, he was referred to S.C.B. Medical College Hospital for better treatment, but he was admitted to Ideal Nursing Home, Buxi Bazar, Cuttack. The claim was opposed by the Insurance Company as opp. party no.1 the insured remained ex parte. The Tribunal on the basis of the pleadings of the parties framed the following five issues:

1. Is the application maintainable?

2. Has the injured Balaram Panda sustained injuries on account of motor accident involving ORP-5867 Truck resulting amputation of his right leg below the knee?

3. Was the driver of the truck rash and negligent in causing the accident?

4. Is the applicant entitled to get compensation, if so, to what extent and from which O.P.?

5. The Tribunal on the basis of the pleadings and evidence on record has answered all the points in affirmative in favour of the claimant and while answering Issue no.4 regarding quantum of compensation at paragraphs-8 to 11 of the award it has awarded Rs.30,000/- towards injuries as well as Rs.10,000/- towards treatment expenses by recording reasons at paragraph-10 that the claim was filed in the year 1993 and the award is passed in 1995 and by this two years have elapsed out of that 20 years as the ambition of the parents was to make the unfortunate child a school teacher and he would have earned about Rs.2,000/- per month after twenty years; and in that event, his contribution to the family would have been in the order of Rs.500/- per months. Accordingly, the claimant would have started earning after 18 years by then. Therefore, the learned Member of the Tribunal came to the conclusion that if a sum of Rs.30,000/- is deposited under the Fixed Deposit Scheme in the name of the unfortunate boy, it will become Rs.2.25 lack approximately, if calculated at the prevalent rate of interest after a lapse of 18 years. That amount of Rs.2.25 lac will fetch him interest at the rate of Rs.2000/- per month keeping in view the rate of interest then applicable to F.D. Scheme. On the basis of such calculation, he awarded the aforesaid compensation in favour of the claimant. The correctness of the same in awarding inadequate compensation is questioned in this appeal by the claimant urging the following grounds:

A. For that the impugned award is inordinately low and contrary to the evidence on record.

B. For that the learned Tribunal has committed gross illegality in fixing up a sum total of Rs.30,000/- without keeping in mind the future standard of living of a person and his earning standard after 20 years particularly when there is un-assailed evidence on record that the appellant would have contributed Rs.500/- per month.

C. For that the fixation of multiplier by the learned court below is inordinately low and contrary to the evidence on record.

D. For that the impugned judgment and award is otherwise bad in law and liable to be enhanced to the amount claimed.

6. The approach of the learned Member of the Tribunal while recording the finding should have been that when the right leg below the knee of a minor boy aged about eight years has been amputated and thereby he has

lost the amenity of his life throughout his life, which is a permanent total disablement and the Tribunal should have awarded just and reasonable compensation keeping in view the age of the minor boy and not on the income at the time of injury nor what he would have earned after a period of twenty years on the basis of the of the ambition of the parents as they wanted their son to become a school teacher in future. This is totally impermissible in law as that is not the criterion to determine the compensation in relation to the injured claimant even though he was minor and not earning. Therefore, it is contended by the learned counsel that the determination of compensation for the reasons recorded at paragraph-9 of the award is not only erroneous, but also suffers from error in law. This Court and the Supreme Court in catena of cases held about what should be the approach of the Tribunal while recording a finding in a case of this nature as in the instant case the right leg below the knee of a minor boy aged about eight years has been amputated and throughout his life he has lost the important organ of his body and thereby lost the amenity of his life. He must have been put to much mental agony, pain and must be requiring the assistance of others throughout his life. Therefore, the Tribunal having not taken all these relevant factors into consideration has failed to apply the correct legal principle while determining the compensation in respect of the injured boy who suffered grievous injury to his right leg, which is amputated below the knee for ever. The total percentage of disablement of the body should be the relevant consideration in the instant case keeping in view the ratio of the judgment rendered by Supreme Court in ***Priya Vasant Kalgutkar v. Murad Shaikh and others***, (2009) SCC 54, wherein the Supreme Court considered the case of a minor aged 9 years who met with an accident and suffered 10% permanent disability and after examining the provisions under Section 163-A and Schedule-II of the M.V. Act, 1988, observed that the compensation for injuries suffered by a person in a motor vehicular accident can be determined either on the basis of actual damages suffered or upon application of structured formula. In the said judgment at paragraph-7, the Supreme Court has referred to the case of ***Lata Wadhwa v. State of Bihar***, (2001) 8 SCC 197. In the said case, compensation awarded in respect of the minor children was divided into two groups, i.e., the first group between the age group of 5 to 10 years and the second group between the age group of 10 to 15 years. In the case of children between the age group of 5 to 10 years, a uniform sum of Rs.50,000/- has been held to be payable by way of compensation, to which the conventional figure of Rs.25,000/- is to be added and as such to the heirs of the 14 children, a consolidated sum of Rs.75,000/- each, has been awarded. So far as the children in the age group of 10 to 15 years are concerned, there are 10 such children who died on the fateful day and

having found their contribution to the family at Rs.12,000/- per annum, 11 multiplier has been applied, particularly, depending upon the age of father and then the conventional compensation of Rs.25,000/- has been added to each case and consequently, the heirs of each of the deceased above 10 years of age, has been granted compensation to the tune of Rs.1,57,000/-.

7. Therefore, the Tribunal is not justified in non-applying the above principle as laid down by the Supreme Court in the case of permanent disablement suffered by the minor boy aged about eight years who has lost his important organ of his body, i.e., right leg below the knee for ever and thereby he will not only suffer from grievous hurt on account of amputation of his leg below the knee but also he cannot walk and run, perform his normal routine work, move freely. He has lost happiness of his life and has lost marital love and enjoyment and he requires an assistant throughout his life for walking, squatting, sitting and to attend his normal routine work.

8. For the purpose of applying the correct principle in the instant case, it is worthwhile to extract the relevant paragraphs from the judgment of Karnataka High Court in the case of ***K.Narasimha Murthy v. the Manager, M/s Oriental Insurance Co. Ltd., Bangalore and another***, ILR 2004 KAR 2471, wherein the Division Bench in an appeal preferred by the claimant under Section 173 of the M.V. Act, 1988 succinctly laid down the legal principle after extracting the relevant paragraphs from the decision of the appeal cases in (1922) 2 AC 242, (1880) 5 App Case 25, (1963) 2 All ER 625, (1965) 1 All ER 563, ILR 1987 Karnataka 1399, (170) AC 1 at 22, (1874) 4 QBD 406 (1970) 114 Sol Jo 193, (1969) 3 ALL ER 1528 and referring to Mc Gregor on Damages (14th Edition) in support of their conclusion for determination of the compensation for personal injury both for pecuniary and non-pecuniary losses in favour of the injured petitioners, which reads as under :

> "***Para-18.*** VISCOUND DUNEDIN, in AMIRALTY COMRS vs. S.S., (1922) 2 AC 242, Valeria has observed thus :
>
> "The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him"
>
> ***Para-19***. LORD BLACKBURN IN LIVINGSTONE vs. RAWYARDS COAL CO., (1880) 5 App Case 25, has observed thus :

"Where any injury is to be compensated by damages, in settling the sum f money to be given……you should as nearly as possible get at that sum of money which will, put the person who has been injured….in the same position as he would have been in if he had not sustained the wrong."

Para-21. Lord Morris in his memorable speech in H.WEST AND SONS, (1963) 2 All ER 625, point out this aspect in the following words:

"Money may be awarded so that some thing tangible may be procured to replace of like nature which has been destroyed or lost. But the money cannot renew a physical frame that has been scattered and shattered. All the Judges and Courts can do it to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent must be reasonable and must be assessed with moderation. Further more, it is eminently desirable that so far as possible comparative injuries should be compensated by comparable awards."

Para-22. In the above case, Their Lordships of the House of Lords, observed that the bodily injury is to be treated as a deprivation which entitles plaintiff to the damage and that the amount of damages varies according to the gravity of the injury. Their Lordships emphasized that in personal injury cases the Court should not award merely token damages but they should grant substantial amount which could be regarded as adequate compensation.

Para-23. In WARDS, (1965) 1 ALL ER, speaking for the Court of Appeal in England, Lord Denning while dealing with the question of awarding compensation for personal injury laid down three basic principles:

"Firstly, assessability. In cases of grave injury, where the body is wrecked or brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity in awards so that similar decisions may be given in similar cases, otherwise, there will be great dissatisfaction in the community and much criticism of the

administration of justice. Thirdly, predictability. Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceable and not brought to Court, a thing very much to the public good."

Para-25 . In BASAVARAJ v. SHEKAR, ILR 1987 KAR 1399, a Division Bench of this Court held :

"If the original position cannot be restored – as indeed in personal injury or fatal accident cases it cannot obviously be –the law must endeavour to give a fair equivalent in money, so far as money can be an equivalent and so make good the damage."

Para-26. "Therefore, the general principle which should govern the assessment of damages in personal injury cases is that the Court should award to injured person such a sum of money as will, put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame."

Para-27. Lord Morris of Borthy Gest in PARRY v. Cleaver, (1970) AC 1 at 22, said;

"To compensate in money for pain and for physical consequenencs is invariably difficult but…..no other process can be devised than that of making a monetary assessment."

Para-28. The necessity that the damages should be full and adequate was stressed by the Court of Queen's BENCH IN FAIR VS. LONDON AND NORTH WESTERN RLY. CO., (1869) 21 LT 326. In RUSTON v. NATIONAL COAL BOARD, (1953) 1 ALL ER 314, Singleton LJ said;

"Every member of this Court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as they can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure."

Para-29. FIELD, J. said in Phillips VS. SOUTH WESTERN RAILWAY CO. held:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. (The plaintiff) can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered."

Para-33. It is well settled principle that in granting compensation for personal injury, the injured has to be compensated (i) for pain and suffering; (2) for loss of amenities; (3) shortened expectation of life if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages. In personal injury actions the two main elements are personal loss and pecuniary loss. Chief Justice Cockburn in FAIR v. LONDON AND NORTH WESTERN RAILWAY CO., distinguished the above two aspects thus:

"In assessing the compensation the jury should take into account two things, first, the pecuniary loss the plaintiff sustained by accident secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income."

Para-34. Mc Gregor on Damages (14th Edition) para 1157, referring to the heads of damages in personal injury actions states:

"The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items, viz., the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the Courts have sub-divided the non-pecuniary losses into three categories, viz., pain and suffering, loss of amenities of life and loss of expectation of life."

Para-35. Besides, the Court is well advised to remember that the measure of damages in all these cases should be such as to enable even a tort feasor to say that he had amply aloned for his misadventure. The observation of Lord Devlin that the proper

approach to the problem or to adopt a test as to what contemporary society would deem to be fair sum, such as would allow the wrong doer to 'hold up his head among his neighbours and say with their approval that he has done the fair thing,' is quite apposite to be kept in mind by the Court in assessing compensation in personal injury cases."

Para-42. LORD REID IN BAKER V. WILLOUGHBY said:

"A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned……"

9. In view of the aforesaid decisions of the Supreme Court and also the judgment of the Karnataka High Court in which number of decisions of the House of Lords are referred, I feel, it would be just and proper to grant reasonable compensation of Rs.2,50,000/- (rupees two lakh fifty thousand) with interest at the rate of 9% per annum from the date of filing of the claim petition till the date of realization under all heads such as loss of amenity, pains and suffering, loss of marital life and enjoyment, allowances to be paid to his assistant whose services are very much required throughout his life, and I so direct. The compensation amount shall be computed and disbursed to the claimant-petitioner within four weeks from the date of receipt of the certified copy of this judgment.

The appeal is allowed.

2011 (II) ILR- CUT- 559

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

W.P.(C) NO.19640 OF 2010 (Decided on 19.05.2011)

ALOKA CHANDRA BISHOI & ORS. …….Petitioners.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.21, 226.

Public interest litigation – Instruction of the Government for verification of the ration cards – Lakhs of bogus / fake cards are in circulation through out the state and no new cards issued to eligible citizens – Supervision of fair price shops under Rs.2/- for Kg. – Warning the bogus Card holders to surrender their Cards – Issuance of new ration cards to the eligible / entitled citizens .

Held, direction issued to the State to conduct a door to door survey for the purpose of eliminating the bogus / fake cards with reference to ration cards already issued and to find out the genuine citizens, who are eligible/entitled to be issued with new ration cards under the P.D.S. on the basis of the application made for that purpose.

(Para 16)

For Petitioners - M/s. M.S.Panda & M.Panda.
For Opp.Parties - Govt.Advocate

B.N. MAHAPATRA, J. The present writ application, in the nature of public interest litigation, has been filed with a prayer for quashing the instruction/guideline/letter dated 23.09.2010 (Annexure-3) issued by the Chief Secretary, Orissa for verification of ration cards in circulation under Public Distribution System at the Fair Price Shops. The further prayer of the petitioners is for a direction to opposite parties to carry out verification of the said ration cards on door to door basis for elimination of bogus cards and to find out the citizens entitled for new ration cards under Public Distribution System (in short, "P.D.S.").

2. The petitioners' case in a nutshell is that they are residents of Bhubaneswar. Petitioner no.1 is a small retail seller of snacks and petitioner no.5 is an Auto Driver whereas rest of the petitioners are daily workers. All

the petitioners have been issued with voter identity cards by the Election Commission of India. The annual average income of all the petitioners vary from Rs.40,000/- to Rs.60,000/- and though all of them are coming under below poverty line, unfortunately none of the petitioners is issued with appropriate ration cards and as such they are deprived of getting commodities and other benefits available under the P.D.S. for various categories such as APL, BPL, AAY & AP. The State Government has not made any effort to conduct enquiry and verification during the last 15 years though a lot of changes have taken place in the economic status or otherwise of the citizens of the State. Some of them have died, some of them have been deprived of their income/lost their livelihood; some of them have become destitute, some of them have lost their property; whereas some have become major citizens and have acquired properties by earning their livelihood in the meantime. Since these economical changes have not been looked into/verified by the State Government for the last 15 years to bring them into the benefits of appropriate P.D.S., a large number of citizens including the petitioners in the State are deprived of getting the benefits under the P.D.S. In spite of repeated approaches to the appropriate authority of the State Government, no new ration cards have been issued to such citizens, thereby they are deprived of getting the benefits under the P.D.S.

3. When the matter stood thus, the apex Court on 31.8.2010 while considering a public interest litigation vide Writ Petition (Civil) No. 196 of 2001 issued a direction for carrying out fresh survey to get a correct and comprehensive picture of the citizens who are coming under the categories of APL, BPL & AAY. The Supreme Court has also directed for issuance of advertisement in the newspaper warning the bogus card holders to surrender all the bogus cards within two weeks from the date of advertisement failing which criminal prosecution may be initiated against such card holders. Consequent upon such direction, the Joint Secretary, Government of India, Ministry of Consumer Affairs, Food and Public Distribution issued a letter dated 01.09.2010 to all the State Governments for issuance of the above advertisement. The apex Court in the said order also directed for distribution of surplus food grains in different godowns of the Government amongst the poor. In order to comply with the direction of the Supreme Court in Annexure-1, Government of India had issued guidelines and instructions to all the State Governments to take annual verification report to find out vague/bogus /ghost /duplicate ration cards and eliminate the same to ensure effective and transparent delivery of essential commodities to various categories of ration card holders such as APL, BPL, AAY & AP under the P.D.S. Pursuant to the above direction of the Government of India, the Chief Secretary of Orissa vide letter dated

23.9.2010 has issued instruction/guidelines under Annexure-3 to the Collectors of all the districts to undertake verification of all categories of ration cards both in rural and urban areas from 1.11.2010 to 31.12.2010. According to the said instruction/guidelines, the Government Officials appointed for such supervision shall verify such ration cards on the dates of distribution of essential commodities at each Fair Price Shop. Challenging the said instruction/guideline, on the ground that the same is not in conformity with the direction issued by the apex Court vide Annexure-1, the present writ petition has been filed.

4. Mr. M.S. Panda, learned counsel appearing for the petitioners submitted that if verification of ration cards is carried out as directed by opposite party no.2, Chief Secretary to Government of Orissa under Annexure-3 on the dates of distribution of essential commodities at each Fair Price Shop, then the aim and object of the order passed by the Supreme Court would be frustrated as thereby no new ration cards would be issued to the eligible/entitled citizens including the petitioners. The direction of the apex Court issued under Annexure-1 would be complied if the appointed verifying officers would conduct verification from door to door of the citizens so that persons having no ration cards would be detected at the spot by collecting information about their category of status from their next door neighbours. Therefore, instead of carrying out verification of ration cards at the Fair Price Shop such verification should be conducted from door to door basis so that eligible citizens including the petitioners who have not been issued with the new ration cards can be issued with such cards and brought in to the benefits of the P.D.S. According to Mr. Panda, due to non-verification and non-issuance of various categories of ration cads to the eligible and entitled citizens for the last several years, huge quantity of food grains remained in the stock and such food grains are ultimately being wasted. Therefore, in order to provide the benefits of PDS to eligible categories of citizens there should be regular verification and new cards should be issued to them every year. Although the PDS order provides for annual verification and preparation of a list of beneficiaries, yet the State Government has failed to comply with the same as no verification has been conducted for the last 15 years as a result of which, 2.5 lakhs bogus cards are in circulation in the State.

5. Per contra, learned Government Advocate appearing for opposite party-authorities submitted that the writ petition is not maintainable as several disputed questions of fact are involved in the present writ petition. The State Government is committed to provide an effective and efficient Public Distribution System for its citizens. As per the recommendations at

para-6 of the Central Vigilance Committee on P.D.S. headed by the Hon'ble Justice Wadhwa, the State Government was advised to devise a scheme to eliminate bogus ration cards circulated in the State. In compliance to the said direction of the Committee under Annexure-A/1 the State Government has initiated verification campaign through out the State to eliminate fake/bogus cards in PDS during 2009-10 and recently in 2010-11. Besides that, newspaper advertisement warning the bogus card holders to surrender their cards has also been published in leading newspapers of the State to eliminate the bogus ration cards in PDS as per the direction of the apex Court. BPL survey is the duty of P.R. Department in rural area and H. & U.D. Department in urban areas. Therefore, survey in rural areas will be conducted by Panchayati Raj Department of the Government of Orissa, soon after the guidelines from Ministry of Rural Development, Government of India are received by them. Government of Orissa has constituted apex Committee under the Chairmanship of Chief Secretary to consider the recommendation of Wadhwa Committee and in its meeting held on 4.10.2010 it was decided that H & U.D. Department shall initiate the process for identification of people Below Poverty Line in urban areas following appropriate guidelines of Government of India for urban areas.

6. Verification campaign to eliminate bogus/fake ration cards in PDS has been initiated for the purpose of adjustment of genuine person having no ration cards. After assessment of bogus/fake ration cards in the State, the matter of distribution of ration cards among the genuine consumers would be considered. After receipt of guidelines from Central Government and on completion of BPL survey by Panchayati Raj Department in rural areas & Housing & Urban Development Department in urban area, new cards will be issued. The State Government is issuing ration cards to the BPL/AAY beneficiaries against cancelled ration cards. This is a continuous process. With regard to setting up of complaint redressal mechanism for P.D.S., Sanjog Help Line based call centre has been set up to redress the grievances of the consumers on priority basis. The State Government had taken up verification work during 2009-2010 and is also carrying on another annual verification campaign to eliminate further bogus/fake ration cards and adjust those bogus/fake ration cards among the genuine persons having no ration cards. In Government letter No.17243/CS. FS & CW dated 23.09.2010, it has been clearly mentioned at para (h) that all such cases where identity of the card holders cannot be established, local enquiry may be conducted through Revenue Officers, Extension Officers, other Government officials and local public representatives by paying visit to the house of the card holders to ascertain the fact. After completion of

verification work, ration cards will be distributed among the genuine persons having no ration card against the cards cancelled. In the matter of proper implementation of PDS work, the State of Orissa is always committed for public interest and has been taking steps effectively to maintain transparency in all the levels in compliance with both the directions of the Supreme Court and Government of India.

7. On rival contentions of the learned counsel for the parties, the question that falls for consideration by this Court is as follows:

> Whether the instructions/guidelines issued by opposite party no.2-Chief Secretary to Orissa under Annexure-3 to all the Collectors for verification of ration cards in circulation at the Fair Price Shop are in conformity with the directions issued by the apex Court under Annexure-1 and the letter of Central Government dated 1.9.2010 under Annexure-2 ?

8. In order to deal with the above question, it is necessary to know the observation and direction made/given by the apex Court in its order passed under Annexure-1 and the direction issued by the Central Government under Annexure-2. The relevant portion of the observation/order of the apex Court passed under Annexure-1 is reproduced below:

> "Justice Wadhwa, in the report of State of Orissa has mentioned that the system of storage agency is one of the main thrust of diversion of PDS food-grains. This system should end forthwith. The State Corporation has adequate storage facilities and sufficient reserves. Some of the godowns which are owned by the Corporation have let out to storage agents. The Panchayat Raj Department has six godowns of 15 M.T. capacity and 300 godowns of 1000 M.T. capacity. The Panchayat Raj Department and also the Urban Development Department may have more godowns if required. This suggestion may also be considered by Union of India and they must respond to it on the next date of hearing.
>
> According to the report of the Food Commissioner, lakhs of bogus cards are in circulation. According to a recent report of Times of India, more than 2,50,000 bogus cards are in circulation in the State of Orissa alone. By a newspaper advertisement, a warning be issued asking all the bogus card holders to surrender the bogus cards forthwith, in any event, within two weeks of the date of advertisement, otherwise criminal prosecution may be initiated

against the bogus card holders. We have to develop a culture of zero tolerance corruption. Unless immediate and urgent steps are taken, the ultimate effect will be on the poorest citizen who is deprived of legitimate entitlement for food-grains. We must ensure that every poor person is ensured of two square meals per day.

It is desirable to abolish the category of the above poverty line altogether. In case it is not possible then the Government should at least consider limiting households whose annual income is less than Rs.2 lacs per year. We see no rationale or justification in providing subsidized food-grains to card holders whose annual income is more than Rupees two lakhs. We also call upon the Union of India to carry out fresh survey to get the correct and comprehensive picture of citizens who are in the categories of APL, BPL and AAY. Let the survey be conducted as early as possible.

A survey is required to get a clearer picture of the targeted population in the categories of APL, BPL and AAY….."

9. The copy of the letter of the Joint Secretary to Government of India, Ministry of Consumer Affairs, Food & Public Distribution Department addressed to Pr. Secretary/Food Secretary, Department of Food, Civil Supplies, all State Governments/UTs is reproduced below:

"While hearing Writ Petition (Civil) No. 196 of 2001, People's Union for Civil Liberties V/s Union of India & Ors. on 31.08.2010, the Hon'ble Supreme Court has directed that " By a newspaper advertisement, a warning be issued asking all the bogus card holders to surrender the bogus cards forthwith, in any event, within two weeks of the date of advertisement, otherwise criminal prosecution may be initiated against the bogus card holders".

2. In order to ensure effective delivery of essential commodities to all eligible ration card holders through Targeted Public Distribution System (TPDS), this Department has from time to time, issued instructions for elimination of bogus ration cards in circulation. The Public Distribution System (Control) Order, 2001 (part 2((8) of Annexure of the Order), stipulates elimination of bogus ration cards as well as bogus units in the ration cards shall be a continuous exercise by the State Governments to check diversion of essential commodities.

> 3. In view of the orders of the Hon'ble Supreme court dated 31.8.2010, I request you to issue a news paper advertisement and take action as directed by the Hon'ble Supreme Court. Compliance of the Supreme Court order may be informed at the earliest."

10. Conjoint reading of the order of the apex Court passed under Annexure-1 and the letter of the Central Government issued under Annexure-2 makes it amply clear that a comprehensive survey should be made and immediate steps should be taken to eliminate the bogus card in circulation and find out the genuine/eligible persons, who are coming under the categories of BPL, APL & AAY and they should be provided with ration cards to avail the benefits under P.D.S.

11. In the letter issued by the Chief Secretary, Orissa to all the Collectors under Annexure-3, the procedures have been provided to ensure effective and transparent delivery of essential commodities to BPL, APL & AAY ration card holders through P.D.S. The same are quoted below:

> "The following procedure should be adopted for the purpose:

(a) The Government Official appointed for supervision of each Fair Price Shop, under the Rs.2/- per Kg. rice scheme shall be the verifying officer.

(b) The verification shall be done on the days of distribution of essential commodities.

(c) Advance Publicity through mike should be made in each village/Grampanchayat/Ward about the annual verification exercise to be carried out and the card holders should be informed to get their identity documents at the time of receiving their commodities. The various documents which can be used for establishing the identity are :-

(i) Electoral Photo Identity Card (EPIC)
(ii) Driving Licence
(iii) Bank/Kissan/Post Office Passbooks.
(iv) Property documents such as Patas, Registered Deeds etc.
(v) SC/ST/OBC Certificate issued by competent authority.
(vi) Pension Documents such as ex-service man, Pension Book/Pension Payment Order, Ex-Service man's widow/Dependant certificate, Old age Pension order

and Widow Pension Order.
(vii) Railway Identification Cards;
(viii) Freedom Fighter Identity Cards
(ix) Certificate of Physical Handicapped issued by competent authority.
(x) NREGS Job Cards

Since a large number of persons in the State have EPICs,. It is expected that this will be the primary document for identification.

In case of APL Ration Card holders, Xerox copy of the identity documents of the card holders shall be received by the verifying officer and the same shall be sent to the CSO of the district with a note on the document that it has been verified with the original. But in case of BPL and AAY ration Card holders, the Xerox copy of the document may not be insisted upon and the verifying officer is to record the name of the document which is verified as identity proof and all these cases need to be sent to the CSO for record. CSO shall make necessary arrangement to test check 10% of these cases and keep it as record for future reference.

(d) The verifying Officer may be provided (i) copy of the original 1997 BPL list available in DRDA, (ii) the copy of the original 1998 BPL list prepared by the Housing & Urban Development Department in respect of ULBs (iii) the list of BPL/AAY/APL cards distributed by the block retailer-wise for GP/village/ward (iv) copy of the electoral rolls pertaining to village/ward.

(e) The verifying Officer will also be given a register as per Annexure-1 to be maintained retailer wise.

(f) When the card holder comes to list his/her entitlements, his/her identity would be verified and the signature of the beneficiaries or household members signature be obtained in the register. The verifying Officer should also sign on the register and put his signature, name and designation on ration card authenticating verification.

(g) As per the instructions of Government of India, a notice is being issued through leading local dailies for surrender of fake/ghost/bogus Ration Cards before the issuing authorities within 15 days of publication and after completion of that period, if any such type of Ration Cards are detected the legal action as per Law need to be initiated against the person having such cards.

(h) All such cases where identity of the card holders can not be established, local enquiry may be conducted through revenue officers, Extension Officers, other Government officials and local Public representatives by making visit to the house of the card holders to ascertain the fact.

(i) Thereafter, action should be taken by the Collector to cancel all fake/ghost/bogus/duplicate ration cards. The time schedule of this annual verification drive will be from 1st November and continue up to 31st December of this year.

(j) If a beneficiary does not appear in the designated dates to verify his cards and authentication , he is not to be allowed to lift the PDS rice thereafter without verification/authentication by Supply Inspector/Marketing Inspector/ACSO etc. In such cases, resultant modification/addition be sent to the concerned CSO to the Administrative Department in the software being provided to them for this purpose."

12. Perusal of the above order of the Chief Secretary shows that the Government Officers shall be appointed for supervision of Fair Price Shops under Rs.2/- per Kg. rice Scheme on the date of distribution of the essential commodities. By this process, only the fake/bogus/ghost ration card holders may be identified and consequently eliminated, but genuine/eligible citizens who have not been issued with the ration cards cannot be brought into the benefit available under the PDS which is one of the directions of the apex Court under Annexure-1. In the counter affidavit, no positive stand has been taken by opposite party-State to show that any effective step has been taken to identify the eligible and genuine citizens who are eligible/entitled to be issued with the ration cards under P.D.S., but so far have not been issued with.

13. The apex Court in its order dated 30.8.2010 under Annexure-1 categorically held as follows:

> " We have to develop a culture of zero tolerance corruption. Unless immediate and urgent steps are taken, the ultimate effect will be on the poorest citizen who is deprived of legitimate entitlement for food-grains. We must ensure that every poor person is ensured of two square meals per day.
>
> xxx xxx xxx

> We also call upon the Union of India to carry out fresh survey to get the correct and comprehensive picture of citizens who are in the categories of APL, BPL and AAY. Let the survey be conducted as early as possible.
>
> A survey is required to get a clearer picture of the targeted population in the categories of APL, BPL and AAY….."

14. Thus, the whole purpose is that the genuine citizens who are eligible/entitled to be provided with ration cards for availing benefit under P.D.S. should be brought into that benefit. Therefore, to achieve the said purpose, a comprehensive door to door survey should be made and in that process not only the bogus card holders will be identified for the purpose of elimination, but also the genuine citizens who are eligible/entitled to be provided with ration cards to avail benefits under the P.D.S. can be identified/located. Annexure-3 does not speak how the genuine citizens who are entitled to be provided with ration cards, but have not yet been provided with such cards will be identified to avail the benefits under the P.D.S.

15. In paragraph 7 of the writ petition, the petitioners have stated that in order to provide the benefits of P.D.S. to all categories of citizens, there should be regular verification and new cards should be issued to them every year. Although P.D.S. Order provides for annual verification of beneficiaries list, the State Government has failed to comply the same, as no such verification has been conducted for the last 15 years, as a result of which, 2.5 lakhs bogus cards are in circulation through out the State and no new card could be issued to a large number of eligible/entitled citizens. In reply to paragraph 7 of the writ petition, at para-9 of the counter affidavit, traversing the above statement, it is stated that the State Government had taken up verification work during 2009-10 and is also carrying on another verification campaign to eliminate further bogus/fake ration cards and adjust those bogus /fake ration cards among the genuine ration card holders. However, in paragraph 6 of the counter it is stated that the prevailing BPL list is based on the assessment of 1997 BPL survey of P.R. Department in rural areas and 1998 survey of H & UD Department in urban areas. Thus, in their counter affidavit, opposite party-State authorities have not denied the grievance of the petitioners that for the last 15 years annual verification of beneficiaries list has not been prepared. No satisfactory explanation is forthcoming from opposite party-authorities as to why for the last several years annual verification work for elimination the bogus ration cards in circulation and issuance of new cards to the genuine persons have not been carried out. As stated in paragraph 6 of the counter, the prevailing BPL list is based on 1997

BPL survey of P.R. Department in rural areas and 1998 survey of H & UD Department in urban areas. In the mean time, as stated in paragraph 4 of the writ petition, lot of changes in the economical status or otherwise of the citizens of the State have taken place. Some have died, some have been deprived of any income and lost their livelihood, some have become destitute, some have lost their properties whereas some have become major citizens and have acquired properties by earning their livelihood. But these economic changes have not been looked into/verified by the State Government for the last 15 years.

Needless to say that as stated above a door to door survey is immediately necessary to achieve the laudable object of the P.D.S.

16. In view of the above, we direct opposite party-State to conduct a door to door survey for the purpose of eliminating the bogus cards with reference to ration cards already issued in addition to steps taken under Annexure-3 and to find out the genuine citizens, who are eligible/entitled to be issued with new ration cards under the P.D.S. on the basis of the application made by them for that purpose, as expeditiously as possible keeping in view the observations made by the Apex Court in its order referred to supra.

17. Writ petition is allowed to the extent indicated above. No order as to costs.

Writ petition allowed.

2011 (II) ILR- CUT- 570

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

W.P.(C) NOS.20023 & 20024 OF 2010 (Decided on 17.05.2011)

KAMALA TADINGI ……..Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.21.

Custodial death – Widows of the prisoners filed writ petition claiming compensation – State filed counter saying that one prisoner died due to Tuberculosis and another due to severe anaemia – Both of them were aged about 38 and 44 years respectively on the date of the incident – Breach of public duty by the state for not protecting the fundamental right to life of the citizen – Held, direction issued for payment of compensation of Rs.3,50,000/- to each of the petitioner.

(Pare 17)

Case laws Referred to:-

1.AIR 1997 SC 610 : (D.K.Basu-V- State of West Bengal)
2.AIR 1996 SC 1051 : (Chameli Singh & Ors.-V-State of Uttar Pradesh & Anr.)
3.AIR 1983 SC 109 : (Board of Trustees of the Port of Bombay-V- Dilipkumar Raghavendranath Nadkarni).
4.AIR 1986 SC 1280 : (Olga Tellis & Ors.-V-Bombay Municipal Corporation & Ors.)
5.(2003) 6 SCC 1 : (Kapila Hingorani-V- State of Bihar).

For Petitioner - M/s. Mina Kumari Das, S.Das & S.Mohanty.
For Opp.Parties - Government Advocate

B.N. MAHAPATRA, J. These two writ petitions have been filed by the widows of two under trial prisoners, namely, Gangula Tadingi and Ratunu Sirika, who died in jail custody praying for a direction to opposite parties to conduct an independent inquiry with regard to unnatural death of their husbands; punish the authorities responsible for such death and award adequate compensation to their families.

2. The case of the petitioners in a nutshell is that their husbands along with others were arrested in connection with alleged attack by the Chasi

Mulia Adivasi Sangha on Narayanpatna Police Station in G.R. Case No.165 of 2009 of J.M.F.C., Laxmipur. Thereafter, they were sent to Koraput Jail. Prior to arrest, they were in good health and were cultivating forest land to earn their livelihood. The deceased were supporting the cause of Chasi Mulia Adibasi Sangha which was fighting against landlords who had occupied the lands of Adivasis. The petitioners were never informed about their husbands' illness while in jail custody. They were also not allowed to meet their husbands in jail custody. After coming to know about death of their husbands, there was agitation among the Mahila Sangha of Narayanpatna and they demanded a judicial probe into the custodial death of their husbands. The news regarding death of their husbands was published in the Indian Express on 24.09.2010. The petitioners, finding no other alternative remedy, have filed these writ petitions.

3. Learned counsel appearing on behalf of the petitioners submitted that the deceased were badly beaten up at the time of arrest and were not provided with any medical treatment while in jail custody. As a result, the young and energetic husbands of the petitioners died untimely due to inhuman behaviour of the State police personnel. He further submitted that the petitioners belong to below poverty line category and are having no means to live after the death of their husbands in jail custody. Their children have become helpless. The death of the petitioners' husbands in jail custody is due to arbitrary, illegal and inhuman attitude of the State Authorities for which they should be punished. The petitioners are illiterate women belonging to below poverty line and their families were mostly depending upon the income of their husbands. Therefore, learned counsel prayed for grant of adequate compensation.

4. Per contra, learned Government Advocate appearing on behalf of the State Authorities submitted that late Gangula Tadingi, husband of the petitioner-Kamala Tadingi in W.P.(C) No.20023 of 2010, died in Tuberculosis in the District Headquarters Hospital, Koraput. Adequate care and medical treatment were provided to the husband of the petitioner. Deceased-Gangula Tadingi, husband of the petitioner, was arrested in connection with G.R. Case No.85 of 2009, G.R. Case No.86 of 2009 and G.R. Case No.165 of 2009 and put to jail on 17.12.2009 as per the order of the learned J.M.F.C., Laxmipur. Due to illness, the deceased-Gangula Tadingi was admitted in the Jail Hospital from 30.01.2010 till 07.04.2010 and he was provided with the medical treatment in the Jail Hospital by the Jail Medical Officer. It is further submitted that from 18.02.2010 the medicine for T.B. was administered to him with proper sick diet. On 04.07.2010, he was shifted to District Headquarters Hospital, Koraput as per the advice of the Jail Medical Officer

for specialized treatment and he was admitted there. As there was no road communication and disruption of telephone line due to agitational activities of the Maoists, none of the staff of the Jail could be deputed to his native village to communicate the news of his illness. On 12.04.2010, during the course of treatment at the District Headquarters Hospital, Koraput, the husband of the petitioner-Kamala Tadingi expired. The petitioner was intimated by the I.I.C., Narayanapatna Police Station to remain present at the time of inquest and post mortem. The post-mortem examination was conducted in presence of his brother-in-law. They were requested to receive the dead body but they expressed their inability and requested the State Authorities to dispose of the dead body. Accordingly, the dead body of the husband of the petitioner-Kamala Tadingi was disposed of by the Office of the Superintendent, District Jail, Koraput.

5. Late Ratunu Sirika, husband of the petitioner-Kamala Sirika in W.P.(C) No.20024 of 2010 died in severe anaemia resulting in complication of Malaria in MKCG Medical College and Hospital, Berhampur. Adequate care and medical treatment were provided to the husband of the petitioner. The deceased-Ratunu Sirika had smoking addiction. The petitioner-Kamala Sirika has failed to show any negligence on the part of the opposite party-authorities. It is further submitted that the deceased -Ratunu Sirika was arrested in connection with G.R. Case No.25 of 2009 and G.R. Case No.165 of 2009 and he was put to the jail on 03.05.2009 as per the direction of the learned J.M.F.C., Laxmipur. Due to illness, deceased-Ratunu Sirika was admitted in jail hospital on 03.05.2010 and was being provided with medical treatment by the Jail Medical Officer. On 27.05.2010, he was shifted to the District Headquarters Hospital, Koraput as per the advice of the Jail Medical Officer for specialized treatment and he was admitted there. At that time, the I.I.C., Narayanapatna Police Station was informed by Wireless Message to intimate the relatives of Ratunu Sirika about his hospitalization. The relatives of the deceased-Ratunu Sirika did not attend him during the time of treatment. On 04.06.2010, the petitioner was shifted to M.K.C.G. Medical College & Hospital, Berhampur for better treatment and on 05.06.2010 the husband of the petitioner expired. The said fact was intimated to the petitioner by the I.I.C., Narayanapatna Police Station to remain present at the time of inquest and post-mortem. Relatives of the deceased were requested to receive the dead body but they expressed their inability and requested to dispose of the dead body then and there. Accordingly, the dead body of the husband of the petitioner was disposed of by the Office of the Superintendent, District Jail, Koraput.

6. The learned Government Advocate further submitted that the husbands of the petitioners were never beaten and there was no ill-treatment

to their husbands inside the jail. The inquest report and post-mortem report would go to show that the deceased had no specific external injuries on their body and proper treatment was provided to them. The diet had been given to them as per Orissa Jail Manual Rules. Apart from that, extra protein diet had been provided to the deceased-Gangula Tadingi as because he was suffering from Tuberculosis. The Jail Manual and the guidelines of National Human Rights Commission were being followed in the jail. The involvement of People's Union for Civil Liberties, which is a private organization, has no nexus with the present cases. The petitioners have failed to prove any negligence on the part of the opposite party-authorities for which the writ petitions are liable to be dismissed.

7. In the rejoinder affidavit filed in W.P.(C) No.20023 of 2010, the petitioner-Kamala Tadingi has stated that the stand taken by opposite party that her husband died in Tuberculosis was totally false and fabricated, as no detailed report on medical treatment has been filed before this Court. Similar averments have been made in the rejoinder affidavit filed in W.P.(C) No.20024 of 2010 by the petitioner-Kamala Sirika. The petitioners being poor adivasis, illiterate women have no access to it. Their husbands have no criminal background and they were arrested being falsely implicated in the criminal cases. When the husbands of the petitioners were put to jail, they had complained of the police beating while they were in police custody before the Jail Medical Officer, but no treatment was provided. In a severe condition, the deceased were admitted into the jail hospital on 03.05.2010. Only after their death, the petitioners got information and were unable to take the dead body to their respective native places for cremation as per their rituals. The undertrial prisoners should have been produced in Court once in every 15 days which has been violated in the present cases.

8. It is not in dispute that the husbands of both the petitioners died while they were in jail custody. The deceased-Gangula Tadingi was aged about 44 years (as per Annexure-1, Photo Identity Card) when he was arrested on 17.12.2009 and after about five months, he died in jail custody on 12.04.2010. Till he was arrested, he was doing cultivation and maintaining his family. Similarly in W.P.(C) No.20024 of 2010, the deceased-Ratunu Sirika was aged about 38 years on 03.05.2009 (as per Annexure-1, Photo Identity Card) when he was arrested. He died after one year and a month from the date of arrest on 05.06.2010. Till his arrest, he was cultivating the forest land and maintaining his livelihood. The deceased-Gangula Tadingi was suffering from Tuberculosis. Similarly, deceased-Ratunu Sirika was suffering from anaemia which resulted in complication of malaria. Therefore, the normal presumption is that the respective deceased persons were

suffering from the alleged disease only after they were admitted into the jail. Both the diseases were curable in nature. Had the opposite party-authorities taken proper care, the husbands of the petitioners could have been cured and they would not have died of such disease.

9. The learned Government Advocate has not brought any material to our notice to show that the victims were produced in 15 days interval as laid down under Section 167 (2) read with Section 167(2)(b), Cr.P.C. The families of the victims are in distress as the only breadwinners of their families died while in jail custody**.** In the counter affidavit it is stated that as there were no road communication and disruption of telephone line due to agitational activities of Maoist none of the staff of the jail could be deputed to the native village of the deceased Gangula Tadingi to communicate about his illness to his family members.

10. In case of deceased Ratunu Sirika, it is stated in the counter affidavit that during the period of his illness, the I.I.C., Narayan Patna Police Station was informed by wireless message to intimate the relatives of Sirika about his hospitalisation. Nothing has been stated whether I.I.C., Narayan Patna Police Station intimated to the relatives of the deceased-Ratunu Sirika about his illness. It is also not understood why a similar step has not been taken in case of deceased Gangula Tadingi to send message about his illness to his family members by I.I.C., Narayanpatna Police Station. If the opposite party-State authorities expressed their inability to communicate the message of illness of a prisoner to his family members, who subsequently succumbed to the illness, then this admission itself shows that the concerned authorities are negligent in their duties. It is found that the District Administration did not make any arrangement to transport the dead bodies of the husbands of the petitioners to their respective native villages for cremation as per the tradition of the community.

11. Needless to say that the apex Court in several decisions has observed that the precious right guaranteed under Article 21 of the Constitution of India cannot be denied to the under trial or other prisoners in custody, except according to the procedure established by law. The prison authority has a great responsibility to ensure that a citizen in custody is not deprived of his right to life. He must be afforded with minimum necessities of life.

12. The apex Court in the case of **D.K. Basu v. State of West Bengal,** AIR 1997 SC 610 held that :

> "Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rules of Law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. Court cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest ? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law."

13. The apex Court, in the case of **Chameli Singh & others Vs. State of Uttar Pradesh and another**, AIR 1996 SC 1051, held as follows:

> "Right to life" means to live like a human being and it is not ensured by meeting only the animal needs of man. It includes the right to live in any civilised society implies the right to food, water, decent environment, education, medical care and shelter."

14. The term "life" used in Article 21 of the Constitution of India has a wide and far-reaching concept. It means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. (vide ***Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni***, AIR 1983 SC 109; ***Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.***, AIR 1986 SC 1280; and ***Kapila Hingorani Vs. State of Bihar*** , (2003) 6 SCC 1)."

15. In the cases at hand, we are not satisfied that the opposite party-authorities have taken adequate care of the deceased prisoners, Gangula Tadingi and Ratunu Sirika in providing proper medical treatment for which they died prematurely at the age of 44 years and 38 years respectively in

curable diseases. Therefore, the widow-dependants of the deceased Gangula Tadingi and Ratunu Sirika are entitled for compensation.

16. At this juncture, it is profitable to refer to the decision of the apex Court in ***D.K.Basu*** (supra) wherein the apex Court held as under :

> "42. Some punitive provisions are contained in the Indian Penal Code which seek to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331, provide for punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustration (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is compulsion of judicial conscience.
>
> xxxx xxxx xxxx
>
> 55. Thus, to sum up, it is now a well accepted proposition in most of the jurisdiction, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to

be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

17. In the fact situation, considering the age of the deceased persons, we direct that compensation of Rs.3,50,000/- (Rupees Three lakhs fifty thousand) should be paid to each of the petitioners. Eighty percent of the total amount of compensation shall be kept in a fixed deposit in any Nationalized Bank in the name of the widow-petitioners for a period of five years and the monthly interest accrued thereon shall be paid to the petitioners on proper identification. If the amount directed to keep in fixed deposit is required to meet any pressing needs or for any development of the family the same may be withdrawn by filing an application before this Court for grant of such permission. The balance twenty percent of the amount of compensation shall be paid to each of the petitioners on proper identification within a period of four weeks from today.

18. With the aforesaid directions, the writ petitions are allowed.

Writ petitions allowed.

2011 (II) ILR- CUT- 578

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

W.A. NO.435 OF 2010 (Decided on 19.05.2011)

ALEKHA SA .....Appellant.

.Vrs.

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

ORISSA GRAM PANCHAYAT ACT, 1964 (ACT NO.1 OF 1965) – S.123 r/w Rule 212 & 213 of the Orissa G.P. Rule 1968

Appointment of Secretary Chahagaon Gram Panchayat – Appellant got appointed after participating in the interview for which an advertisement had been floated in the public – After due approval appellant had joined as Secretary of the said Gram Panchayat – Previously one Chitrasen Sabar was working as Secretary of that Gram Panchayat and removed subsequently and on the direction of the State Government he was re-appointed and the appellant was removed – In the meantime Sri Sabar has been promoted to the post of V.L.W. and the post of Secretary has been lying vacant.

Held, interest of justice would be better served if the appellant is allowed to join the post of Secretary Chahagaon Gram Panchayat without going for fresh selection.

(Para 5 & 6)

For Appellant - M/s. S.K.Dalai & S.Mohapatra.
For Respondents - Addl. Government Advocate

B.N. MAHAPATRA, J. This Writ Appeal has been filed with a prayer to review/modify the order dated 02.12.2010 passed in W.P.(C) No.3653 of 2010 and to direct the Sarapanch, Chahagaon Gram Panchayat, district Kalahandi to allow the petitioner to join in his work with all past service benefits. Learned Single Judge vide impugned order dated 02.12.2010 while disposing of the Writ Petition No.3653 of 2010 ordered that if the Chahagaon Gram Panchayat is required to appoint a Panchayat Secretary, it shall invite applications from eligible candidates and if the petitioner offers his candidature for the same, due weightage shall be given to his past experience.

2. The facts and circumstances giving rise to the present Writ Appeal in a nutshell are that the writ petitioner was appointed as Secretary of Chahagaon Gram Panchayat on 19.10.1996. His appointment was duly approved by the District Panchayat Officer, Kalahandi. While he was continuing as such, he was asked to handover charge to one Chitrasen Sabar pursuant to direction of respondent No.4-B.D.O., Bhawanipatna vide letter No.338 dated 27.02.1997 and accordingly, the appellant handed over the charge to said Chitrasen Sabar on 05.03.1997, who was earlier appointed as the Secretary of the said Gram Panchayat and was dismissed from service because of his unauthorized absence. Being aggrieved of his dismissal from service Sri Chitrasen Sabar made a representation to respondent No.1-Principal Secretary to Government, Panchayatraj Department, Orissa who, after considering his case, directed the Chahagaon Gram Panchayat to allow him to join as Secretary of the said Gram Panchayat and accordingly, Sri Sabar took charge from the appellant on 05.03.1997. Considering the submissions of the appellant-petitioner that said Sri Sabar was promoted to the post of V.L.W. and the post of Secretary was lying vacant and this Court in an earlier order dated 27.11.2009 passed in OJC 6979 of 1997 directed that if the petitioner makes a representation to the Collector, Kalahandi within a period of ten days from the date of that order, the Collector shall do well to hear and dispose of the same within three weeks from the date of receipt of the representation, the learned Single Judge passed the above order. Hence, the present appeal.

3. Learned counsel Mr.S.K.Dalai appearing on behalf of the appellant submits that the impugned order passed by learned Single Judge is contrary to the provisions contained in the Orissa Gram Panchayats Act, 1964. According to Mr.Dalai, there was no order of removal of the petitioner either by the Gram Panchayat or by the State Government. Therefore, the learned Single Judge should not have directed the Gram Panchayat for such fresh advertisement. Since the petitioner was appointed as Secretary by the Gram Panchayat and his appointment was approved by the District Panchayat Officer under Rule 242 of the Orissa Gram Panchayat Rules, 1968, the cancellation of such appointment is illegal. The appellant was removed illegally from the said post of Secretary of the Chahagaon Gram Panchayat without following the procedure prescribed under Rule 216 of the OGP Rules, 1968. Direction of the State Government to Sri Chitrasen Sabar to join as Secretary of the Gram Panchayat in question is illegal. The appointment of the petitioner in the post of Secretary of the said Gram Panchayat was made after following the due procedure and his appointment is not temporary in nature. Removal of the writ appellant from the post of Secretary of the Gram Panchayat in question on the ground that his

appointment was temporary is not at all correct since the post of Secretary in a Gram Panchayat is not a civil post. The Government has no role to play in the appointment and removal from the said post. Moreover, no reasonable opportunity of hearing was afforded to the appellant as provided under Rule 216(a) of the Rules, 1968 before removing him from the said post. Concluding his argument, Mr. Dalai submits that since in the meantime, Sri Sabar has been promoted to the post of V.L.W. and the post of Secretary of the said Gram Panchayat is lying vacant, the appellant may be given appointment in that post.

4. Learned Addl. Government Advocate supporting the impugned order submits that there is no infirmity or illegality in the impugned order passed by the learned Single Judge. Therefore, he prays for dismissal of the Writ Appeal.

5. In the instant case, the writ appellant was appointed in the post of Secretary of the Gram Panchayat in question after participating in the interview conducted for the said post for which an advertisement had been floated in the public. After due approval, the appellant has joined as Secretary of the said Gram Panchayat where Sri Chitrasen Sabar was previously working and removed subsequently. On the direction of the State Government, the Gram Panchayat reappointed Sri Chitrasen Sabar and removed the writ appellant. Admittedly, in the meantime, Sri Chitrasen Sabar has been promoted to the post of V.L.W. and the said post of Secretary has been lying vacant.

6. In that view of the matter, justice would be better served if the appellant is allowed to join in the post of Secretary of Chahagaon Gram Panchayat without going for fresh selection. We direct accordingly. Needless to say that the appellant is entitled to all pecuniary and service benefits for the period he has worked as Secretary of the said Gram Panchayat.

7. The writ appeal is allowed to the extent indicated above. No order as to costs.

Writ appeal is allowed.

2011 (II) ILR- CUT- 581

B.P.DAS, J & S.K.MISHRA, J.

(SUO MOTU) CONTC NO.906 OF 2011 (Decided on 2.8.2011)

STATE OF ORISSA ……..Petitioner.

.Vrs.

TARAKANTA MOHAPATRA & ORS. … …….Opp.Parties.

CONTEMPT OF COURTS ACT, 1971 (ACT NO.70 OF 1971) – S.12.

Contempt of Court – This Court restrained O.P.1 to 3 from raising any construction on the land of the petitioner – They have the knowledge of the order of the Court – Deliberate and willful disobedience of the Courts order – Contemnors have neither repentance nor a bona fide attempt to purge the contempt – Affidavit of contemnor, Nrupesh Kumar Nayak Corporator shows that he has no remorse for his act of disobedience of this Court's order – This Court has sufficient reason to impose punishment and sentence which is in public interest and it will have the curative effect – No leniency in attitude should be expected from this Court – Contemnors found guilty are committed to prison.

(Para 12 & 13)

Case laws Referred to:-

1.AIR 2008 SC (Suppl.) 1138 : (Parents Association of Students-V- M.A.Khan & Anr.)
2.1968 M.L.J.(Cri.) 531 : (S.Sanyasi Appa Rao-V-Officer-in-Charge of the Amadalavalasa Co-operative Agricultural & Industrial Society Ltd.)
3.AIR 1952 ALI.86 : (State-V-Krishna Madho)
4.AIR 1994 SC 1837 : (Satyabrata Biswas-V- Kalyan Kumar Kishu)
5.2003 CRI. L.J. 2575 : (Court on Its own Motion & Ors.-V- J.R.Gangwani).

For Petitioner - Addl. Standing Counsel
For Contemnor No.1- M/s. J.Pattnaik, H.M.Dhal, B.Mohanty & T.K.Pattnaik.
For Contemnor No.2 & 3 - M/s. B.Roy, B.Mohanty, A.Das, S.Das & H.K.Mahali.
For Contemnor No.4 - M/s. M.Mohapatra, S.K.Routray, S.Mohanty, S.Pattnaik.

For Contemnor No.5 - M/s. I.C.Dash, D.Nanda, P.Mohanty & S.Samal

B.P.DAS, J. This contempt proceeding has been initiated against the contemnors for willful violation of the order of this Court dated 6.10.2010 passed in Misc. Case No.16177/2010 arising out of W.P.(C) No.17272/2010.

2. The brief facts leading to this proceeding are that one Mrs. Dipti Mitra wife of Late Brigadier Ajit Kumar Mitra aged about 80 years, of Bhubaneswar filed W.P.(C) No.17272/2010 with a prayer to issue a Writ of Mandamus to the opposite parties particularly opposite party nos.1 & 2 to stop the construction over the suit land in question, i.e., Sabik Plot No.4766 under Sabik Khata No.1180 situated in Sabik Mouza-West Badagada, Bhubaneswar of area Ac.0.500 decs. of homestead land, which now corresponds to Hal Mouza-Goutam Nagar, Hal Khata No.1337, Hal Plot No.483 with recorded area of Ac.0.488 decs. as per the current settlement of 1995, to direct the Tahasildar, Bhubaneswar to make an official measurement of the suit land of the petitioner and to demarcate the road and give proper opportunity of hearing to the petitioner before taking any coercive steps for eviction/demolition in respect of the suit land.

3. This Court by its order dated 6.10.2010 while issuing notice to the opposite parties passed the following orders.

> "W.P.(C) No.17272 OF 2010 & M.C.NO.16177/2010
>
> Heard.
>
> Issue notice to opposite party nos.1 to 4 by registered Post with A.D. Requisites shall be filed within seven days.
>
> Let three copies of the brief be served on the learned counsel for the State appearing for opposite party nos.5 to 7.
>
> Put up this matter on 25th October, 2010.
>
> Perused the letter dated 15.9.2010 issued by the Commissioner, Bhubaneswar Municipal Corporation. It is stated that despite the undertaking of the petitioner that in case it is found during the measurement that she has encroached any portion of the Government land, she will remove the structure within a suitable given time, it is alleged that the Municipality without following due procedure is carving out a road inside the petitioner's land.

> As an interim measure, we restrain opposite party nos.1 to 3 from raising any construction/development on the land of the petitioner, i.e., an area of Ac.0.500 decimals of Gharabari Kissam in Sabik Plot No.4766 under Sabik Khata No.1180 situated in Sabik Mouza-West Badagada, Bhubaneswar, which now corresponds to a recorded area of Ac.0.488 decimals in Hal Plot no.483 under Hal Khata No.1337 of Hal Mouza Goutam Nagar, Bhubaneswar, without going for fresh measurement of the area in presence of the petitioner or her representative through an Amin deputed from the Civil Courts, for which requisition shall be made by O.P.3 to the District Judge, Khurda at Bhubaneswar.
>
> Sd./-B.P.Das,J.
> Sd./-S.Panda,J."

The Commissioner, Bhubaneswar Municipal Corporation, Bhubaneswar, Dist.-Khurda, the Recovery Officer, Bhubaneswar Municipal Corporation, Bhubaneswar, Dist.-Khurda and Sri Nrupesh Kumar Nayak, Corporator, Ward No.52, Bhubaneswar Municipal Corporation, Bhubaneswar, Dist.-Khurda have been arrayed as O.Ps.2, 3 & 4 respectively.

According to the petitioner, the aforesaid land was acquired on 12.3.1936 on the basis of a lease granted by the Collector, Puri in favour of late Dukhishyam Mitra, the father-in-law of the petitioner for residential purpose and the lease was continuing in peaceful possession thereof by constructing pucca boundary wall up to the height of 5 feet to 6 feet on all sides and growing different types of permanent trees. After the death of the petitioner's father-in-law, the aforesaid property was partitioned amongst his sons and the said property was put into the share of her husband, Late Ajit Kumar Mitra, who constructed his residential building on eastern half of the said plot and the western half remained vacant and it was used for plantation of different kinds of trees. The husband of the petitioner died on 27.1.2004 leaving behind the petitioner and she was residing there peacefully without any disturbance. The aforesaid plot is surrounded by roads on three sides and only the western side road is now occupied by the members of a Youth Club namely, "Star Club", which is patronized by local politicians and is situated on plot no.509. On 23.8.2010, some staff of the Bhubaneswar Municipal Corporation visited the locality and without giving any prior notice to the petitioner and without measurement, put markings on the North-West and South-West boundary walls measuring 17 feet X 108 feet length claiming that the said area belongs to Bhubaneswar Municipal Corporation and attempted to demolish the boundary walls of the petitioner.

Apprehending such action, the petitioner filed a suit being C.S.No.1479/2010 before the Civil Judge (Sr.Divn.), Bhubaneswar praying for permanent injunction against the Bhubaneswar Municipal Corporation and the Civil Judge vide order dated 4.9.2010 directed both the parties to maintain status quo over the suit land till filing of objection and adjourned the matter to 22.9.2010 and the said status quo order was subsequently extended till 31.9.2010. The said order was passed in presence of the learned counsel for the parties. While the matter stood thus, on the request of the petitioner, the Secretary, Rajya Sainik Board, vide communication dated 25.8.2010 requested the Bhubaneswar Municipal Corporation to re-assess the matter and give reasonable time to shift her boundary wall in case any land has been encroached upon by the petitioner. Added to this, on 31.8.2010 the petitioner made a representation to the Commissioner, Bhubaneswar Municipal Corporation with a prayer to make an official measurement of the suit property in her presence so as to ascertain the accurate measurement of the land recorded in her favour. But considering the said representation, on 15.9.2010 the Bhubaneswar Municipal Corporation instructed its Recovery Officer to ensure proper demarcation of the plot before any eviction. But the opposite party-authorities demolished the boundary wall of the petitioner violating the order of status quo of the suit land passed by the Civil Court on 4.9.2010.

4. Thereafter, the petitioner challenging the said demolition approached this Court in W.P.(C) No.17272/2010 and this Court by order dated 6.10.2010 while issuing notice to the opposite parties passed restraint order, which is quoted above.

On 16.5.2011 when this matter was taken up, Mr.S.K.Padhi, learned counsel for the petitioner, submitted that despite this Court's order dated 6.10.2010 restraining O.Ps.1 to 3 from raising any construction/development on the land of the petitioner, without measuring the land in question, construction over the same was continuing by the Bhubaneswar Municipal Corporation, for which we directed the Recovery Officer, Bhubaneswar Municipal Corporation, to remain present in this Court on 19th May, 2011 at 7.30 a.m. and inform this Court whether the allegation made by the petitioner was correct. On the said date, Miss Sumita Behera, Recovery Officer, Bhubaneswar Municipal Corporation, appeared in person and filed an affidavit. But despite notice issued, Sri Nrupesh Kumar Nayak, Corporator, Ward No.52, Bhubaneswar Municipal Corporation did not appear nor was any counsel on his behalf present.

5. The affidavit filed by Miss Sumita Behera on 19.5.2011 is re-produced herein below.

"I, Miss Sumita Behera, aged about 43 years, D/o.Late Ramakrishna Behera, presently working as Recovery Offier, Bhubaneswar Municipal Corporation, At/P/O.-Bhubaneswar, Dist.-Khurda, do hereby solemnly affirm and state as follows .

a. That, I am the opp. Party no.3 in this case.

b. That, I have gone through the orders passed by the Hon'ble Court on 6.10.10, 21.2.11 and 16.5.11 in W.P.(C) No.17272/10.

c. That, in the above orders this Hon'ble Court as an interim measure have restrained the opp. Parties no.1 to 3 from raising any construction/development without going for fresh measurement of the area in presence of the petitioner of her representative through an Amin deputed from the Civil Court for which requisition shall be made by the opp. Party no.3, the learned District Judge, Khurda at Bhubaneswar.

d. That, soon after communication of the first order dated 6.10.10 to the Bhubaneswar Municipal Corporation on 5.1.11 requisition to the learned District Judge, Khurda for the above purpose was made on 10.1.11. On 3.2.11, on the intimation of the learned District Judge, Khurda to deposit Rs.1,000/- towards deputing an Amin, the said amount was deposited on 25.2.11, with the Registrar of District Judge, Khurda. Thereafter again learned District Judge by the letter dated 8.3.11, intimated the counsel of BMC to supply the village map and Record of Right pertaining to the disputed land.

Thereafter, the village map along with a copy of ROR was filed before the learned District Judge on 10.3.11, but the learned District Judge again asked the counsel for BMC to supply the original/certified copy of the ROR vide letter dated 22.3.11.

e. That, upon receipt of the above letter from the learned District Judge, Khurda, the Deputy Commissioner, Bhubaneswar Municipal Corporation vide his letter dated 28.3.11 requested the Tahasildar, Bhubaneswar to supply the certified copy of the ROR so as to take necessary steps to re-measure the disputed land through a civil court's Amin as directed.

f. That, the certified copy of the ROR pertaining to the disputed land was received from the office of Tahasildar, Bhubaneswar on 13.5.11 and filed with the Registrar of learned District Judge on 17.5.11, awaiting deputation of an Amin from the learned District Judge, Khurda.

In the above circumstances though with due regard to the interim order of the Hon'ble Court, sincere steps have been taken, but for the above reasons, re-measurement of the disputed land could not be done and as soon as the Amin will be deputed from the learned District Judge, Khurda and measurement shall be done immediately for which some more time may be granted for the purpose.

g. That, with regard to the allegation made in respect of raising some construction/development over the land in question, it is ascertained from the Engineering Division-II of Bhubaneswar Municipal Corporation, that proposals for improvement of internal roads in different wards of Bhubaneswar including the internal roads of Nageswar Tangi (inclusive of the disputed land) was placed before the contracts committee of BMC on 28.4.11 for its approval. But as on date, no approval of such proposal has been made by the contracts committee for which there is no occasion for issue of work order the disputed land and no construction/development has been made over the plot in question by the Corporation.

h. That, after receiving the order dated 16.5.11 passed by the Hon'ble Court, a report was sought for from the Executive Engineer, Division-II of BMC and he reported that since there is an order of stay over land in question the same was excluded from the list of construction and no work order has been issued for execution of the work by the Engineering Division. The Executive Engineer further reported that he ascertained from the Jr.Engineer that the office is not involved in any type of execution/construction in that portion of road which is subjudiced. But some execution of work was done on 14th and 15th which were holidays, of which the office was unaware.

i. That, in such circumstances the Commissioner has decided to refer the matter for investigation by the State Crime Branch as to how the work was executed in the absence of approval by the Contract Committee and issue of work order.

True copies of the report of Executive Engineer, Division-II, BMC dated 18.5.11 and Junior Engineer, BMC dated 17.5.11 are annexed hereunto as Annexure-3/1 & 3/2 respectively.

j. That, for the above reasons, the opp. Parties no.1 to 3 have is no manner violated the Hon'ble Court's order.

Xxx xxx xxx"

In the additional affidavit filed by Miss Sumati Behera on 11.3.2011, it is clearly indicated that the order of this Court dated 6.10.2010 reached the Office of Bhubaneswar Municipal Corporation on 5.1.2011.

6. A counter affidavit has been filed by O.Ps.2 & 3 through Sri Vishal Kumar Dev, Commissioner, Bhubaneswar Municipal Corporation,stating therein that a joint eviction squad was constituted consisting of General Administration Department, Bhubaneswar Development Authority and Bhubaneswar Municipal Corporation for the purpose of eviction and demolition of unauthorized constructions and accordingly, unauthorized constructions were demolished. It may be stated here that we are not dealing with the merit of the writ petition, which was filed after the demolition of the boundary wall and as the order was not to make any construction over the property in question during pendency of the writ petition, we have examined in this proceeding whether the order of this Court restraining the O.Ps. from making any construction over the suit land has been violated. As the affidavit of Miss Sumita Behera prima facie revealed that there is violation of this Court's order dated 6.10.2010, this Court directed initiation of contempt proceeding against Miss Sumita Behera, Recovery Officer, Bhubaneswar Municipal Corporation. On the allegation of the petitioner that O.P.4-Sri Nrupesh Kumar Nayak, who is the Corporator of Ward No.52 of Bhubaneswar Municipal Corporation, is responsible for making the construction with the help of the officials of the Corporation, we directed to initiate contempt proceeding against said Sri Nayak and Miss Sumati Behera fixing their personal appearance to 21.6.2011 before this Court. On 21.6.2011 while accepting the show cause reply of Miss Sumita Behera, we dispensed with her personal appearance and directed to issue notice of contempt to Sri Tarakanta Mohapatra, Executive Engineer, Sk.Nashrulla, Assistant Engineer and Sri Satya Sai Baba Subudhi, Jr. Engineer of the Corporation by special messenger fixing their personal appearance before this Court to 27.6.2011 but no notice was issued to Sri Nrupesh Kumar Nayak, Corporator, as he was personally present in Court.

On 27.6.2011, all the contemnors appeared and filed their respective show cause replies. Sri Sk. Nashrulla, Asst. Executive Engineer, Divn.-II, while offering unconditional apology in his affidavit dated 27.6.2011 has stated that on 25.1.2011 he joined the Ward and could know about the order of this Court on 14.5.2011 after he reached the site when the work was almost completed except the finishing layer. According to him, the construction was undertaken and completed within two days, i.e., 14th and 15th May, 2011, i.e., during second Saturday and Sunday and according to him, he intimated regarding such unauthorized construction to the higher authority, i.e., Executive Engineer. He has also given a date chart furnishing the following details :-

> i) September, 2010: Eviction was conducted and the Corporator gave proposal for construction of the said road.
>
> ii) 6.10.2010: The Hon'ble Court in W.P.(C) No.17272 of 2010 passed an order :
>
> "As an interim measure, we restrain opposite party nos.1 to 3 from raising any construction/development on the land of the petitioner in plot no.xx xx xx xx"
>
> iii) 27.10.2010: Land clearance was taken from land branch for road work.
>
> iv) 9.11.2010: Estimate was prepared
>
> v) 25.11.2010: Commissioner approved the estimate after technical sanction of the Executive Engineer.
>
> vi) 9.12.2010: Tender was floated
>
> vii) 21.12.2010: It was placed before the Works Committee.
>
> viii) 29.12.2010: After recommendation of the Works Committee it was put up before Corporation and the Corporation approved.
>
> ix) January, 2011: Noticee No.1 kept in-charge of Ward No.52
>
> x) 28.4.2011: Tender document was put up before the Contract Committee.
>
> xi) 14.5.11 & 15.5.11 : Constructions undertaken and completed.
> xii) 18.5.2011: Intimation by deponents to Executive Engineer and on the same date it was intimated to the Recovery Officer."

Sk. Nashrulla in his reply to show cause notice has also stated that he was not aware if the Contract Committee had approved the construction. No work order or agreement for execution was issued to the noticee of either of the deponents.

7. Sri Tarakanta Mohapatra, Executive Engineer, Bhubaneswar Municipal Corporation, has filed his show cause reply, in paragraph-5 whereof he has stated that the Standing Committee on contract in its resolution dated 27.5.2011 vide item no.11 resolved not to undertake any construction over the disputed plot of the petitioner. The copy of such resolution dated 27.5.2011 is annexed hereto as Annexure-B/2, which shows that as the matter was pending before the Civil Jude (Sr.Divn.), Bhubaneswar, till a decision is taken no construction shall be made. In paragraph-6 of the reply, it is stated that no work order was ever issued in respect of the work at serial no.25 of the tender notice. On 14.5.2011, the Executive Engineer came to know from the Junior Engineer that the work in the disputed plot was going on in presence of the Corporator of Ward No.52, for which he instructed the Junior Engineer that no construction work should be undertaken in the disputed plot in view of the interim order of this Court dated 6.10.2010. So he was under the bona fide impression that the construction had been stopped. On the next date, i.e., 15.5.2011, he had to rush to the proposed Solid Waste Treatment Plant site at Bhuasuni, Chandaka to monitor fire that was broken out at the plant site and was not aware whether the work was stopped.

To this incident, an enquiry was caused by the Bhubaneswar Municipal Corporation. The record of enquiry was produced before us. Before going through the said record, let us see the stand taken by Sri Nrupesh Kumar Nayak, Corporator, Ward-52, Bhubaneswar Municipal Corporation.

8. In paragraph-6 of the show cause affidavit filed on 27.6.2011, Sri Nrupesh Kumar Nayak, Corporator, has taken a stand that in the order of this Court dated 6.10.2010, there is no restraint order against him and the substance of omission and commission alleged by the petitioner is against the Bhubaneswar Municipal Corporation. The Corporation has entered into contest. He is neither a necessary party nor a proper party. It is also stated that though notice in the writ petition was issued to him in his office address, there being a communication gap, it could not be served upon him within the time stipulated and after receipt of the notice, he consulted his counsel, who opined that the substance of allegation was to be taken care of by the Bhubaneswar Municipal Corporation, for which he did not appear and

participate in the day-to-day proceeding of the writ petition. His non-appearance in the writ petition cannot be construed to be violation of Court's order.

In paragraphs-10 & 11 of the show cause affidavit, the Corporator has stated that grant of any relief in favour of the petitioner would amount to put a premium on dishonest activities, for which the petitioner should be saddled with cost and also be proceeded under Penal Law for furnishing false statement.

The Corporator has filed a further affidavit on 15.7.2011 taking a stand that the order of this Court dated 6.10.2010 was never within his knowledge till 15.5.2011. There was no restraint order against him but it was against O.Ps. 1 to 3 of the writ petition. It is further stated that he is neither a decision making authority nor executing authority, but the petitioner is an encroacher of the public road. The decision was taken by the Corporation to take out a road on plot no.506. On measurement when it came to the notice that the petitioner had encroached a portion of the road, the encroached portion was removed with due notice to the petitioner. The Corporator has no involvement in the decision taken by the Bhubaneswar Municipal Corporation nor is he executing the decision of the Corporation. There is no unimpeachable evidence on record to indict the Corporation. The allegation made by the petitioner that the Corporator in connivance with the O.Ps. is forcibly constructing the road on the disputed land and if it is allowed, the petitioner will suffer irreparably, has not been proved beyond reasonable doubt.

9. The aforesaid show cause affidavits reveal two different things. First of all, Sri Nrupesh Kumar Nayak, Corporator, has avoided the service of notice issued in the writ petition. Secondly, on receipt of such notice by him, may be by the advice of his lawyer or anybody or on his own volition, he preferred not to appear and participate in the proceeding initially. He has justified the construction over the property relating to which an order of stay was passed on the ground that it was an interim order. Be that as it may, from the tenor of the affidavits of the Corporator shows that he was conscious of this Court's proceeding and the orders passed therein. He has justified the demolition as well as construction. We are not concerned with the demolition part, as our order was not to make any construction over the land in dispute during pendency of the writ petition..

10. Let us see the records produced before us relating to the enquiry conducted by the Commissioner, Bhubaneswar Municipal Corporation, the findings of which read thus :-

"1. The Engineering division was aware of the Hon'ble High Court stay order on construction of the road from "**Star Club to Dibyaprabha Appartment".** The information of the stay order was received by the Executive Engineer on 6.1.2011 and he in turn communicated the same to the Asst. Engineer & Jr. Engineer.

2. By 6.1.2011, tender for construction of this road was already invited i.e. on 9.12.2010. As per the statement of the Executive Engineer, tenders are invited in anticipation of approval of the Contracts Committee and subsequently if it is not approved, the tender is cancelled.

3. The tender documents were put up to the Contracts Committee on 28.4.2011 which was discussed on 28.5.2011 and keeping in view the stay order of the Hon'ble High Court, the contract was not approved.

4. Construction of the same road was carried out on 14th and 15th of May, 2011 with the knowledge of Executive Engineer Division-II, Assistant Engineer, Junior Engineer and the Ward Corporator.

5. It was a collective decision of Executive Engineer, Asst. Engineer & Jr. Engineer to start the work before issue of the work order.

6. Since the statements are contradictory in nature it can not be established as to who constructed the road and what action was exactly taken to stop the construction.

7. However, it is apparent that lack of supervision and control on part of the Jr.Engineer, Asst. Engineer & Executive Engineer resulted in construction of the road violating the stay order of Hon'ble High Court.

8. Thus by not preventing the construction of the road and by not taking action against violation of the orders of Hon'ble, which could have been done, the Ward Corporator, the Executive Engineer, Division-II, Asst. Engineer, Jr. Engineer became parties to the act of disobedience of the order of the Hon'ble High Court. The Recovery Officer has no role to play in construction work of the Corporation and she was therefore not involved in this operation.

Sd./-City Engineer Sd./- Deputy Commissioner"

In the show cause affidavit filed on 19.5.2011, Miss Sumita Behera, Recovery Officer, Bhubaneswar Municipal Corporation, has stated that no approval for improvement of internal roads in different wards of Bhubaneswar including the internal roads of Nageswar Tangi (inclusive of the disputed land) has been made by the Contracts Committee, for which there is no occasion for issue of work order for construction over the disputed land and no construction has been made over the plot in question by the Corporation but the Executive Engineer has reported that execution of some work was done on 14.5.2011 and 15.5.2011, which were holidays. Thereafter, the Commissioner referred the matter for investigation by the Crime Branch.

In paragraph-2.2 of the show cause affidavit filed on 27.6.2011, Sk. Nasrulla, Assistant Engineer, Division-II, has stated as follows.

> "2.2-Noticee no.2 learnt about the said order in January, 2011 and was never aware who and when the construction was undertaken and on 14.5.2011 after reaching the spot, he found the Corporator on the spot and intimated him about the stay order passed by the Hon'ble Court."

In the show cause reply filed on 27.6.2011, Sri Tarakanta Mohapatra, Executive Engineer, has disclosed that it is the Assistant Engineer and Junior Engineer, who should have stopped the construction work.

We find, the blame-game was started after initiation of this contempt proceeding. The Executive Engineer blames the Assistant Engineer and the Assistant Engineer blames the Corporator. The contents of the statement made by Sri Nrupesh Kumar Nayak, Corporator, in the record of enquiry, which was produced before this Court, by the Corporation, are as follows :-

> "I am the Corporator of Ward No.52, there was no stay order of the Hon'ble High Court over construction of the road from Star Club to Dibya Prabha Apartment (Road Land no.506 khata no.2279) when I proposed for construction of the said road during October-2010. Tender call notice was issued on 9.12.2010 for construction of this road by Bhubaneswar Municipal Corporation. The tender of this road along with four other roads in my ward was finalized and placed before the Contract Committee on 28.5.2011. Pending finalization of the contract the work of all the proposed construction started on 1st

> week of May, 2011 by the instruction of the Engineering Division. The Asst. Engineer, Jr. Engineer and other technical staff supervised the construction of all the roads under construction in my ward. This particular portion of this road was constructed on 14th May, 2011. I am not aware who was the contractor, but since this is a construction in my ward, I was aware of the construction. Jr. Engineer, Mr. Subudhi informed that there was a stay order of the Hon'ble High Court and since, I was present on the spot on 14.5.2011, I immediately checked the matter with the Executive Engineer, Divn.-II, who said that he was not aware of any such court order and he even said that he was hearing about it from me for the first time. He further said that the work could go ahead and the construction was carried out in the presence of the Asst. Engineer & Jr. Engineer as per the instruction of the Executive Engineer, Divn.-II."

Pausing for a moment, we can confidently say that the Corporator, Sri Nrupesh Kumar Nayak, was informed with the restraint order of this Court by the Jr. Engineer, Mr. Subudhi, and he was aware of the order of this Court but he proceeded with the work. This clearly proves his presence in the site of construction but also by his own admission, his participation in the progress of the work despite being informed about the interim order of this Court. If he had scant regard to the Court's order, he could have stopped the work the moment he was informed about the order of this Court.

The statement of Sri Tarakanta Mohapatra, Executive Engineer, Divn.-II is re-produced here.

> "I am aware of the stay order of Hon'ble High Court on construction of road on disputed portion from Star Club to Dibyaprabha Apartment of Ward No.52. I came to know about it on 6.1.2011 after receiving the copy of the Hon'ble High Court order from legal branch. I instructed the Asst. Engineer and Jr. Engineer that no construction work would be taken up on the disputed plot. I have not made any site visit after that. Tender was invited for construction of this road on 9.12.2010. The proposal was recommended by the Works Committee on 20.12.2010 and it was approved by the Corporation on 29.12.2010. However, the tender was called on 9.12.2010 in anticipation of approval of the Standing Committee. As per practice this is done to save delay and in case approval is not received, the tender is to be cancelled. On 28.4.2011, it was sent to the Contract Committee with a noting for approval with reference to the order of Hon'ble High Court. However, the matter

came up for discussion in the Contract Committee on 28.5.2011 and the Committee recommended that the work shall be withheld till finalization of the Hon'ble High Court case.

I got the news when Recovery Officer telephoned me on 16.5.2011 that the work has been taken up on the disputed portion of the road, where there was stay order of Hon'ble High Court. No work order has been issued for this work. I do not how the work was taken up. I also do not know who took up the work. On 14.5.2011 the Jr. Engineer telephoned me and told me that was a stay order on a portion of a road and the work was going on. I told him no work should be taken upon if it is subjudice. I did not ask him which the road was. I cannot say about other roads of Ward No.52 on which there is a stay order. The Corporator called me up and told me that the Jr. Engineer was stopping the work on a road saying that there was stay order and I told him that if it was so the work could not be taken up. I did not ask him which the road was. I had asked the Asst. Engineer & Jr. Engineer not to carry out any work without work order while visiting the work of one such road, I had asked to stop the work however, I did not issue any letter/instruction to stop such work. I had said that if any body working without work order, let him continue and asked the A.E. & J.E. not to go to the site. I have not intimated this to the authority because there is no such procedure to stop such work."

The statement of Sk. Nasrulla is re-produced here.

"I know that there is a stay order for construction of these stretch of road which a part of the road from "Star Club to Dibyaprabha Apartment" I took charge of SDO of Ward No.52 on 25.1.2011. I first visited the ward on 15.4.2011. I was not aware that there was stay order of the Hon'ble High Court till 14.5.2011. Jr. Engineer, Sri Subudhi called me up on 14.5.2011 and told me that there was a stay order but the work was going on. By the time I reached the site on 14.5.2011 the work was almost complete except the finishing layer, I also told the Corporator who was present on the spot that there was a stay of Hon'ble High Court and showed him the copy of the order and said that the work should not be carried out then I left the site. I informed the matter to the Executive Engineer on 15.5.2011 and he did not give any instruction to me on this issue."

The relevant portion of the statement of Sri Satya Sai Baba is also re-produced here.

> "xxx xxx The above said road was taken up for construction on 14/15 May, 2011. I was aware that there was a stay order on this portion of the road which was communicated to me by the Executive Engineer, Divn.-II on 6.1.2011. On 14th May, 2011, I reached the spot and told the Corporator who was present on the spot not to construct that portion as there was stay order of Hon'ble High Court. Then the Corporator spoke to Executive Engineer Divn.-II over phone and told me that the Executive Engineer told him that "I have not asked you to stop the construction" I do not know what Jr. Engineer is saying, " I am not aware of any stay order I also contacted Executive Engineer and informed him that the work was going on despite the stay order, however the Executive Engineer remained silent and did not give any clear instruction. Same day in the evening myself and the Asst. Engineer again went to the site and showed the court order to the Corporator. However, he said that since the Executive Engineer has told him to continue the work, the work went ahead."

The aforesaid clearly shows how this Court's order dated 6.10.2010 has been blatantly, deliberately and willfully violated by two officers of the Corporation and an elected Corporator.

11. Mr.B.Roy, learned counsel for contemnor no.1-Sri Tarakanta Mohapatra, Executive Engineer, relies upon a decision of the apex Court in **Parents Association of Students vrs. M.A. Khan & Another**, AIR 2008 SC (Suppl.) 1138, wherein it is held that a person if not a party to the lis and no direction having been issued against him, a contempt petition against him would not lie. Whether an exceptional case has been made out against him is yet to be determined.

Here is a case where in the writ petition, order of restraint was passed against the Bhubaneswar Municipal Corporation, its Commissioner and Recovery Officer. Contemnor no.1-Sri Tarakanta Mohapatra, Executive Engineer, Sk. Nashrulla, Assistant Engineer and Sri Satya Sai Baba Subudhi, Jr. Engineer are the officers of Bhubaneswar Municipal Corporation and they were executing the construction work being aware of the order of this Court, for which they cannot be said to be third parties. Sri Nrupesh Kumar Nayak, Corporator, is also a party to this proceeding and he cannot be said to be a third party. We may also refer to the decision in **S.Sanyasi Appa Rao vrs. Officer-in-Charge of the Amadalavalasa Co-operative Agricultural and Industrial Society Ltd.,** 1968 M.L.J. (Cri.) 531, wherein it is held thus :-

"……Every person who, with the knowledge of those orders, prevents any person from giving effect to them, or prevents or obstructs the execution of those orders or acts in contravention of those orders, commits contempt. It is not necessary that the prohibitory orders should have been served upon the party against whom they have been granted nor is it necessary to direct third parties to desist from interfering with the execution of prohibitory orders. It is sufficient if they know and act contrary to them."

Sri Nayak also did not show any remorse for his action. Though apology has been tendered by Sri Tarakanta Mohapatra, Executive Engineer, Sk.Nashrulla, Assistant Engineer and Sri Satya Sai Baba Subudhi, Jr. Engineer, the same is evasive and not moved by a genuine feeling of remorse. So the word "apology" has been used by them as a convenient device to escape the punishment. In their show cause affidavits, there are both justification and apology and those are incompatible. When apology is not a free and frank confession of their guilt indicating a penitent attitude on their part, an attempt to justify their conduct under the cover of bona fide, a haulting, hesitating and vacillating apology deserves to be rejected and thrown out **(See-State vrs. Krishna Madho,** *AIR 1952 ALI.86.*

12. There is no doubt that the present is a case of contumacious and a willful disobedience of the orders of the Court. There is neither repentance nor a bona fide attempt to purge the contempt. On the other hand, there is every effort to subvert the process of the Court and to interfere with it substantially. This brazen conduct on the part of the contemnors has brought the Court and its process in ridicule, creating disrespect for its orders. The conduct of the contemnors, therefore, deserves severe punishment. In our considered opinion, there is willful disobedience of this Court's order, which has been proved beyond doubt as the contemnors have the knowledge of the said order and proceeded with the construction work. Moreover, the affidavit of the contemnor-Sri Nrupesh Kumar Nayak, Corporator, shows that he has no remorse for his act of disobedience of this Court's order and the brazen manner, in which he has conducted himself in the entire episode, this Court has sufficient reason to take strict view in the matter and to impose appropriate punishment.

In the case of **Satyabrata Biswas vrs. Kalyan Kumar Kisku**, AIR 1994 SC 1837, the apex Court has held that order of injunction or an order for preservation status quo cannot be circumvented by the parties with impunity, who cannot expect the Court to confer its blessing upon the violators. The party cannot gain an advantage in derogation to the rights of the parties, who were litigating originally.

13. Considering the facts and circumstances of the case, we reject the show cause affidavits filed by the contemnors and find all the contemnors guilty for willful disobedience of this Court's order dated 6.10.2010 passed in W.P.(C) No.17272/2010 and are accordingly convicted under Section 12 of the Contempt of Courts Act except the contemnor-Miss Sumita Behera, Recovery Officer of Bhubaneswar Municipal Corporation, as nothing has been proved against her, for which her affidavit has been accepted and the contempt proceeding against her is dropped.

The contemnors, Sri Tarakanta Mohapatra, Sk. Nashrulla and Sri Satya Sai Baba Subudhi are sentenced to undergo for simple imprisonment for a period of fifteen days each.

So far as it relates to the contemnor-Sri Nrupesh Kumar Nayak, the facts as narrated above would show the manner, in which he conducted himself that too he has tried to mislead this Court by giving an affidavit, which is contrary to the stand taken before the authority while facing the enquiry. Any leniency or sympathy to this contemnor would encourage lawlessness and no society can exist without laws and laws have no meaning if they cannot be enforced. The Courts are established to administer justice. There should be zero tolerance to disobedience of the orders of the Court. This contemnor is a political person and representative of people and his conduct shows that he is of impression that law can be disregarded and disobeyed without any consequence. In this regard, we may quote a portion of the judgment rendered by the Delhi High Court in case of **Court on its Own Motion & Others vrs. J.R.Gangwani,** 2003 CRI.L.J. 2575.

> "An impression especially amongst the well-to-do sections of the society that law can be disobeyed or disregarded with impunity or without any adverse consequence flowing needs to be dispelled."

This Court sincerely wants to dispel the impression of the contemnor that he can do anything and get away with it. The punishment of this contemnor and sentence are in public interest and it will have the curative effect. No leniency in attitude should be expected from this Court.

Accordingly, the contemnor-Sri Nrupesh Kumar Nayak, Corporator, Bhubaneswar Municipal Corporation, is sentenced to undergo simple imprisonment for a period of one month.

All the contemnors are committed to prison.

Application allowed.

2011 (II) ILR- CUT- 598

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

W.P. (C) NO.11398 OF 2008 (Decided on18.05.2011)

N. SURYA RAO ……. Petitioner.

.Vrs.

ORISSA FOREST DEVELOPMENT CORPN. LTD. & ORS. …… Opp.Parties.

ORISSA FOREST CORPORATION SERVICE RULES ,1986 - RULE 123-A

Departmental proceeding initiated against the petitioner in 2005 although he retired on superannuation on 30.11.2003 - No provision in the pre-amended Rules to initiate such a proceeding after retirement – Such rule was introduced by way of amendment of Rule 123 by adding a provision as Rule 123-A which is prospective in nature.

Held, initiation of Departmental Proceeding after retirement in the absence of any rule is bad hence the same is quashed – However since it is found that certain amount is due from the petitioner the corporation is directed to issue a fresh letter to the petitioner indicating the dues to be recovered and after giving a personal hearing the same shall be recovered from the amount due to the petitioner on retirement.

(Para -3 &4)

Case laws Referred to:-

1.2008 (II) OLR 612 : (Sukadev Behera-V- M.D., OFDC Ltd.)
2.2010 (I) OLR 622 : (Dinabandhu Sarangi-V- M/s. Orissa Forest Development Corporation Ltd.)

For Petitioner - M/s. Biraja Prasanna Das & J.S.Mohapatra.

For Opp.Parties - M/s. S.K.Pattanaik, U.C.Mohanty, D.P.Das, P.K.Pattanaik, N.Satapathy & D.Pattanaik.

L.MOHAPATRA, J. The petitioner in this writ application prays for quashing Annexure-5, the Memorandum of charge, the order in Annexure-7 passed by the disciplinary authority for recovery of Rs.98,996/- from the retiral dues of the petitioner as well as the orders in Annexures-9 and 10. In Annexure-10, the petitioner has been requested to deposit an amount of Rs.33,388/- outstanding in favour of O.F.D.C. as due from him.

2. The case of the petitioner is that he started his career as a Mate in January 1966 in the office of opposite party No.3. In the year 1989 he was promoted to the post of Assistant Supervisor and thereafter to the post of Sectional Supervisor. While working as Sectional Supervisor under Divisional Manager, Bhawanipatna (C-KL) Division he retired on superannuation on 30.11.2003. At the time of retirement he was being paid wage of Rs.5,351/-. The petitioner after retirement having not received his gratuity and other retiral benefits, filed the case for release of his gratuity and the Assistant Labour Commissioner, Jeypore on 3.12.2004 disposed of the said case directing the opposite parties to pay the gratuity of Rs.1,17,310/- along with interest at the rate of 10% per annum from 1.12.2003 to the petitioner. The petitioner received the gratuity amount but the other retirement dues like arrear increments, E.L. bill and leave salary to the tune of Rs.67,137/- was withheld. When the petitioner started demanding the said amount from the Corporation, a Departmental Proceeding for minor punishment was initiated against him and the charge memo was served on the petitioner in October, 2005. In the said proceeding, the petitioner was called upon to file his reply. The proceeding was concluded on 29.8.2006 and the disciplinary authority imposed punishment of recovery of a sum of Rs.98,996/- from the petitioner. After adjustment of the dues of the petitioner to the extent of Rs.67,000/-, the balance amount was demanded to be paid in Annexure-10. Challenging the said order of punishment, this writ application has been filed.

3. The learned counsel for the petitioner submitted that no Departmental Proceeding could have been initiated against the petitioner after his retirement. Though the petitioner retired on superannuation on 30.11.2003, the Departmental Proceeding was initiated against him in 2005. Reliance is placed by the learned counsel on two decisions of this Court in support of such contention. One such decision is the case of ***Sukadev Behera v. M.D., OFDC Ltd., reported in 2008 (II) OLR 612***. In the said reported case, the petitioner therein retired from service on 31.3.1999 and the Disciplinary Proceeding was initiated in July, 2003. There was no provision in the pre-amended Rules to initiate such a proceeding after retirement. Such Rule was introduced by way of amendment of Rule 123 by adding a provision 123-A. The Court held that the amendment of the Rule vide 123-A can only be prospective and cannot be applied retrospectively. With the above finding, the Court quashed the Departmental Proceeding. Similar view was also taken by this Court in the case of ***Dinabandhu Sarangi v. M/s. Orissa Forest Development Corporation Limited., reported in 2010 (I) OLR 622***.

Shri S.K. Pattanaik, the learned counsel appearing for the O.F.D.C. faced to the above decisions fairly submitted that the petitioner having retired prior to amendment, in absence of any provision in the pre-amended Rule for initiation of a Departmental Proceeding after retirement, the two decisions cited by the learned counsel for the petitioner shall apply to the facts of this case. However, he submitted that even if the order of punishment is set aside, from the record it is found that certain amount is due from the petitioner and accordingly the petitioner should be directed to pay that amount to the Corporation.

4. In view of the above two decisions and the fact that the Departmental Proceeding was initiated against the petitioner almost two years after his retirement in absence of any Rule, the initiation of the Departmental Proceeding in Annexure-5 and the order of punishment in Annexure-7 are quashed. The Corporation is directed to issue a fresh letter to the petitioner indicating the dues to be recovered from him. After receipt of such letter, the petitioner shall be given a personal hearing and if it is found that the Corporation is to get some amount from the petitioner, the same shall be recovered from the amount due to the petitioner on retirement.

5. With the above observation, the writ application is disposed of.

Writ petition disposed of.

2011 (II) ILR- CUT- 601

L.MOHAPATRA, J & B.K. MISHRA

MISC CASE NO .224 OF 2010

(ARISING OUT OF RVWPET NO. 304 OF 2010)

(Decided on 29.06.11)

STATE OF ORISSA ……..Petitioer

.Vrs.

DAITARY ROUT AND ORS. ……..Oppt. Party

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

Delay in filing Review petition – Ground is that the review petitioner i.e. the General Administration department was not a party to the writ petition – State of Orissa along with collector of the district were parties – Compliance of the provisions U/s 79 CPC- No reasonable explanation for the delay caused – Held, no justification to condone the delay of about seventeen years.

(para-7)

For Petitioner -- Addl. Government Advocate

For Opp. Parties -- M/s. Ramakanta Mohanty,S.N.Biswal, N.Das , S.Mohanty & S.Mohnaty
M/s. Deepankar Varadwaj & Animesh Mohanty

L. MOHAPATRA, J. The review petition out of which this Misc.Case arises has been filed by the State of Orissa challenging the legality of the order passed by this Court dated 22.11.1993 in O.J.C.No.3768 of 1993. The impugned order was passed on 22.11.1993 and the review petition has been filed on 24.12.2010. Accordingly, there is delay of almost seventeen years in presenting the review petition.

Misc.Case has been filed for condoning the inordinate delay in filing the review petition.

2. In paragraph-3 of the Misc.Case, it is stated that the review petitioner i.e. the State of Orissa represented through its Special Secretary to Government of Orissa, G.A. Department was not a party in the writ petition and the impugned order was passed behind the back of the review petitioner. The review petitioner could know about the said order on

13.10.2009 when the Power of Attorney Holder of opposite parties 2 to 8 submitted an application for issuance of No-Objection Certificate in respect of the land in question. It is further stated that while examining the records in connection with issuance of No Objection Certificate, the Tahasildar, Bhubaneswar was reminded to furnish the report along with relevant records/documents in August, 2010. In September,2010 the Tahasildar, Bhubaneswar submitted the report and file was processed and examined. Thereafter, the file was endorsed to Law Department on 12.9.2010 for its opinion as to whether the review petition is to be filed or not. The file returned from the Law Department on 3.11.2010 with an opinion to file a review petition against the impugned order. On 25.11.2010, file was re-endorsed to the Law Department for obtaining concurrence on the proposal for filing the review petition and it was received from the Law Department on 2.12.2010. Thereafter, the review petition was filed on 24.12.2010.

3. Learned Advocate General appearing on behalf of the petitioner submitted that the land belongs to G.A. Department but the said Department was not made a party in the writ petition. In absence of the General Administration Department as a party to the writ petition, an order was passed on 22.11.1993 disposing of the said writ petition. Long thereafter the opposite parties filed another writ application before this Court vide W.P.(C) No.7380 of 2010 alleging non-disposal of a petition filed by them before the Special Secretary, G.A. Department, Government of Orissa for grant of No Objection Certificate and this Court disposed of the said writ application on 22.4.2010 with an innocuous order directing the petitioner to pass orders on the petition with regard to grant of No Objection Certificate within a specified time. In compliance of the said order, when the opposite parties drew attention of the petitioner to the petition dated 12.10.2009 filed by their Power of Attorney Holder the impugned order dated 22.11.1993 came to the notice of the review petitioner. Thereafter, the file was immediately processed and decision was taken to file review petition. According to the learned Advocate General, in view of the above, delay of almost 17 years in filing the review stands explained.

4. Shri R.K.Mohanty, learned Senior Counsel appearing for the opposite parties submitted that the Courts are always liberal while considering an application for condonation of delay specially when filed on behalf of the State authorities but in the present case, delay is almost 17 years and no reasonable explanation has been given in the petition filed for condonation of delay. The only ground taken in the petition is that the review petitioner was not a party to the writ application. The State of Orissa represented through the Secretary, Department of Revenue and Excise, Member, Board of

Revenue, Orissa, Collector, Puri and Tahasildar, Bhubaneswar were parties to the writ application. Once the State of Orissa is represented through a Department, it is no more open for the review petitioner to take a ground that General Administration Department was a necessary party. The Collector being the custodian of the property in dispute and the order having been passed in presence of the Collector represented through the learned Advocate General, the ground taken in the review petition for condonation of delay is unacceptable.

Learned Advocate General and Shri R.K.Mohanty, learned Senior Counsel appearing for the parties in course of their submission cited some decisions in support of their respective submission.

5. As is evident from the record, the order sought to be reviewed by the review-petitioner is the order dated 22.11.1993 passed by this Court in O.J.C.No.3768 of 1993. The State of Orissa represented by the Secretary, Department of Revenue and Excise, Member, Board of Revenue, Orissa, Cuttack, Collector, Puri and Tahasildar, Bhubaneswar were the opposite parties in the said writ application. The learned Additional Government Advocate represented for the aforesaid State authorities at the time of hearing of the writ application. It is clear from the impugned order that it was passed after hearing the learned counsel for the petitioner therein as well as the learned Government Advocate on the relevant issues involved in the case. At no point of time any objection had ever been raised by the learned Government Advocate to the effect that the General Administration Department is a necessary party to the proceeding. We looked into the original record and found that the opposite parties had not filed any counter in the case and contested the proceeding without filing a counter affidavit. No objection with regard to non-inclusion of the review petitioner as a party to the proceeding having been taken at the time of hearing of the writ application, it is no more open for the review petitioner to say that it was a necessary party to the proceeding. Not only the Collector, Puri who is the custodian of the property in dispute but also the Tahasildar, Bhubaneswar were parties to the proceeding. The State of Orissa was also a party represented through the Secretary, Department of Revenue and Excise. Under the above circumstances, we are inclined to accept the contention of the learned counsel appearing for the opposite parties that the State of Orissa had been heard on the relevant issues at the time of hearing of the writ application. Learned Advocate General relied on a decision of the Apex Court in the case of **State of Karnataka Vrs. Y. Moideen Kunhi and others** reported in (2009) 13 SCC 192. From the said reported judgment, it appears that agricultural lands to the extent of 4000 acres had been purchased

through registered partnership firm M/s. Y. Moideen Kunhi company. The declaration under Section 66(4) of the Karanataka Land Reforms Act, 1961 was filed by the three partners of the firm who were respondents before the Apex Court for determination of the excess holding. In the very declaration, it was stated that the lands being the plantation lands are exempted under Section 104 of the said Act. The Land Tribunal by order dated 27.9.1982 held that the declarants were holding the lands to an extent of 368.16 acres in excess of the ceiling limit. The said order was challenged before the High Court by the declarants in a writ application and the State of Karnataka also challenged the order of the Land Tribunal in another writ application. The declarants withdrew the writ application filed by them and the writ application filed by the State of Karanataka was heard by the High Court and it was dismissed on 7.11.1990 on merits holding that there were no error in the order passed by the Land Tribunal. Challenging the order of the High Court, the State of Karanataka approached the Hon'ble Supreme Court by way of a Special Leave Petition. There were delay of 605 days in filing the Special Leave Petition against the original order passed by the High Court in the writ application and about 300 days delay against the order passed by the High Court in the review petition.

The Hon'ble Supreme Court in para-22 of the judgment observed that expression "Sufficient Cause" as appears in Section 5 of the Limitation Act,1963 must receive a liberal construction so as to advance substantial justice. At the same time in paragraph-20 of the said judgment, it was observed that even though the courts are liberal in dealing with the belated presentation of appeals/applications, yet there is a limit up to which such liberal attitude can be extended. Many matters concerning the State Government and the Central Government are delayed either by the nature of bureaucratic process or by deliberate manipulation of the same by taking advantage of loopholes in the conduct of litigation. Several instances have come to the notice of the Court wherein appeals have been filed where the revenue involved runs to several crores of rupees. Occasionally delay occurs which is inexplicable in normal circumstances. Considering the explanation given and the application filed by the State of Karnataka for condoning the delay, delay of 605 days was condoned by the Hon'ble Supreme Court on payment of exemplary cost of Rs.10 lakhs.

There are distinguishable features in the present case. The extent of land involved in the reported case is more than 4000 acres whereas in the present case the extent of land is less than one acre. In the reported case, there is delay of 605 days and in the present case, delay is almost 6200 days. In the reported case reasonable explanation had been given for not being in a position to file the Special Leave Petition within the time whereas

in the present case the only explanation given is that the G.A. Department was not a party in the writ application. We are therefore of the view that the above decision cited by the Advocate General is clearly distinguishable on facts. Learned Advocate General also relied on another decision of the Apex Court in the case of ***State of Nagaland Vrs Lipok AO and others*** reported in AIR 2005 S.C.2191. While interpreting Section 5 of the Limitation Act, 1963, the Apex Court held that the Government and private parties cannot be put on same footing in the matter of showing sufficient cause for condonation of delay. Peculiar characteristic of functioning of Governmental conditions requires adoption of pragmatic approach and certain amount of latitude is permissible. In the said reported case, delay of 57 days in filing the appeal against an order of acquittal was condoned and leave to appeal was granted. Even if we take a liberal view in the matter of condonation of delay considering the fact that the review petitioner is the State as observed by the Hon'ble Supreme Court in the case of ***State of Karnataka Vrs. Y. Moideen Kunhi and others,*** there is a limit up to which such liberal attitude can be extended.

6. Section 79 of the Code of the Civil Procedure deals with suits by or against the Government. A plain reading, Section 79 shows that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, in the case of the Central Government, the Union of India and in the case of the State Government, the State, which is suing or is being sued. This observation has been made by the Hon'ble Supreme Court in the case of ***Chief Conservator of Forests, Government of Andra Pradesh Vrs. Collector and others*** reported in AIR 2003 Supreme Court 1805. Though Shri R.K.Mohanty, learned Senior Counsel appearing for the opposite parties also referred to para-13 of the judgment, we find that the observation made by the Hon'ble Supreme Court in the said paragraph may not be relevant for the purpose of this case.

7. In view of the discussions made above, we find no justification to condone the inordinate delay of about seventeen years in filing the review petition and, accordingly dismiss the petition. Consequently, the review petition also stands dismissed.

Review petition dismissed.

2011 (II) ILR- CUT- 606

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

W.P.(C) NO.11684 OF 2009 (Decided on 28.07.2011).

DILLIP KUMAR SAMANTRAY & ORS. ……Petitioners

.Vrs.

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

Service Law – Regularization in public employment – Difference between illegal appointment and irregular appointment – Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualification such appointments are considered to be illegal – But where the person employed possessed the prescribed qualification and was working against sanctioned post but had been selected without undergoing the process of open competative selection such appointment is considered to be irregular.

In the present case even if the appointment of all the petitioners is accepted to be irregular since they have not completed ten years of service without intervention of the Court their case cannot be considered for regularization. (Para 9,10)

Case law Referred to:-

(2006) 4 SCC 1 : (Secretary, State of Karnataka & Ors.-V-Umadevi & Ors.)

For Petitioners - M/s. Budhadev Routray, D.K.Mohapatra, D.Routray, S.Jena, D.Mohapatra, P.K.Sahoo & S.Das.
For Opp.Parties - Addl. Standing Counsel

L.MOHAPATRA, J. The petitioners in this Writ Petition pray for quashing the order dated 03.8.2009 under Annexure-11 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A No.754 of 2009 as well as the order dated 28.7.2009 under Annexure-9 passed by the Engineer-in-Chief, Department of Water Resources, Orissa, Bhubaneswar and the order dated 02.7.2009 under Annexure-10 passed by the State Government. The further prayer in the Writ Petition is for a direction to the opposite parties to regularize the services of the petitioners against the post of Junior Assistants in terms of the recommendation made by the Engineer-in-Chief

under Annexures-4 and 7 and in terms of the direction given by the Tribunal in O.A Nos.604 of 2006 and 1083 (C) of 2007.

2. The case of the petitioners is that on 16.3.1991 the Government of Orissa in General Administration Department passed a resolution relating to new Job Policy of the Government in respect of the recruitment of Class-III, Non-Gazetted Posts and Special Gazetted Posts. It was further decided in the said resolution that pending establishment of Sub-ordinate Staff Selection Commission by the Government the respective Departments/Heads of the Departments will recruit candidates against all Non-Gazetted and Specially Declared Gazetted Posts, which forms State Cadre. As there was no recruitment agency, opposite party no.2 took a decision to fill up nine vacant sanctioned posts of Junior Assistants on ad hoc basis. The present petitioners were appointed as Junior Assistants against seven number of vacant posts in the office of the Engineer-in-Chief, Departments of Water Resources, Government of Orissa on ad hoc basis for a period of 44 days. The tenure of appointment of all the petitioners was extended from time to time and by office order dated 31.12.1992 the petitioners were regularized against the said posts. After regularization, Kalyani Mohanty and others filed Original Application No.2621 of 1992 before the Orissa Administrative Tribunal. The said Original Application along with another batch of cases were disposed of by the Tribunal with an observation that the regularization of services of the present petitioners was irregular but the petitioners were permitted to continue on ad hoc basis. Sub-ordinate Staff Selection Commission was constituted in the month of November, 1993 but no steps for recruitment against the seven vacant posts occupied by the petitioners on ad hoc basis was undertaken. Therefore, the petitioners submitted representation to opposite party no.2 to regularize their services on the ground that they had been appointed at a time when there was no examining agency and in the meantime they have gained the experience and had also the requisite qualification to hold the posts. On 06.2.2006 the Engineer-in-Chief –opposite party no.2 recommended the case of the petitioners to the Commissioner-cum-Secretary to Government, Water Resources Department for regularization and it was clearly mentioned in the said recommendation that the petitioners should continue as Junior Assistants against regular sanctioned posts and disposal of official business by the petitioners have been found to be satisfactory. Despite such recommendation made by opposite party no.2 no action was taken, as a result of which the petitioners moved the Orissa Administrative Tribunal in O.A No.604 of 2006 for regularization of their services. The Tribunal disposed of the Original Application directing opposite party no.1 i.e. the

Secretary, Water Resources Department to consider the case of the petitioners treating the Original Application as representation. There were several correspondences between the office of opposite party no.2 and the office of opposite party no.1 but no final decision could be taken. In June, 2006, opposite party no.2 again recommended the case of the petitioners for consideration by the Government for the purpose of regularization but no action was taken. The petitioners, therefore, again approached the Orissa Administrative Tribunal in O.A No.1085 (C) of 2007 praying for a direction to the State Government to accept the recommendation made by opposite party no.2 and regularize their services. The said Original Application was disposed of by the Tribunal on 22.4.2007 directing opposite party no.1 to consider the proposal submitted by opposite party no.2 and take a decision thereon within a specified time.

3. While matter stood thus the petitioners received a communication that they have been permitted to compete in the forthcoming selection for appointment of Junior Assistants conducted by the Orissa Sub-ordinate Staff Selection Commission. The petitioners after receipt of such communication approached the Tribunal in O.A No.754 of 2009 challenging the said communication on the ground that as they have already rendered 18 years of service as Junior Assistants, they cannot be forced to compete with freshers and when the matter is pending consideration for regularization they should not be asked to take any test for appointment. The Tribunal dismissed the Original Application on 03.8.2009 without issuing notice to the opposite parties. The said order of the Tribunal annexed to the Writ Petition as Annexure-11 is assailed in this Writ Petition.

4. Sri Budhadev Routray, learned counsel appearing for the petitioners submitted that had opposite party no.1 taken a decision regarding reguliazitation of the services of the petitioners in the post of Junior Assistants on the basis of recommendation made by opposite party no.2 in time, the petitioners could not have been asked to compete with freshers for the purpose of appointment to the post of Junior Assistants. It was further contended by learned counsel for the petitioners that having been appointed on ad hoc basis in the year 1992, the petitioners have completed more than eighteen years of service continuously on ad hoc basis and therefore, it is no more open for the State authorities to fill up the posts by open recruitment test and permitting the petitioners to compete with freshers.

5. Learned counsel for the State referring to the counter affidavit and also the order passed by the Tribunal on 19.6.1996 in a batch of Original Applications submitted that by virtue of the order of the Tribunal, the

petitioners are continuing in service on ad hoc basis and therefore they cannot claim regularization in service having continued for more than fourteen years by order of the Court. According to learned counsel for the State, the vacancies are to be filled up in accordance with the Rules prescribed for the same and no departure can be made. Therefore, the State authorities considering the services rendered by the petitioners permitted them to appear in the test by condoning their overage.

6. Undisputedly petitioner nos.1 and 4 had filed O.A No.1628 of 1995, petitioner no.6 had filed O.A No.629 (C) of 1992, petitioner No.5 had filed O.A No.628 (C) of 1992 and petitioner nos.2, 3 and 7 had filed O.A No.262 of 1992 before the Tribunal claiming for regularization in service. All the Original Applications were disposed of in a common judgment dated 19th June, 1996. The operating portion of the said judgment is quoted in the impugned order but for convenience it is again quoted below:-

> "In view of the fact that they have gathered experience by continuing in the Department for so many years, they may be given chances to apply for the posts and compete with others and if necessary, their upper age limit may be relaxed. We further direct that the concerned Department should take immediate steps for filling up the vacancies on regular basis and in case it is felt necessary to fill up any of the vacancies pending regular selection, the applicants who have already gained some experience by working in the Department should be taken on adhoc basis in accordance with their length of service. The aforesaid direction will also be applicable in respect of Srinibas Behera, Dilip Kumar Samantray and Lelin Kumar Lenka who had been regularized and subsequently terminated and are continuing on the strength of interim orders. They may be allowed to continue on adhoc basis until regular selection is made and they should be given chance to apply for the posts and compete with others and if necessary, their upper age limit be relaxed."

7. As is evident from the above operating part of the judgment the Tribunal directed the concerned Department to take immediate steps for filling up the vacancies on regular basis and in case it is felt necessary to fill up the vacancies pending regular selection by appointing the petitioners on ad hoc basis considering the experience they had gained earlier while working on ad hoc basis. It was further directed that the petitioners shall be allowed to continue on ad hoc basis until regular selection is made and they should be given a chance to apply for the posts and compete with others and if necessary their upper age limit shall be relaxed. This judgment of the

Tribunal attained finality having not been challenged by anyone of the parties. It is, therefore, clear that since the date of judgment i.e. 19.6.1996 the petitioners are continuing on ad hoc basis by virtue of the order of the Tribunal. In the said order the Tribunal clearly directed that till regular selection is made, the petitioners shall continue on ad hoc basis and as and when steps are taken for selection, the petitioners shall be permitted to apply for the post and compete with others, however, age relaxation shall be extended to them. Considering these facts it is now clear that the petitioners have worked from 1992 to 1996 on ad hoc basis without intervention of the Court and since 1996 they have been continuing on ad hoc basis because of the order passed by the Tribunal in the aforesaid four Original Applications.

8. In the case of **Secretary, State of Karnataka and others Vs. Umadevi and others** reported in **(2006) 4 SCC 1** an exception was made to the extent that those who have been appointed irregularly and not illegally against a vacant post and have completed at least 10 years of service without intervention of the Court may be considered for regularization.

9. As admitted in the Writ Petition at the time of initial entry into service in the year 1992, the petitioners did not face any kind of test for being recruited against the vacant posts of Junior Assistants on ad hoc basis. Even if the Court accepts the contention of Sri Budhadev Routray, learned counsel appearing for the petitioners that such appointment was irregular, the petitioners have not completed ten years of service without intervention of Court. As stated earlier the petitioners were recruited in the year 1992 and their continuance is because of the order passed by the Tribunal in the aforesaid Original Applications dated 19.6.1996. Therefore, the petitioners continued on ad hoc basis without intervention of the Court only for a period of four years. Accordingly the petitioners cannot take advantage of the said exception made in the aforesaid judgment and claim for regularization. Reliance was placed by Sri Budhadev Routray, learned counsel appearing for the petitioners on another decision of the Hon'ble Apex Court in the case of **State of Karnataka and others Vs. M.L.Kesari and others** in Civil Appeal No.6208 of 2010 arising out of SLP (C) No.15774 of 2006. In the said judgment the Hon'ble Apex Court directed that if the respondents therein do not fulfill the requirements of paragraph-53 of the judgment in the case of **Secretary, State of Karnataka and others Vs. Umadevi and others,** their services need not be regularized. If the employees who have completed ten years of service do not possess the educational qualification prescribed for the post at the time of their appointment, they may be considered for regularization in suitable lower posts. This decision was cited

by Sri Budhadev Routray, learned counsel appearing for the petitioners to explain what is an irregular appointment. In paragraph-5 of the judgment in the case of **State of Karnataka and others Vs. M.L.Kesari and others,** it was held by the Hon'ble Apex Court held that where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointment is considered to be irregular. As stated earlier even if we accept the contention of learned counsel for the petitioners that the appointment of all the petitioners in the year 1992 on ad hoc basis was irregular still then they do not come within the exception made in the case of **Secretary, State of Karnataka and others Vs. Umadevi and others** having not completed ten years of service without intervention of the Court.

10. We have not referred to other decisions cited by learned counsel for the parties as these two decisions are enough to answer the issues raised in the case. Sri Budhadev Routray, learned senior counsel appearing for the petitioners referring to certain annexures filed to the rejoinder and additional affidavit submitted that in some other Departments employees had been regularized in service on completion of less than ten years of service. If we go by the judgment **Secretary, State of Karnataka and others Vs. Umadevi and others** no such regularization could be made by any Department ignoring the law laid down by the Hon'ble Apex Court, therefore, merely because one Department has committed a mistake the Water Resources Department cannot be directed to commit the same mistake specially on the face of the judgment of the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others Vs. Umadevi and others.**

For the reasons stated above, we find no merit in the Writ Petition and accordingly dismiss the same.

Writ petition dismissed.

2011 (II) ILR- CUT- 612

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

JCRA. NO.69 OF 2001 (Decided on 04.05.2011)

SUKUN KISSAN …… Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

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

Confessions shall not be relevant if it is caused by inducement, threat, promise etc. – However mere absence of inducement, threat, promise etc. is not enough to make the confessions admissible – Any extra-judicial confession to be admissible and relevant requires that the person making confession would gain any advantage or avoid any evil of a temporal nature – In simple words, prosecution must establish the reason as to why the accused reposed confidence on the person before whom such confession was made.

In the present case there is certain contradictions between P.Ws. 2 & 3 – Evidence of P.W.10 shows that P.W.2 had not stated before him U/s. 161 Cr.P.C. whether the accused Sukun Kissan made extra-judicial confession before him and P.W.2 nor the exact time was stated before him – On the contrary P.W.3 has stated before the I.O. that the accused made such extra-judicial confession in the evening – Held, extra judicial confession allegedly made by the appellant found to be un trust worthy.

(Para 9 to 12)

Case law Referred to:-

(2009) 44 OCR-p-3 : (Jura Purty-V-State of Orissa).

For Appellant - Miss Mamata Sahoo
For Respondent - Addl. Govt. Advocate

S.K. MISHRA,J. The appellant assails her conviction under Section 302 of the Indian Penal Code, 1860, hereinafter referred to as the 'IPC' for brevity, in S.T. Case No. 94/11 of 2000 of the court of Additional Sessions Judge, Jharsuguda.

2. The case of the prosecution, bereft of all unnecessary details, is that the deceased Dutia Kissan was working in the house of Goura Kishore Patel at the time of occurrence. It is alleged that on 21.10.1999 around 12

p.m. the wife of P.W.5 sent the deceased to Jharsuguda for procuring 'Mudhi' and other sundry articles. Since thereafter the deceased did not return to the house of the informant, Niranjan Kissan and others started enquiring regarding whereabouts of the deceased. In course of such search, they found the dead body of the deceased lying in Dalki forest near village Kumudapalli with cut injuries on his head. The bi-cycle and other articles were lying nearby. Thereafter, P.W.1 submitted an FIR in the Jharsuguda Police Station in writing. The investigation of the case was taken up and upon completion of investigation, the Investigating Officer laid charge-sheet against the present appellant for the offence under Section 302 of the IPC.

The plea of the accused is that of complete denial of the entire occurrence.

3. The prosecution, in order to prove its case, examined 10 witnesses. P.W.1 is the informant of the case. P.Ws. 2 and 3 are the two witnesses before whom the accused had allegedly made extra-judicial confession regarding murder of Dutia Kissan. P.W.4 is another witness, who deposed to have seen the deceased leaving the house of the accused on a cycle being followed by the accused with a 'Budia'. P.W.5 is the person, in whose house, Dutia Kissan was working. P.W.6 is a seizure witness and P.W.7 is a witness regarding the conduct of the deceased on that day. Rest of witnesses are official witnesses. P.W.8 is the doctor, who conducted post-mortem examination on the dead body of the deceased Dutia Kissan and P.Ws. 9 and 10 are the two Investigating Officers.

The defence, on the other hand, has not examined any witness on its behalf to substantiate its plea.

4. Admittedly, the prosecution has not led any direct evidence regarding the complicity of the appellant in commission of the crime. It bases its case on the following components of evidence:

i. extra-judicial confession allegedly made before P.Ws. 2 and 3.

ii. the incident where P.W.4 saw the deceased being followed by the accused with a 'Budia' towards the forest and

iii. the evident of the doctor, who on post-mortem examination came to the conclusion that the deceased died, as a result of several incised injuries on his head and his death was homicidal in nature.

5. The learned counsel for the appellant did not challenge the findings of the trial court regarding the homicidal death of the deceased but argued that the evidence on record is not sufficient to come to the conclusion that the appellant has committed murder of the deceased. She further submitted that the evidence of extra-judicial confession is a weak piece of evidence and it cannot be relied upon without independent corroboration and in her opinion the last seen theory as relied upon by the trial court is not sufficiently corroborating the statement of the witnesses regarding the extra-judicial confession. The learned Addl. Government Advocate, on the other hand, supported the findings recorded by the trial court and prayed to dismiss the appeal.

6. Since it is not disputed that the death of the deceased was homicidal in nature, it is not necessary to examine the evidence on that score. It is accepted that the deceased died due to the injuries found on his person, which can be caused by sharp cutting weapon as deposed by the P.W.8 and the death was homicidal in nature. The only question remains to be decided in this case is whether there are sufficient evidence on record to come to the conclusion that the appellant did the deceased to death by inflicting the blows by means of a 'Budia' on his person.

7. In this regard, the prosecution relies heavily on the evidence of P.Ws. 2 and 3. P.W.2, Ashok Sahariya has stated on oath that on 22.10.1999, at about 4 p.m., the accused came to him and confessed to have killed Dutia Kissan by giving four to five blows with a 'Budia' and abandoned the dead body of the deceased in the jungle and further disclosed to have thrown the 'Budia' at the spot. It is further stated by this witness on oath that the accused Sukun Kissan also disclosed before him that the deceased Dutia Kissan was in her house in the morning of 21.10.1999 and at that time Bhaskar Patel @ Thunta of Ainlamal also arrived at her house and on seeing that Thuntha, Dutia Kissan told her 'Ja to Ghaita Ashigala' for which she got annoyed. It is further stated by this witness that the appellant confessed before him that Dutia Kissan used to come and stay with her and had physical relationship with her prior to occurrence and she had also confessed that on 21.10.1999 around 2.30 p.m. Dutia Kissan came to her house again and she asked Dutia Kissan to procure liquor and after Dutia Kissan came with liquor he and the appellant consumed liquor and proceeded to Dalki Jungle to bring fire wood. It is further stated by this witness that the appellant further confessed before him that she directed the deceased Dutia Kissan to have physical relationship at that place but Dutia Kissan was unable to cohabit with her. Hence, the appellant got enraged and brought out the 'Budia' with which she assaulted

on the head of the deceased causing his death and thereafter took away Rs.350/- from the person of the deceased. This witness admits he belongs to 'Ganda' caste whereas the accused belongs to 'Kisan' caste. He further stated that he has the acquaintance with the appellant and that the appellant is a lady of easy virtue having very bad reputation. In cross-examination he has also admitted that when the appellant made extra-judicial confession before him, P.W.3 Fakira Bhainsa was present.

8. P.W.3, Fakira Bhainsa has stated on oath that on 22.10.1999, at about 4 p.m., after finishing Durga Puja he and Ashok Sahariya were returning from Puja Mandap and were discussing about the missing of Dutia. He further stated that while they were crossing the house of the accused, the appellant called them and confessed before them that she has killed Dutia Kissan with a 'Budia' in Dalki Jungle and directed them to go to Dalki Jungle and see the dead body of the deceased lying there. Then, he has gone to describe the confessional statement made by the appellant in presence of P.W.2 and himself.

9. Reading the entire evidence of P.Ws. 2 and 3, it is clear that as far as the place of confession is concerned, there is a contradiction between these two witnesses. P.W.2 stated that while he himself and Fakira Bhainsa were talking, the appellant came and confessed before them but P.W.3 has stated while they were crossing the house of the accused, the accused came and confessed before them. Further more, the prosecution has not led evidence to show that the appellant has any special reason of making confessional statement before these two witnesses. Section 24 of the Indian Evidence Act, 1872 reads as follows:-

> " C**onfession caused by inducement, threat or promise, when irrelevant in criminal proceeding**.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused persons grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

A plain reading of the provision makes it abundantly clear that confessions shall not be relevant if it is caused by inducement, threat, promise etc. But mere absence of inducement, threat, promise etc. is not enough to make the

confessions admissible. Any extra-judicial confession to be admissible and relevant requires that the person making confession would gain any advantage or avoid any evil of a temporal nature. In simple words, prosecution must establish the reasons for the accused to repose confidence in him. In this case no evidence is forthcoming on that aspect of the extra-judicial confession.

10. The learned counsel for the appellant relying on the reported case of ***Jura Purty vs. State of Orissa,*** (2009) 44 OCR-page-3 submits that extra-judicial confession is essentially a weak piece of evidence. Conviction can be based on such evidence if it is found to be trustworthy, but as a matter of prudence, the courts always look for corroboration from independent source. In the said case, it is also decided that the prosecution must also establish the reason why the accused reposed confidence on the person before whom such confession was made. The observation made in the said decisions is relevant to the case in hand as pointed earlier there is certain contradictions between P.Ws. 2 and 3. Moreover evidence of P.W.10 shows that P.W.2 had not stated before him under Section 161 Cr.P.C. whether the accused Sukun Kissan made extra-judicial confession before him and P.W.2 nor the exact time was stated before him. On the contrary, P.W.3 has stated before the I.O. that the accused made such extra-judicial confession in the evening. Thus, these being the salient features of the extra-judicial confession available in this case, we are of the opinion that it is not wholly trustworthy and it cannot be acted upon without independent corroboration.

11. The next component of evidence which comes forth in this case is the last seen theory as stated by P.W.4. P.W.4 has stated that a year, prior to his deposition, in the court on the date of Durga Puja he found Dutia Ping leaving the house of the accused on his bi-cycle being followed by the accused, who was armed with a 'Budia'. Last seen theory can be placed into service only when the accused and the deceased were seen together and immediately thereafter the deceased was found to be dead. In other words, a time gap between the last seen together as well as death of the deceased should be so short that there should be no chance of any other person intervening in the meantime and committing murder of the deceased. In this case, the death of the deceased was disclosure only on 22.10.1999, i.e. about 24 hours after P.W.4 saw the deceased and the accused together. Therefore, the last seen theory cannot be pressed into service in this case.

12. Accordingly having found that the extra-judicial confession allegedly made by the appellant to be untrustworthy and the only other component of evidence, i.e. last seen theory not being applicable to this case, we are of

the opinion that the prosecution failed to prove its case by leading clear and convincing evidence. Hence, we are unable to concur the findings recorded by the learned trial judge and accordingly set aside the same.

In the result, the appeal is allowed. The Judgment of conviction and the order of sentence are hereby set aside. The accused, who is in jail custody be set at liberty forthwith if her detention is not required in any other case.

Appeal allowed.

2011 (II) ILR- CUT- 618

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

W.P.(C) NO.13912 OF 2010 (With Batch) (Decided on 15.03.2011)

DR. NIHAR RANJAN SAMAL & ORS. .....Petitioners.

.Vrs.

COMMISSIONER-CUM-SECRETARY & ORS. .....Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.309.

Transfer – Order should be passed in public interest or on administrative exigency – It should not be passed arbitrarily or for extraneous consideration or to victimize the employee – Courts have power to annul the order of transfer if it is in contravention of the statutory rules or mala fides – However transfer on the ground of personal inconvenience of the employee is to be considered by the employer himself.

In the present case petitioners are office bearers of the Employees Association – Their stand is that the Government in G.A. Department issued guide lines prohibiting transfer of office bearers of recognized service Association of the employees – Held, guide lines issued by the Govt. have no statutory force – Petitioners although alleged mala fides they have not specified the names of persons who have acted in a mala fide manner and ordered for their transfer and such persons have not been made parties in the present proceeding – Orders passed by the Tribunals rejecting the prayer of the petitioners to quash their transfer orders do not suffer from any illegality requiring interference of this Court. (Para 10,11,12)

Case laws Referred to:-

1.AIR 1986 SC 1955 : (B.Varadha Rao -V- State of Karnataka & Ors.)
2.(2009) 2 SCC 592 : (Somesh Tiwari-V- Union of India & Ors.)
3.AIR 1993 SC 2444 : (Union of India-V- S.L.Abbas).
4.AIR 1962 SC 1044 : (Calcutta Gas Company(Propriety) Ltd.-V-State of West Bengal & Ors.)
5.AIR 2003 SC 1561 : (Sadhana Lodh-V-National Insurance Co.Ltd. & Arn.)
6.(2004) 11 SCC 402 : (State of U.P. & Ors.-V- Gobardhan Lal).
7.AIR 2002 SC 1314 : (First Land Acquisition Collector & Ors.-V- Nirodhi Prakash Gangoli & Anr.).

For Petitioner - Mr.Amit Prasad Bose
For Opp.Parties - Advocate General

S.K.MISHRA, J. These batch of writ applications involve common questions of fact and law and, therefore, are disposed of by this common judgment. In all three writ petitions, the petitioners have assailed the orders passed by the learned Chairman, Orissa State Administrative Tribunal on 08.04.2010 in O.A. Nos. 360, 359 and 357 of 2010 rejecting the prayer of the petitioners to quash their transfer orders.

2. **W.P.(C) No. 13912 of 2010** In this writ application, Dr. Nihar Ranjan Samal, the petitioner, who happens to be the Editor of OMSA Voice, *inter alia*, pleads that he entered to Government service as a doctor on 26.06.1991 and was posted at Sankara Additional P.H.C. under Binika Block of Sonepur district. He continued there up to March, 1992. Thereafter, he underwent P.G. studies in Radiotheraphy at S.C.B. Medical College and Hospital, Cuttack. He was then posted at Kalyansinghpur P.H.C. in the district of Rayagada, where he served for four years. Then he was posted at B.M.C. Hospital, Bhubaneswar from 1999 to March, 2004 and from September, 2004 he was posted as Medical Officer, Post Partun Centre, Capital Hospital, Bhubaneswar.

It is pleaded by the petitioner that the State Government in General Administration Department issued letter No. 16326/Gen. dated 10.06.1992 clarifying that the office bearers of the recognized Service Association should not be disturbed from the respective stations during 1991-92. It is further pleaded that now the Government have decided that if an officer is the office bearer of the recognized Service Association, he can continue in the station beyond three years and up to six years or till completion of his current term of office, whichever is later. He further pleads that the petitioner is holding post of Editor, OSMA Voice from 17.12.2009 to March, 2011 and the said office is functioning at Bhubaneswar.

The petitioner further claims that he has been transferred from Capital Hospital, Bhubaneswar to Sub-Divisional Hospital, Bonei in the district of Sundergarh as Medical Officer and nobody has been posted in place of the petitioner. He further pleads that in the transfer order specific direction was given to the Chief Medical Officer, Capital Hospital, Bhubaneswar (opp.party no.3) to relieve the petitioner forthwith without posting his substitute and the petitioner has been directed to join immediately without giving any transit, which shows vindictive attitude of the opposite parties.

The petitioner further pleads that his mother is aged about 70 years and is a chronic patient suffering Ostioarthritic with Ostiotorosis and Ostiomalacia and recurrent UTI complicated with the obstructive Nephropathy. His son has appeared the Matriculation examination and is now appearing in various tests to take admission in the B.J.B. College and other colleges in Bhubaneswar. He is a brilliant student and the transfer of the petitioner to Bonei will affect his career which cannot be compensated in any manner.

The petitioner further pleads that the Capital Hospital is the Headquarters hospital of the State Capital catering to three thousand patients daily. Nearly 120 doctors have been posted at the Capital Hospital. Petitioner further pleads that nearly 30% of the doctors, who have been posted at Bhubaneswar have been transferred in a single order, which is prohibited under law.

3. The petitioner thereafter gives names of certain doctors, who have been working at Bhubaneswar for 10 to 15 years either in the Capital Hospital or nearby hospitals and alleged that they have not been transferred and instead the transfer of the present petitioner has been made which is discriminatory, arbitrary and violative of Articles 14 and 16 of the Constitution of India. On such ground, the petitioners pray that the order of transfer dated 08.04.2010 be quashed.

W.P.(C) No. 13714 of 2010:- In this case, the petitioner Dr. Narayan Rout happens to be Secretary-cum-Treasurer of Orissa Medical Service Association, hereinafter referred as 'OMSA'. The petitioner pleads that he entered to the Government service in the year 1991 and at present working as Medical Officer at Capital Hospital, Bhubaneswar. He further pleads that he has been transferred from Capital Hospital, Bhubaneswar to the District Headquarters Hospital, Boudh against an existing vacancy. It is further pleaded by him that his application for interim relief was rejected by the learned Tribunal, against which he preferred a writ application bearing W.P.(C) No. 10253 of 2010, which was disposed of on 10.06.2010 by this Court, wherein directions were given to the Orissa Administrative Tribunal, Bhubaneswar to dispose of the Original Application filed by him by 15th July, 2010 and till that date, no coercive action was to be taken by the petitioner. Rest of the pleadings is almost identical as that of the earlier case.

W.P.(C) No. 13748 of 2010:- In this case, the petitioner happens to be President of the OMSA. He pleads that he joined in the service in 1992 in the District Headquarters Hospital, Balangir and worked there for five years. Then he worked at the District Headquarters Hospital, Dhenkanal.

Thereafter, he had worked in tribal area of Koraput for six years and at present he is working as Dental Surgeon in Capital Hospital at Bhubaneswar. Moreover, he is the President of the OMSA. The petitioner has been transferred from Capital Hospital, Bhubaneswar to District Headquarters Hospital, Sundargarh and one Dr. Ajay Kumar Das of District Headquarters Hospital, Balasore has been posted in place of the applicant. Rest of the pleadings of the petitioner is almost identical as that of the earlier two petitions.

4. In short, the petitioners claim that they being the office bearers of the OMSA are protected from transfer during their tenure as office bearers. Secondly, they contend that their transfers were actuated by *mala fides* on the part of the authorities and, therefore, bad in law and requires interference.

5. The opposite parties in this case filed their written counter affidavit, *inter alia* pleading that the transfer of these petitioner were effected in exigency of public service. The authority is competent enough and has got its liberty to take decision in the interest of patient care. The order by which the petitioners have been transferred was issued considering their long stay in the Capital Hospital at Bhubaneswar. The Notification of the Government in General Administration Department, which has been referred to in the writ petitions has no relevancy to the present transfer of the petitioner. It is further pleaded that during the year 2005, the General Administration Department of Government of Orissa have issued revised circular clarifying the transfer of the Government employees bearing no. 19963 dated 15.07.2005 superseding all earlier circulars issued on transfer. Such circulars provide that office bearers of recognized Service Associations; such as President, Secretary and Treasurers may be ordinarily allowed to continue in their respective headquarters for a single term in exceeding three years unless decided in exigency of public service.

The post of Editor of OMSA Voice, Bhubaneswar is not an office bearer of the Service Association. It is specifically pleaded that in the same transfer orders more than 150 similarly placed doctors have been transferred on administrative exigency. Since the petitioner is holding a transferable job, an order of transfer is inevitable and he cannot claim for his posting in a particular place for a long period on his own interest. It is further pleaded that in this respect, Government is the best Judge as well as the appropriate authority to decide where the employee shall be posted for discharging his duty. Thus, the opposite parties pleaded that the transfers were actuated by exigency of public service and not fraught with *mala fides* and hence, the writ petitions should be dismissed.

6. The petitioners have filed rejoinder affidavit, in which they pleaded that the authorities have discriminated against them as they have been putting forth the demand of the members of the Association. They have also pleaded that the Circular of the year 2005 was not circulated and, therefore, has no binding effect.

7. In course of hearing of the writ applications, the learned counsel appearing for the petitioners very emphatically submitted that the transfers were illegal on two grounds; viz. it is in violation of the statutory guidelines prescribed by the State governing the transfers of office bears of the recognized association and secondly, all these transfers are fraught with *mala fides* on the part of the authorities and, therefore, they may be struck down. The learned Advocate General, on the other hand, submitted that the transfers were effected for exigency of public service and there is no statutory force of the circular issued by the General Administration Department. There being no *mala fides*, the order of transfers cannot be interfered with.

8. Law relating to the transfer and posting has been considered time and again by the Hon'ble Supreme Court and it has been settled by a plethora of decisions. It is entirely open to the competent authority to decide when, where and at what point of time, a public servant is to be transferred from his present posting. Transfer is an incident of service. It does not affect the conditions of service in any manner. The employee does not have any extra right to be posted at a particular place. (relied on **B.Varadha Rao v. State of Karnataka and others**, AIR 1986 SC 1955; **Somesh Tiwari v. Union of India and others**, (2009) 2 SCC 592).

9. In **Union of India v. S.L. Abbas**, AIR 1993 SC 2444, the Apex Court has observed that the Government instructions on transfer are mere guidelines without any statutory force and the Court or Tribunal cannot interfere with the order of transfer unless the said order is alleged to have been tainted with malice or where it is made in violation of the statutory provisions. In the case of **Calcutta Gas Company (Propriety) Ltd. v. State of West Bengal and others,** AIR 1962SC 1044, the apex Court has further observed that the transfer policy does not create any legal right in favour of the employee. It is settled law that a Court/Tribunal can entertain a case only for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breach of a statutory duty on the part of the employer. Therefore, there must be a judicially enforceable legal right for the enforcement of which legal proceedings can be resorted to. The Court/Tribunal can enforce the performance of a statutory duty by public bodies through its jurisdiction at the behest of a person, provided such

person satisfies the Court that he/she has a legal right to insist on such performance. The existence of the said right is a condition precedent for invoking the Court's jurisdiction. Similar view has been taken in **Sadhana Lodh v. National Insurance Co. Ltd. and another**, AIR 2003 SC 1561.

10. While dealing with a case on transfer, the Supreme Court in **State of U.P. and others v. Gobardhan Lal, (2004) 11 S.C.C. 402** has observed that a challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of *mala fides* when made must be such as to inspire confidence in the court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer. At paragraph 7 of the said judgment, the Hon'ble Supreme Court has described in very lucid words, the law guiding the matters of transfer. We feel it apposite to quote the same.

> "7. It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a *mala fide* exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments.

> This court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by *mala fides* or is made in violation of any statutory provision."

Furthermore, in the case of **First Land Acquisition Collector and others v. Nirodhi Prakash Gangoli and another,** AIR 2002 SC 1314; the Apex Court held that burden of proving *mala fides* is very heavy on the person who alleges it. Mere allegation is not enough. Party making such allegations is under a legal obligation to place the specific materials before the court to substantiate the said allegations.

It is further laid down by the Supreme Court in several cases that it is settled legal proposition that in case allegations of *mala fide* are made against any person he is to be impleaded by name, otherwise the allegations cannot be considered, to cite one, **State of Bihar and another v. P.P.Sharma, I.A.S. and anther,** AIR 1992 SC 1260;

Thus, this being the settled principle of law, legal position on the matter can be summarized as follows:

Transfer is an incident of service. It does not adversely affect the status or emoluments or seniority of the employee. The employee has no vested right to get a posting at a particular place or can choose to serve at a particular place for a particular tenure. It is within the exclusive domain of the employer to determine as to what place and for how long the services of a particular employee are required. Transfer order should be passed in public interest or administrative exigency, and not arbitrarily or for extraneous consideration or for victimization of the employee nor it should be passed under political pressure. There is a very little scope of judicial review by the Court/Tribunal against the transfer order and the same is restricted only if the transfer order is found to be in contravention of the statutory Rules or *mala fides* is established. In case of allegation of *mala fides*, the employee has to make specific averments and should prove the same by adducing unimpeachable evidence. The person against whom allegation of *mala fide* is alleged is to be impleaded as a party by name. Transfer policy or guidelines issued by the State or employer does not have any statutory force as it merely provides for guidelines for the understanding of the Departmental personnel. The Court does not have a power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee, his family members and children as consideration of these issues fall within the exclusive domain of the

employer. If the transfer order is made in mid-academic session of the children of the employee, the Court/Tribunal cannot interfere. It is for the employer to consider such a personal grievance.

11. Applying these principles to the cases in hand, it is seen that the guidelines issued by the Government in G.A. Department regarding transfers of office bearers of recognized Service Association of the employees does not have any statutory force and if in case of their violation as has been laid down by the Supreme Court in **State of U.P. and others v. Gobardhan Lal** (supra), they do not confer any legal right on the petitioners. In this case, therefore, the order passed by the learned Chairman of the Tribunal cannot be found to be incorrect. Furthermore, there is allegation that the petitioners have been transferred because of their activity as the elected representatives of the Association. In other words, *mala fides,* are complained of in this case. However, no concrete and unimpeachable materials have been placed before the court to come to the conclusion that actually the authorities have acted with malice to put the petitioners to trouble. On this score also, the petitioners' transfer cannot be said to be fraught with *mala fides*. Moreover, the petitioners have not specified the names of persons who have acted in a *mala fide* manner and ordered for their transfer. Such persons have not been made a party to the present proceedings.

12. Thus, on the aforesaid discussion, we come to the conclusion that the orders passed by the learned Chairman of the State Administrative Tribunal do not suffer from any illegality requiring interference of this Court. Accordingly, the writ petitions are dismissed as devoid of any merit. No cost.

Writ petition dismissed**.**

2011 (II) ILR- CUT- 626

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

JCRA NO. 06 OF 2002 (Dt. 11.02. 2011)

KENDU NAIK ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

(A) CRIMINAL PROCEDURE CODE 1973 (ACT NO 2 OF 1974) - S.313.

Appellant in his statement recorded U/s 313 Cr.P.C. stated in reply to question No. 13 that he sustained injury on his eye while cutting wood for which he was treated in the hospital – Contention of the counsel for the appellant that it is the duty of the persecution to explain the injury on the person of the appellant and failing which the prosecution case is to be viewed with suspicion has no basis – Held, appellant has been rightly convicted by the trial court – No scope for this court to interfere with the impugned judgment.

(Para 11& 13)

(B) CRIMINAL PROCEDURE CODE 1973 (ACT NO 2 OF 1974) - S.154.

Delay in lodging F.I.R.- Occurrence took place on 31-05-1997 in the evening – Next day Medical officer, Konokoroda PHC intimated the police about receipt of a medico-legal case which reached the police station on 02-06-1997- On receipt of the same PW-1 the ASI of police made preliminary inquiry and finding it a case of cognizable offence lodged the F.I.R .- Held, in this case delay in lodging the F,I.R. can not be said to be fatal to the prosecution case.

(Para 12)

For Appellant - Miss Deepali Mohapatra
For Respondent - Mr. Soubhagya Ketan Nayak
(Addl. Govt. Advocate)

PRADIP MOHANTY, J. This Jail Criminal Appeal is directed against the judgment and order of conviction dated 23.11.2001 passed by the learned Additional Sessions Judge, Bhanjanagar-Aska, Circuit at Aska in S.C. No.7/99 (S.C.16/98 ADJ-1) by which the appellant has been convicted for commission of the offence under Section 302, IPC and sentenced to undergo imprisonment for life and pay a fine of Rs.5000/- in default to undergo rigorous imprisonment for one year.

2. The case of the prosecution is that on 31.05.1997 at about 9:00 PM, the Medical Officer of Konkoroda PHC treated the deceased Raghunath Polei and referred him to M.K.C.G. Medical College & Hospital, Berhampur for further treatment. On the next day, he intimated the police in writing about receipt of a medico-legal case and on being directed by the OIC, Pattapur P.S., the A.S.I. of Police of the said P.S. on 2.6.1997 made a preliminary inquiry and came to know that on 31.5.1997 at about 8:00 PM, the appellant assaulted the deceased by means of a Tangia on his head to cause death at Harijan Sahi of Village Bakilikana. Subsequently, the deceased was shifted to the S.C.B. Medical College and Hospital, Cuttack. On return to the Police Station, the ASI lodged FIR, pursuant to which the OIC registered the case u/s 307 IPC and directed him to investigate into the matter. On 5.6.97, the OIC received a V.H.F. message from I.I.C., Mangalabag P.S. that the deceased died on 4.6.97 at 2:30 PM while undergoing treatment at Cuttack. Accordingly, the case was turned to one under Section 302 IPC and the OIC took charge of the investigation from the ASI and after its completion filed charge sheet against the appellant under Section 302, IPC

3. The plea of the appellant is that at the relevant time, he was admitted in the hospital, as he had sustained injuries on his eye while cutting wood, and from there police arrested and falsely implicated him in this case.

4. In order to prove its case, prosecution examined as many as 14 witnesses including the doctor and the I.O. and exhibited 15 documents. The defence did not choose to adduce any oral evidence but exhibited one document marked Ext.A.

5. Learned Additional Sessions Judge on conclusion of the trial convicted and sentenced the appellant as indicated hereinbefore mainly relying on the evidence of P.W.5.

6. Miss Mohapatra, learned counsel for the appellant assails the impugned judgment on the grounds that there is unexplained delay in lodging the FIR. The witnesses, who have been examined as occurrence and immediate post-occurrence witnesses, being relatives of the deceased are interested witnesses. P.W.5 is a child witness and the evidence on record shows that she was tutored by the prosecution. Furthermore, the prosecution has failed to explain the injury sustained by the appellant.

7. Mr. Nayak, learned Additional Government Advocate, vehemently contends that the evidence of P.W.5 is very clear and cogent and as such trustworthy. Nothing has been elicited from her in cross-examination to demolish her evidence. Moreover, the deceased made a dying declaration before P.Ws.6 and 7, who are the widow and mother of the deceased, and there is no material to disbelieve their evidence. The medical evidence also corroborated the evidence of P.Ws.5, 6 and 7. Therefore, no infirmity or illegality has been committed by the learned Additional Sessions Judge in convicting the appellant under Section 302 IPC.

8. Perused the LCR. P.W.1 is the ASI of Police, who made a preliminary inquiry and found that on 31.5.1997 at about 8.00 PM the appellant has assaulted the deceased by means of a Tangia on his head to cause death at Harijan Sahi of Village Bakilikana. During investigation, he ascertained that the deceased was shifted to S.C.B. Medical College and Hospital, Cuttack. He also found that the appellant sustained some injuries. On 5.6.1997, on getting information from Mangalabag P.S. that the deceased died on 4.6.97 at 2:30 PM while undergoing treatment at Cuttack, the case was turned to one under Section 302, IPC and the OIC took charge of the investigation from him. Nothing has been elicited from him in his cross-examination to demolish the evidence.

P.W.2 is the doctor who examined the deceased and found two incised injuries and referred him to Medical College at Berehampur for further treatment. He proved his report marked Ext.3/2. He has stated that the deceased was not in a conscious state of mind. He has further stated that the incised wounds noticed by him were possible by means of a Tangia.

P.W.3 is the doctor who conducted autopsy over the dead body of the deceased and found following external injuries:

"1. Abrasion on the middle of right chin of tibia of size 1.5 c.m. x 1 c.m.

2. Surgically stitched wound on left temporal area of 10 cm long with ten black silk stitches extending from anterior to posterior.

3. Surgically stitched wound from anterior aspect to posterior aspect of 9 cm long with five black silk stitches 2.5 cm above the injury no.2

4. Surgically stitched wound on the middle of the vault with two silk black stitches of 6 cm long.

On dissection he found the following injuries:

"1. Sub-Scalpal tissue contused with haematoma formation of the left side of the head.

2. Burr-hole of 1 c.m. dia-meter present on the left side parietal area, gel-foam given over it. Dura-metter stitched correspondingly.

3. Fissure fracture present on the left side frontal bone of 14 c.m. long. Left orbital plate fractured in continuation with the fissure fracture.

4. Left parietal lobe lacerated with haematomas formation.

5. Intra-cerebral petechael haemorr-hage present."

He opined that the cause of death was due to shock and haemorrhage as a result of cranio-cerebral injuries. External injury nos.2 to 4 and internal injury nos.1 to 5 were fatal in nature and sufficient to cause death in ordinary course of nature. The fracture injuries have been caused due to violent force of the weapon of offence.

P.W.4 is the Havildar and a witness to the seizure of blood stained Gamuchha made vide Ext.8. P.W.5 is a child witness aged about 12 years. She is a witness to the occurrence. It transpires from her evidence that after taking bath from the river she and her father (deceased) were returning home. While they were on the village road, about 5 to 6 houses away from the house of the appellant, the appellant came towards them by holding a Parsuram Tangia and dealt a blow on the head of her father. He also gave two successive blows on the same place of the head of her father, for which her father fell down. Soon thereafter the appellant fled away to his house with that Tangia. Leaving her father, she ran to her house to call her mother, paternal grand-mother, two other sisters and her uncle, who were present in the house. She told about the occurrence to them and they rushed to the spot and found her father in breathless condition though was able to talk slowly. Thereafter, the deceased was removed to Konkoroda Hospital by means of a cot and from there to Cuttack for treatment. In cross-examination, she admitted that she was reading in Class-V in village school. Her father was assaulted inside JAGUALI SAHI. She also admitted that she had not seen any person coming near her father after the assault from the houses situate surrounding the spot.

P.W.6 is the widow of the deceased and a post-occurrence witness. She came to the spot along with P.W.7 and others and found her husband with profuse bleeding on the backside of his head. On her query, the

deceased with difficulties told that the appellant dealt tangia blows on his head and at that time her mother-in-law (P.W.7) was with her. In cross-examination, she admitted that there was no other house between her house and the house of the appellant. The place where her husband was assaulted was locally known as JAGUALI SAHI. She admitted that the age of P.W.5 was between 10 and 12 years at the time of occurrence. Nothing has been elicited from her in cross-examination to demolish her evidence.

P.W.7 is the mother-in-law of P.W.6 and mother of the deceased, who corroborated the evidence of P.W.6 that on being asked the deceased disclosed that the appellant assaulted him. Nothing has been elicited from her in cross-examination to disbelieve her testimony.

P.W.8 is the cousin brother of the deceased who deposed that he saw P.Ws.6 and 7 with their children crying near the deceased who was lying on the road with bleeding injuries on his head. P.Ws.6 and 7 told him that the appellant had caused those injuries. Thereafter, the deceased was shifted to Konkoroda PHC where the Medical Officer stitched and bandaged the wound and advised to take the deceased to Cuttack for treatment.

P.W.9 is the nephew of the deceased and a post-occurrence witness. Hearing about the incident, he went to the place of occurrence and saw the mother and wife of the deceased were crying near him. On his query, the deceased with much difficulty told that the appellant had assaulted him. Thereafter, they shifted the deceased to the PHC and subsequently to Cuttack for treatment.

P.W.10 is the younger brother of the deceased and a post-occurrence witness. He deposed that after taking bath when he was returning towards his house he saw the daughter and wife of the deceased were bringing him to the village Danda and there was severe bleeding injury on the head of the deceased. His mother, wife of the deceased (P.W.6) and Buli (P.W.5) told him that the appellant had assaulted the deceased. He along with others took the deceased on a cot to the PHC and from there to S.C.B. Medical College, Cuttack on the advice of the doctor.

P.W.11 is a seizure witness, who proved the bed-head ticket (Ext.5).P.W.13 is the Investigating Officer who on receipt of the written intimation from the Medical Officer, Konkoroda PHC that the deceased and the appellant were undergoing treatment and that the deceased had been referred to M.K.C.G. Medical College & Hospital, Berhampur made an entry in the station diary and directed P.W.1 to enquire into the matter. On

05.06.1997, he took charge of the investigation from P.W.1 and on the very same day, he received the message from I.I.C., Mangalabag P.S. that the deceased died on 04.06.1997 at 2:30 PM. In cross-examination, he admitted that the appellant was treated as an indoor patient in the PHC from 31.5.1997 to 12.6.1997.

P.W.12 is the I.O., who took charge of the investigation from P.W.13 on his transfer. During investigation, he visited the spot and deputed P.W.1 to Cuttack to obtain the wearing apparels of the deceased which he seized as per seizure list (Ext.8) and sent for chemical examination. He submitted charge-sheet after completion of investigation.

P.W.14 is the Lecturer of Neuro Surgery Department of S.C.B. Medical College & Hospital, who stated that on being referred by M.O., Konkoroda PHC, he prepared the bed-head ticket.

9. On scrutiny of the entire evidence, it is clear that P.W.5 is an eye witness to the occurrence, who specifically stated about the assault given by the present appellant by means of a Tangia. She is the daughter of the deceased and at the time of examination her age was 12 years. She was tested by the trial court about her power of understanding and giving rational answers. She categorically deposed that she was with her father at the time of incident. Witnessing the occurrence, she rushed to her house and called P.Ws.6 and 7 who also corroborated this part of her version. Admittedly, the incident took place in the evening during summer. The ability of villagers in identifying a person whom they daily see even in darkness is much better than the person living in urban lighted areas. The fact that P.W.5 had correctly identified the appellant is corroborated by P.Ws.6 and 7 before whom the deceased disclosed the name of the appellant. Therefore, the theory of lack of visibility resulting in improper identification is inconsequential in the present case.

10. The evidence of P.W.5 cannot be disbelieved on the ground that she is a child witness when her evidence otherwise inspires confidence and there is nothing to show that she was tortured. There is nothing on record to disbelieve the evidence of P.Ws.6 and 7 that they went to the spot on being called by P.W.5 and on their query the deceased disclosed before them that it was the appellant who assaulted him. The evidence of P.Ws.5, 6 and 7 gets support from the evidence of P.Ws.9 and 10.

11. It is next contended by Miss. Mohapatra, learned counsel for the appellant that it is the duty of the prosecution to explain the injury on the

person of the appellant and in the instant case the prosecution having failed to do so its case has to be viewed with suspicion. On careful perusal of the evidence available on record this Court does not find any iota of evidence to show that the appellant sustained injury on his person during the course of incident. Rather, the appellant in his statement recorded under Section 313 Cr.P.C. stated in reply to question no.13 that he sustained injury on his eye while cutting wood for which he was treated in the hospital.

12. So far as the contention of the learned counsel for the appellant with regard to delay in lodging the FIR is concerned, it transpires that on 31.05.1997 in the evening the occurrence took place. On the next day (01.06.1997), the Medical Officer, Konokoroda PHC intimated the police about receipt of a medico-legal case which reached the police station on 02.06.1997. On receipt of the same, P.W.1 made preliminary inquiry and finding that it was a case of cognizable offence of attempt to murder lodged the FIR after returning to the P.S. Therefore, delay in lodging the FIR cannot be fatal to the prosecution.

13. For the reasons recorded above, this Court comes to the conclusion that the appellant has been rightly convicted by the trial court and there is no scope for this Court to interfere with the impugned judgment of conviction and sentence which is accordingly upheld.

14. The JCRLA is dismissed.

Appeal dismissed.

2011 (II) ILR- CUT- 633

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

JCRLA NO.30 OF 2002 (Decided on 25.04.2011)

CHAITAN PARAJA ……..Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

EVIDENCE ACT 1872 (ACT NO 1 OF 1872)-S.24.

Extra judicial confession by the accused before P.Ws. 2 &5 that he had killed his wife –This is an incriminating material brought by the prosecution against the accused implicating him in the crime – Held, since no question has been put to the appellant with regard to the above extra judicial confession in his examination U/s 313 Cr.P.C. the same can not be utilized against him – The impugned judgment of conviction and sentence passed by the trial court is set aside

(Para-10.11)

Case law Referred to:-

(2009) 6 SCC 583 : (Shaikh Maqsood-V- State of Maharashtra).

For Appellant - Mr. Gyanaranjan Mohapatra.

For Respondent - Mr. Anupam Rath
(Addl. Standing Counsel)

PRADIP MOHANTY, J. This Jail Criminal Appeal is directed against the judgment dated 27.08.2002 passed by the learned Ad hoc Additional Sessions Judge, Jeypore in Criminal Trial No.7 of 2002 convicting the appellant for commission of offence under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution, as narrated in the F.I.R. (Ext.1), is that on 20.01.2000 the Sarpanch of Godapodar Gram Panchayat (P.W.1) lodged a report at B.Singhpur Police Station that on 20.01.2000 at about 11:00 AM the appellant had murdered his wife by means of a Tangia due to sudden quarrel. It is further alleged in the F.I.R. that the appellant made an extra judicial confession before P.Ws.2 and 5.

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

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

5. Learned Ad hoc Additional Sessions Judge, who tried the case, convicted the appellant under Section 302 I.P.C. basing upon the evidence of P.Ws.2 and 5.

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

(1) The entire conviction has been based upon the testimony of P.Ws.2 and 5 who are not trustworthy witnesses; and

(2) Conviction cannot be based solely upon the extra judicial confession without any corroboration and in the instant case there is no corroborative evidence since the eye witnesses have been turned hostile and nothing adverse has been elicited from them in cross-examination by the prosecution.

7. Mr.Rath, learned Additional Standing Counsel, on the other hand, contends that a conviction can be based upon the extra judicial confession. The appellant himself made a confession before P.Ws.2 and 5 who are trustworthy witnesses. The dead body of the deceased was lying in front of the house of the appellant. The weapon of offence i.e. axe was lying on the spot and human blood stains were found from it. Therefore, there is no material before this Court to interfere with the impugned judgment and order of conviction.

8. Perused the LCR. P.W.1 is the informant. At the relevant time, he was a Sarpanch. He deposed that on the day of occurrence, some villagers of Kotagaon came to him and told that the appellant had committed murder of his wife by assaulting her on neck by means of a Tangia. On the next morning, he along with the villagers went to the spot and found the dead body of the deceased lying in front of the house of the appellant. Thereafter, they proceeded to Ranigada Out-post and reported the matter orally to the S.I. of police who reduced it to writing. He proved the FIR (Ext.1). The police came to the spot and seized some sample earth and blood stained earth under Ext.2 which was proved by P.W.1.

P.W.2 deposed that on getting information that the appellant had committed murder of his wife, he along with P.W.1 and others went to the

spot and found the dead body lying in front of the house of the appellant. On being questioned, the appellant told him that when he returned to his house from weekly market, he found his wife in a compromising position with another male. Finding them in such a position, he lost his temper and killed the deceased by means of an axe by assaulting her on neck. In cross-examination, he admitted that he was acquainted with the appellant prior to the occurrence and had visited his village but he was not on visiting terms with the appellant. He did not see any person with whom the deceased had alleged illicit connection and had not made any inquiry to know the identity of that person. He denied the suggestion that he was deposing falsehood against the appellant as he (appellant) did not support him in the last Samiti election.

P.W.3 is the uncle of the appellant. The prosecution declared him hostile but in cross-examination nothing has been elicited to support its case. P.W.4 is a co-villager of the appellant who was also declared hostile.

P.W.5 is the 'Naik' of the village. He stated that he went to the spot hearing about the murder from his wife and found the dead body of the deceased lying in front of the house of the appellant. Seeing the appellant, he asked as to why he killed the deceased. The appellant confessed before him that he had killed his wife by means of an axe as he was angry. P.W.5 stayed there and directed Arjuna Jani and Domu Jani (P.W.7) to call the Sarpanch who came to the spot on the next morning before whom the appellant also confessed to his guilt. In cross-examination, he admitted that he had not been examined by the police. In presence of Gramarakhi, the appellant made the confession. He further admitted that appellant made confession before him in presence of the police and the Sarpanch only after their arrival and not prior to that.

P.Ws.6 and 7 are also co-villagers of the appellant who did not support the case of the prosecution and turned hostile. P.W.8 is the uncle of the appellant and a witness to the inquest.

P.W.9 is the doctor who conducted autopsy over the dead body of the deceased and found four incised injuries of sizes 2" X 2" X 4" on the left side of the neck just below the mandible with corresponding injuries to sternomastoid muscles, carotid artery, jugular vessels and cervical vertebra. He opined that the cause of death was due to haemorrhagic shock as a result of excessive bleedings and the death was homicidal in nature. He also proved the post mortem report (Ext.4). On examination of the Tangia sent by

the I.O., he opined that the injuries found on the body of the deceased could be possible by the said Tangia.

P.W.10 is the constable and a seizure witness to the wearing apparels of the deceased. P.W.11 is the I.O., who registered the case, held inquest over the dead body of the deceased and sent the same for autopsy, recorded the statement of the witnesses and after completion of the investigation filed charge-sheet against the present appellant under Section 302, I.P.C.

9. Scrutinizing the evidence this Court finds that there is no eye witness to the occurrence. The conviction has been based upon the extra judicial confession made by the appellant before P.Ws.2 and 5. Nothing has been elicited from P.W.2 to demolish his evidence. Therefore, there is no material to disbelieve the evidence of P.W.2. P.W.5 is a co-villager, who specifically deposed that he asked the appellant as to why he killed the deceased to which the appellant confessed that he had killed his wife by means of an axe as he was angry. In cross-examination, P.W.5 specifically admitted that the appellant made confession before him in presence of police and the Sarpanch (P.W.1) only after their arrival and not prior to that. But P.W.1, the informant, does not whisper a single word about the extra judicial confession. Moreover, as per statement of P.W.5 if the appellant would have confessed in presence of P.W.1 and the police, such confession would hit under Section 25 of the Evidence Act. In view of the above, it is not proper to rely on the evidence of P.W.5. Although the I.O. proved the seizure of axe under Ext.8 and specifically deposed that he seized the same on production by one Dhania Jani, the said Dhania Jani, who has been examined as P.W.8, has not whispered a single word in his evidence about the production of any axe. P.Ws.2 and 5 have not stated anything about the seizure of blood stained axe. Therefore, the factum of seizure of the axe is doubtful. Furthermore, the axe was not produced or proved before the trial court.

10. Now, the only question that arises for consideration is whether basing upon the evidence of extra judicial confession said to have been made before P.Ws.2 and 5 conviction can be recorded or not. On perusal of the accused statement, it reveals that no question was put to the appellant with regard to the extra judicial confession made before P.Ws.2 and 5. It is well settled that if an incriminating material which is brought by the prosecution against the appellant implicating him in the crime not put to him in his examination under Section 313 Cr.P.C., that evidence cannot be utilized against him. In ***Shaikh Maqsood V. State of Maharashtra; (2009) 6 SCC 583,*** the apex Court held that in the examination under Section 313

Cr.P.C. if no question was put to the accused which established that he was the author of the crime, the entire case of the prosecution fails. In the instant case, no question has been put to the appellant with regard to the extra judicial confession. Therefore, the same cannot be utilized against the appellant. This Court finds that there is no reason to depart from the time tested legal principle as noted herein above.

11. In view of the above reasons, the appeal is allowed. The judgment of conviction and sentence passed by the trial court is set aside. The appellant be set at liberty forthwith, if his detention is not required otherwise.

Appeal allowed.

2011 (II) ILR- CUT- 638

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

JCRA NO.9 OF 2002 (Decided on 06.07.2011)

BALARAM DANDSENA … ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.32.

Dying declaration – There is no material on record to show that the dying declaration was the result or product of imagination, tutoring or prompting – On the contrary the same appears to have been made by the deceased voluntarily and it receives corroboration from the evidence of the prosecution witnesses – Held, there is no infirmity in the dying declaration which the trial court has accepted as a piece of credible and trust worthy evidence. (Para 8)

Case laws Referred to:-

1.(2003) 6 SCC 443 : (P.V. Radhakrishna-V-State of Karnataka)
2.(2007) 12 SCC 754 : (State of Rajasthan-V-Parthu).

For Appellant - Miss. B.L.Tripathy.
For Respondent - Mr. A.Rath Addl. Standing Counsel.

B.K.NAYAK, J. In this Jail Criminal Appeal, the appellant has challenged the judgment and order dated 29.11.2001 passed by the learned Ad hoc Additional Sessions Judge, Sundargarh in S.T. Case No.232/16 of 1999 convicting the appellant under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life.

2. Shorn of unnecessary details, the prosecution case is that the accused-appellant and his wife-Kamala (deceased) shifted from their village-Dudikarei and stayed in the rented house belonging to P.W.6 in village-Daijimahul. On 29.03.1999 at about 9.00 P.M., the appellant became angry and annoyed with his wife as because she gave away a sum of Rs.100/- to her nephew- Baleswar Naik for his treatment on the previous day. He was annoyed because his wife had given the money without his consent and out of anger he poured kerosene from the 'Dibiri' over his wife, Kamala and set her on fire with a lighted match stick. After setting her on fire, he left the

village. Kamala tried to extinguish the fire and crawled out of her house and raised alarm. Some neighbours and co-villagers gathered and gave her water to drink. Before them on the spot she narrated the incident. Being called the Grama Rakshi came to the spot and thereafter informed the Sadar Police Station about the incident. The I.I.C., Sadar Police Station reached the spot and before him Laxman Chhatria (P.W.11) submitted a written report which was sent to the police station where the case was registered under Sections 498-A/307 of the I.P.C. The injured victim was shifted to District Headquarters Hospital, Sundargarh in the police Jeep. Since her condition was critical, the emergency doctor (P.W.17) recorded her dying declaration. While undergoing treatment in the hospital, the victim succumbed to the burn injuries in the early hours of 31.3.1999 whereupon the I.I.C. Sadar Police Station converted the case to one of murder under Section 302 of the I.P.C.

Before the death of the deceased, the I.I.C. Sadar Police Station had sent requisition to the hospital for treating the injured and in course of his investigation, he seized one match box, one Dibiri, some half burnt straws, some burnt clothes and some ashes from the spot. A futile search was made for the absconding accused, inquest over the dead body was made in presence of a Magistrate and other witnesses and thereafter postmortem examination was conducted. On 14.4.1999 the accused was arrested while he was concealing at village Lulkidihi. The Investigating Officer also seized the bed head ticket with regard to the treatment of the deceased and on completion of investigation charge-sheet was submitted against the present appellant.

3. The defence plea is one of complete denial of the prosecution case. Further the accused in his statement under Section 313, Cr.P.C. took a plea of alibi stating that on the date of occurrence he was not available in the village but had gone to village-Karamdihi to work as a daily labourer.

4. In order to establish its case, the prosecution examined twenty witnesses. P.Ws.1, 5, 7 and 8 are the co-villagers and neighbours, who came to the spot on hearing hullah of the deceased and before whom the injured narrated the incident. P.W.2 is the Grama Rakshi, who was called to the spot. P.W.3- Baleswar Naik is the nephew of the deceased to whom the deceased had given Rs.100/- on the previous day of occurrence. P.Ws.4 and 9 are post occurrence witnesses. P.W.6 is the landlord of the house where the accused and deceased were staying as tenants. P.W.10 is the mother of P.W.3 and sister of the deceased. Laxman Chhatria, the informant (P.W.11) and the Executive Magistrate (P.W.14) are witnesses to

inquest. P.Ws.13 and 16 are the two doctors, who conducted postmortem examination jointly over the dead body of the deceased. P.W.15 is the witness to seizure of bed head ticket of the deceased. P.W.17 is the emergency doctor, who admitted the deceased in the hospital and recorded her dying declaration. P.W.18 is a constable and a seizure witness. P.W.19 claims no knowledge about any aspect of the prosecution case. P.W.20 is the I.I.C. of Sadar Police Station, who investigated into the case and submitted charge-sheet.

The appellant led no evidence in his defence.

5. The learned counsel for the appellant submitted that the trial court convicted the appellant primarily basing upon the dying declaration of the deceased without any corroboration from any other evidence. It is her further submission that keeping in view the evidence of the critical condition of the victim, the dying declaration recorded by P.W.17 cannot be treated to be true and voluntary declaration.

Mr. A. Rath, learned Additional Standing Counsel, on the other hand, contended that the victim made two dying declarations, first shortly after the occurrence before the neighbours, which is oral in nature, and the second one before P.W.17, the emergency doctor, which was recorded and proved as Ext.7 and that in view of the evidence of P.W.17 that in spite of the critical condition of the deceased, she was conscious and able to make a statement which he recorded considering the case to be of emergency it is his submission that there is nothing on record to suspect the true and voluntary nature of the dying declaration. It is also submitted that the trial court has taken into consideration the seizure of incriminating articles from the spot, the bed head ticket and the long abscondance of the accused soon after the occurrence as corroborative pieces of evidence.

6. The evidence of two doctors, P.Ws. 13 and 16, who conducted the post mortem examination over the dead body of the deceased and the postmortem report, Ext.3 make it clear that the deceased had sustained extensive burn injuries except on the lower part of abdomen below umbilicus, anteromedial aspect of both thighs and lateral aspects of the neck and forehead. There was charring of skin. On dissection the doctors found the brain and its coverings were congested. Larynx, trachea, lungs, lever, spleen and kidneys were congested. The death was due to shock resulting from extensive burn injuries, which were ante mortem in nature. There is no material on record nor there is defence suggestion that the deceased received burn injuries accidentally or that she set herself on fire in her attempt to commit suicide.

7. Now, the question is whether the appellant set the deceased on fire out of rage as because the deceased gave Rs.100/- to her nephew without the consent of the appellant.

In the absence of eyewitness to the occurrence, the prosecution has relied upon the dying declaration, Ext.7 recorded by the doctor (P.W.17) and also the testimony of neghbours and co-villagers such as P.Ws.1, 5, 7 and 8, who have stated that on hearing cries of Kamala, they came to the spot and found Kamala crawling out of her house and her whole body was on fire, the wearing apparels on her body were burnt. On her asking the witnesses gave her water and on their query she stated that her husband set her on fire by pouring kerosene from 'Dibiri' being annoyed as because she gave Rs.100/- to her nephew. She also informed the witnesses that after setting her on fire her husband fled away. In cross-examination, these witnesses have stated that Kamala was groaning in pain due to burn injuries and was stammering and her speech was indistinct. Merely, because the speech was indistinct and unclear, it cannot be said that these witnesses viz; P.Ws.1, 5, 7 and 8 concocted a story to falsely implicate the appellant. They are independent witnesses, who have no axe to grind against the appellant. On the basis of such information received by these witnesses from the deceased soon after the occurrence, P.W.11 lodged the F.I.R. (Ext.10). The F.I.R. contains clearly what the deceased has stated before the witnesses outside her house soon after the occurrence.

8. The Investigating Officer (P.W.20) arrived at the spot being telephonically informed by P.W.2, the Grama Rakshi. P.W.20 has stated that on the spot he found the victim lying with serious condition and so he made arrangement and shifted her to the District Headquarters Hospital, Sundargarh for her medical treatment. He also sent requisition (Ext.6/2) to the hospital for treating the injured and getting her dying declaration recorded. P.W.17 was the Asst. Surgeon attached to the District Headquarters Hospital, Sundargarh. According to him, he admitted the victim woman in the hospital at 11.45 P.M. on 29.3.1999 in the female surgical ward and prepared the indoor ticket (Ext.5). It is further stated by him that the patient was severely burnt, but she was conscious. Her pulse was 88 and blood pressure was 120/88. Chest and lungs were clear and heart was normal. In the same night on police requisition he prepared the injury report (Ext.6). Thereafter, he recorded the dying declaration of the injured victim vide Ext.7 as he apprehended that the patient might die at any moment. The dying declaration was recorded verbatim what the patient expressed at that time. It is also the testimony of P.W.17 that the injured was conscious and in a fit condition to give her dying declaration. In cross-examination, he has

stated that he was on emergency duty in the hospital at the relevant time and finding the extensive burn injuries and the critical condition of the patient, he felt that it was a case of emergency and therefore, he recorded the dying declaration of the patient and did not send any requisition to the Magistrate. After recording, P.W.17 put his signature on Ext.7 and got the LTI of the patient appended on Ext.7 through the hospital Peon. It is fairly admitted by him that he has not mentioned on Ext.7 any certificate to the effect that the patient was in a fit condition to give any dying declaration. Learned counsel for the appellant has contended that when the patient had severe and extensive burn injuries, which is undisputedly between 70% to 90%, and P.W.17 having not appended any endorsement on Ext.7 to the effect that the patient was in a fit condition to make a statement, Ext.7 cannot be accepted as a true dying declaration. The contention is not tenable inasmuch as there is no legal requirement for a certificate of the Medical Officer in each and every case. In the instant case, the bed head ticket (Ext.5) of the injured reveals that at the time of her admission in the hospital on the date of occurrence, she was conscious and her pulse rate and blood pressure were normal. To the same effect is the oral evidence of P.W.17, who himself recorded the dying declaration. Therefore, absence of any endorsement or certificate on the body of Ext.7 will not affect the dying declaration adversely so as to make it unworthy of credence (see (2003) 6 SCC 443; P.V. Radhakrishna v. State of Karnataka and (2007) 12 SCC 754; State of Rajasthan v. Parthu).

There is no material on record to show that the dying declaration (Ext.7) was the result or product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily, inasmuch as, it receives corroboration from the evidence of P.Ws.1, 5, 7 and 8 and also from the testimony of the post occurrence witnesses, who deposed that on arrival at the spot, they learnt from other witnesses gathered earlier that the deceased informed that she was set on fire by her husband, as because she gave Rs.100/- to her nephew (P.W.3). The motive for the crime which has been described in the dying declaration also receives corroboration from the testimony of P.W.3, who stated that his aunt-Kamala (deceased) gave him Rs.100/- on the previous day of the occurrence for his medical treatment and with that money he came to the District Headquarters Hospital, Sundargarh for treatment and got himself admitted as indoor patient in the hospital and stayed for four days. He saw her aunt-Kamala in the hospital when she was brought there for treatment with burn injuries. At the time she came to the hospital, she was conscious. Admittedly, Kamala succumbed to the burn injuries in the intervening night of 30/31.3.1999. In the circumstances, there is no infirmity in the dying

declaration which the trial court has accepted as a piece of credible and trustworthy evidence.

9. Apart from the clear, cogent and trustworthy dying declaration which gets corroboration from the other oral testimony of witnesses, it is also established from the evidence that the appellant absconded soon after setting the deceased on fire and despite repeated search he could be apprehended until 14.4.1999, i.e., seventeen days after the occurrence when he was found in another village. This is a strong incriminating circumstance against the appellant. Besides, though a plea was taken by the appellant that on the date of occurrence he was not present in the house but had gone to another village, namely, Karamdihi to work, the same has not been proved. Rather, the appellant, a daily labourer staying away from home for seventeen days and being apprehended from another place falsifies the defence plea.

10. In the light of the aforesaid discussions, we find no infirmity in the impugned order of conviction and sentence. The JCRA has no merit and is accordingly dismissed.

Appeal dismissed.

2011 (II) ILR- CUT- 644

M.M.DAS, J.

S.A.O. NO.4 OF 2011 (Decided on 29.08.2011)

BALARAM BEHERA …… Appellant.

.Vrs.

RAMA CHANDRA KAR ……. Respondent.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 41, RULE 23-A & 24.

Where parties have led evidence in respect of issues involved in a suit and such evidence is available on record and is sufficient to enable the appellate Court to pronounce the judgment, the appellate Court even if resettles the issues, if necessary, shall finally determining the suit not withstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded upon some ground other than that on which the appellate Court proceeds.

In the present case the parties having led evidence on the contentious issues and this Court being of the opinion that there was sufficient evidence on record on which the learned lower appellate Court could have pronounced its judgment even after resettling the issues so as to finally determine the suit, has committed an error of law in remitting the matter back to the learned trial Court for trying the suit afresh by exercising power under Order 41, Rule 23-A C.P.C. – Held, the impugned judgment is set aside and the matter is sent back to the learned lower appellate Court to rehear and finally determine the suit on the evidence available on record.

(Para 11,12,13)

Case law Referred to:-

AIR 1982 Orissa 268 : (Bauri & Ors.-V- Natabar Swain & Ors.)

For Appellant - M/s. S.K.Mishra, J.Pradhan, P.Prusty, D.K.Pradhan & D.Samal.

For Respondent - M/s. A.P.Bose, P.S.Nayak, R.K.Mahanta, N.Hota & N.Pradhan.

M. M. DAS, J. This appeal has been filed under the provision of Order-XLIII Rule-1 Sub-rule-(u) of the Code of Civil Procedure against the judgment passed by the learned Civil Judge (Sr. Division), Kamakhyanagar

in R.F.A. No.1 of 2010 dated 24.02.2011. The learned Civil Judge (Sr. Division) by the impugned judgment set aside the judgment and decree passed by the learned trial court and remanded the suit to the trial court for fresh disposal in accordance with law with a further direction that the trial court shall frame the seven issues framed by the first appellate court in the impugned judgment as issue numbers 4 to 10 after issue no.3, which was framed by the trial court during trial of the suit. Both the parties were granted liberty to adduce further evidence with regard to the said issues, framed by the learned lower appellate court.

2. As it appears that C.S. No.42/2008/19/2009 was filed by the appellant as plaintiff against the respondent as defendant for grant of permanent injunction, the plaintiff's case in short was that the suit land belongs to the State. The forefathers of the plaintiff reclaimed and possessed it during their lifetime. After them, the plaintiff's father possessed the same with his only brother till his death in 2006. The suit land appertains to plot no.407 constituting an area of Ac. 0.124 decimal recorded as jungle and plot no.408 constituting an area of Ac. 0.326 decimal also recorded as jungle, in village Natakata, Bhuban, under Khata No.427. Plaintiff claimed that he being the legal heir of his father- Dhani Behera is continuing in possession over the same with his mother and his brother. This fact has been noted in the remarks column by the Settlement Authority in the record of rights. Basing on the above uninterrupted continuous possession from the time of his forefathers, the plaintiff claimed to have perfected his title by way of adverse possession over the disputed property and he also pleaded to have no cause of action against the State. It was alleged in the plaint that the defendant having no right, title and interest over the land in question threatened to dispossess the plaintiff by propagating publicly, to raise permanent construction over the same and for that purpose gathered materials. It was further alleged that even though an order of status quo was passed by the trial court, the defendant forcibly constructed a wall on suit plot no.408.

3. The defendant on appearing in the suit filed his written statement, inter alia, stating that plot nos.406 and 410 are also Government lands adjacent to the suit plots and there was a passage over plot nos.405,408 and 410 to the main road. The father of the plaintiff-Dhani Behera along with his brother Ghani Behera occupied the suit plot and constructed house over it. They used the passage for ingress and egress to their house. As the family members increased, the sons of the Dhani constructed their house over suit plot no.407 and Ghani @ Ghanashyam's son constructed their house over plot no.408 without enclosing their passage. The fact of the plaintiff acquiring

the entire suit plot was denied. But it was admitted that their names have been recorded in the remarks column in the record of rights, which according to the defendant was done by gaining over the Settlement Officials. The defendant further pleaded that all land owners have got easementary right over the passage over plot nos.405, 408 and 410. Plot No.409 is situated adjacent to plot no.408 and a portion of this land is purchased by defendant from its owner. With an intention to acquire the said plot, the plaintiff has raised the boundary dispute and except a passage over suit plot no.408, defendant has no claim over the rest of the land. The learned trial court framed as many as five issues which are as follows:-

1. Whether there is any cause of action to file this suit ?

2. Whether the state is the necessary party and without whose presence the suit is bad for non-joinder of parties ?

3. Whether the plaintiff is in possession over the suit land ?

4. Whether the plaintiff can claim injunction in presence of other co-shares ?

5. Whether the plaintiff can claim permanent injunction without praying for recovery of possession from the defendant ?

4. Deciding the said issues, the learned trial court found that there was a cause of action for filing of the suit. The suit is maintainable without the State as a party. There is no passage existing over plot no.408, the defendant has raised a wall over the said plot no.408 when the order of status quo was in force. The plaintiff has a right to claim injunction on behalf of the other co-sharers also and as per the decision in the case of ***Bauri and Others V. Natabar Swain and Others***, A.I.R. 1982 Orissa 268, the plaintiff having been deprived of his possession during the operation of the order of status quo a relief for recovery of possession can be granted even if such relief has not been asked for along with a relief for permanent injunction.

5. The learned trial court basing on the above findings decreed the suit by directing the defendant to deliver vacant possession of the suit land to the plaintiff within two months and to demolish the wall built on the suit land within the said period and clear the debris at his own cost failing which the plaintiff shall demolish the wall and the cost of such demolition shall be realizable by the plaintiff.

6. The defendant-respondent carried the matter to the first appellate court in the aforesaid RFA No.1 of 2010. The learned lower appellate court in the impugned judgment after noting the facts of the case and the issues framed by the learned trial court and the prayer made in the plaint, came to the conclusion that the issue no.5 as framed by the learned trial court is found to be wrongly framed. Similarly, issue no.4 as framed by the learned trial court is found not necessary, inasmuch as, there is no such bone of contention raised by either party. Accordingly issue nos.4 and 5 as framed by the learned lower court is to be struck out. The learned lower appellate court thereafter in the impugned judgment has stated that on careful consideration of the pleadings of both he parties, the following issues are required to be settled for complete and effective adjudication of the matters in controversy and framed the following issues:

(1) Whether the suit is maintainable?

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

(3) Whether the plaintiff is entitled for permanent injunction in respect of suit properties as shown in schedule to the plaint?

(4) Whether the plaintiff is entitled for mandatory injunction in respect of suit plot no.408 of Mouza Natakata with a direction to remove the wall erected during pendency of the suit against the defendant?

(5) Whether the plaintiff is entitled for recovery of possession in respect of suit plot no.408?

(6) Whether the defendant has got easementary right as of right over a portion of suit plot no.408 as shown in red colour in a separate map attached with the W.S.?

7. On framing the above issues, it set aside the judgment and decree of the trial court and remitted the matter back for fresh adjudication, as already stated above. Being aggrieved, the plaintiff-appellant has approached this Court in the present appeal.

8. Mr. Mishra, learned counsel for the appellant submitted that the learned lower appellate court has completely failed to note the provision of Order-XLI, Rule-24 of the Code of Civil Procedure and though noted in the impugned judgment that the appellate court should, as far as possible, decide on all issues to avoid piece meal trial, protracted litigation and

repeated appeals in the same suit, has committed an error of law in remitting the matter afresh to the learned trial court for a de novo trial.

9. Mr. Bose, learned counsel for the respondent, on the other hand, contended that the learned trial court has to frame specific issues, which were raised in the suit and was noted by the learned lower appellate court, who on examining the pleadings of the parties, framed the real issues to be tried in the suit. Therefore, in support of the impugned judgment, he argued that this Court should not interfere with the said judgment as there is no illegality on the part of the learned lower appellate court in remanding the suit to the learned trial court for fresh adjudication.

10. This Court on analyzing the facts of the case as per the pleadings of the parties finds that originally the suit was filed for a relief of permanent injunction, which was prohibitory in nature. But subsequently, on account of the alleged violation of the order of status quo and allegation of raising of a wall over Plot no.408 by violating the said order of status quo by the defendant, the plaintiff prayed for amendment of the plaint by introducing a relief for mandatory injunction seeking removal of the wall constructed over the said plot and recovery of possession. The said amendment was allowed. Parties have led evidence in respect of their respective contention made in their pleadings.

11. It is a well settled proposition of law that as per the provision of Rule-24 of Order-XLI where parties have led evidence in respect of issues involved in a suit and such evidence is available on record and is sufficient to enable the appellate court to pronounce the judgment, the appellate court even if resettles the issues, if necessary, shall finally determine the suit notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded upon some ground other than that on which the appellate court proceeds.

12. In the instant case, as stated above, the parties having led evidence on the contentious issues, this Court being of the opinion that there was sufficient evidence on record on which the learned lower appellate court could have pronounced its judgment even after resettling the issues so as to finally determine the suit, has committed an error of law in remitting the matter back to the learned trial court for trying the suit afresh by exercising power under Order-XLI, Rule-23-A, C.P.C.

13. Hence, this Court is of the view that the impugned judgment passed by the learned lower appellate court cannot be sustained. The same is

accordingly set aside and the matter is sent back to the learned lower appellate court to rehear RFA No.1 of 2010 afresh and finally determine the suit on the evidence and materials available on record with liberty to reframe the issues, if necessary. The appeal shall be disposed of within a period of six months from the date of communication of this order by giving opportunity of hearing to both the parties.

14. The S.A.O. is accordingly allowed, but in the circumstances without cost.

Appeal allowed.

2011 (II) ILR- CUT- 650

R.N.BISWAL, J.

W.P.(C) NO.3898 OF 2009 (Decided on 26.07.2011)

RABINDRANATH SAMAL …..…Petitioner.

.Vrs.

MEMBER CO-OPERATIVE TRIBUNAL & ORS. ……Opp.Parties.

ORISSA CO-OPERATIVE SOCIETIES ACT, 1962 (ACT NO.2 OF 1963) – S.28(3)(e).

Decree against petitioner for Rs.1,74,166/- Non-payment of dues despite notice – Petitioner filed nomination for the office of president of the committee of Areikana Service Co-operative Society which was fixed to 27.11.2007 – He paid a sum of Rs.7,000/- on 22.10.2007 and Rs.4,500/- on 26.11.2007 perhaps to be eligible to file nomination – He entered in to an agreement with Central Co-operative Bank, Cuttack under the OTS Scheme on 13.12.2007 much after filing of nomination – Held, the petitioner was a defaulter U/s. 28 (3) (e) of the Act – Subsequent agreement between the bank and the petitioner under the OTS Scheme can not waive the default of the petitioner.

(Para 7)

For Petitioner - M/s. Biswanath Dash, Mr. S.Ratha.
For Opp.Party - M/s. N.R.Samal (O.P.4)
M/s. P.C.A. Biswal, B.P.Das (O.P.3)
M/s. Sarat Ch. Panda, M.K.Mazumdar, R,Das Nayak, Ch. A.K.Das, G.C.Nath, P.K.Nayak & S.Mohanty (O.Ps.5,6 & 7)
M/s. Biplab K.Dash, J.Sahoo, S.R.Subudhi, B.M.Mohapatra,B.K.Das, J.P.Rath & B.K.Mohanty (O.P.2)

R.N.BISWAL,J. The sole question that arises for consideration is whether the petitioner is a defaulter in terms of Clause (e),Sub-section(3) of Section 28 of the Orissa Co-operative Societies Act (hereinafter referred as 'Act') so as to be ineligible to contest for the office of President of the Committee of Areikana Service Co-Operative Society Ltd ,Areikana under Jajpur district, (hereinafter referred as 'Society').

2. Petitioner, opp.party no.2 and some others contested for the office of member of Committee of the Society in the election held on 4.11.2007.

Petitioner and opp.party no.2 were elected as members of Committee of the Society. The Election Officer issued programme for election to the office of President of the Committee and as per the programme, 27.11.2007 was fixed for filing of nomination by the intending candidates from amongst the members of the Committee .The petitioner and opp.partyno.2 alone filed nomination for the office of President of the Committee. The election was held on 28.11.2007 and the petitioner having secured highest number of votes was declared to be the president of the committee. It is alleged that during scrutiny of nominations opp.partyno.2 challenged the candidature of the petitioner on the ground that he was a defaulter in terms of Clause (e)sub-Section (3) of Section 28 of the Act, but, the Election Officer did not pay any heed to it and allowed the petitioner to contest the election. So opp.party no.2 filed Election Dispute Case No.55 of 2007 under Section 67-B of the Act before learned Member, Co-operative Tribunbal, Orissa, Bhubaneswar challenging the election of the petitioner. As per the case of the opp.party no.2 before the Member Co-operative Tribunal, Orissa, Bhubaneswar, petitioner availed Cash Credit loan of Rs.40,000/- on 31.1.1996 from Badachana Branch of Cuttack Central Co-operative Bank Ltd, Cuttack. As he failed to repay the dues in spite of several notices, Dispute case no.259 of 2001 was instituted against him before the competent authority and a decree was passed for Rs.1,74,166/- on 4.7.2007. He did not clear up the dues till 26.11.2007 and thereafter. According to opp.party no.2, the petitioner was not eligible to contest for the office of member or President of the Committee of the society. So, he filed the aforesaid Election Dispute with prayer to declare the election of the petitioner as member and President of the Committee of the Society to be void and to declare him (opp.party no.2) as the elected president of the said committee.

3. The petitioner in his written statement before learned Member, Co-operative Tribunal inter alia contended that the management of Cuttack Central Co-operative Bank Ltd offered him to avail the benefit under One Time Settlement Scheme and accordingly, he availed it. He entered into an agreement with the said bank as per the Scheme on 13.12.2007. Once the One Time Settlement Scheme was accepted, all the past defaults are waived. He paid a sum of Rs.7,000/- on 22.10.2007 and Rs.4500/- on 26.11.2007. So, he prayed to dismiss the Election Dispute.

4. On the basis of pleadings of the parties, learned Member Co-operative Tribunal framed four issues. To establish his case. Plaintiff-opp.party no.2 examined two witnesses and the Defendant-petitioner also examined same number of witness. After assessing the evidence on

record, learned Member, Co-operative Tribunal held that Ext.7 obtained under the R.T.I. Act proved that the bank in their letter dated 18.2.1998 demanded payment of loan amount of Rs.40,000/- from the petitioner-defendant. Admittedly, he did not pay the same, let alone, within three months. The O.T.S. Scheme cannot erase the past default and accordingly allowed the Election Dispute, declared the election of the petitioner-defendant as void and further declared the plaintiff-opp.partyno.2 as the duly elected President of the Committee vide judgment and order dated 7.5.2009. Being aggrieved with the said judgment and order, defendant-petitioner preferred the present writ petition.

5. Learned counsel appearing for the petitioner submits that once the parties entered into a fresh agreement under the O.T.S. Scheme, even if the petitioner did not pay the dues of the bank despite notice, he cannot be considered as defaulter. So, the finding of the learned Member, Co-operative Tribunal is bad in law.

6. On the other hand, learned counsel appearing for opp.party no.2 contends that since the petitioner failed to pay the dues within three months of the notice under Annedxure-7 and thereafter, he became a defaulter in terms of the provision contained under Clause(e)Sub-section(3)of Section 28 of the Act. As he could not repay the dues and the loan became a NPA, offer was made to him to avail the benefit under the O.T.S.Scheme. Only because he paid Rs.7000/- in one occasion and Rs.4,500/- in another occasion, his earlier default cannot be waived. So the learned Member, Co-operative Tribunal rightly allowed the Election Dispute.

Clause (e), Sub-section-(3) of Section 28 of the Act reads as follows:

> "(3)No individual shall, whether by himself or as a representative of the Society, be eligible for being chosen or for continuing as a member or the President or as the Vice-President, if any of the Committee of a Society, if he
>
> Xx xx xx xx
> Xx xx xx xx
> Xx xx xx xx
>
> (e) has failed to pay any amount due, whether in cash or in kind, to the Society; its Financing Bank, or any other Society, on account of any loan or otherwise within three months from the date of notice by the Society or the Financing Bank concerned for payment of such dues;

> Provided that nothing in this clause shall debar any such person from being chosen as member or President if he makes payment of the dues before the date of filing his nomination at an election of any Society."

7. In the present case, admittedly, a sum of Rs.1,74,166/- was decreed against the petitioner by the competent authority on 4.7.2007. It is also an admitted fact that he did not repay the same despite notice under Annexure-7 dated 10.3.2009 issued to him. As found from Ext.E, the agreement was entered into between the petitioner and the Central Co-operative Bank, Cuttack on 13.12.2007 under the OTS scheme. As per the agreement, he has to pay eleven instalments at the rate of Rs.2800/- per month starting from 15.1.2008 to 15.11.2008 and another instalment of Rs.2,867/- on 15.12.2008. He paid a sum of Rs.7000/- on 22.10.2007 and Rs.4500/- on 26.11.2007. The date of filing of the nomination for the office of President of the Committee was fixed on 27.11.2007, perhaps to be eligible to file the nomination, he paid the aforesaid amount in two occasions, but as stated earlier the agreement between the petitioner and the Central Co-operative Bank, Cuttack under the OTS scheme was entered into on 13.12.2007-much after the filing of the nomination. So, on the date of filing of the nomination for election to the office of President of the committee, the petitioner was defaulter in terms of Clause(e), Sub-section (3) of Section 28 of the Act. The subsequent agreement between the petitioner and the Central Co-operative Bank, Cuttack can not waive the default of the petitioner.

8. Accordingly the writ petition stands dismissed being devoid of merit. In view of dismissal of the writ petition, Misc. Case No.3110 of 2009 stands dismissed and the interim order is vacated.

Writ petition dismissed.

2011 (II) ILR- CUT- 654

INDRAJIT MAHANTY, J.

CRLMC. NO.2680 OF 2010 (Decided on 30.08.2011)

AKSHAYA KUMAR PATRA ……Petitioner.

.Vrs.

STATE OF ORISSA …….Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.311.

Law does not authorize either the prosecution, the informant / complainant or the Court to add to the list of witnesses as and when they so like in the absence of a convincing reason to invoke the provision in Section 311 of the Code – Whenever an application is made U/s.311 Cr.P.C., the same must be supported by the materials available on record qualifying the requirement of Section 311 Cr.P.C. i.e. "his evidence appears to it to be essential to the just decision of the Case".

In the present case both prosecution and defence have concluded their evidence and after arguments were over from both sides this case was posted for judgment and this application was filed thereafter, even after three adjournments – Held, when there is no positive circumstance available on the trial court's record to indicate that Palu @ Ajaya Kumar Barik is a witness to the occurrence the application U/s. 311 filed by the prosecution ought to have been rejected by the Courts below.

(Para 14)

Case laws Referred to:-

1.(2009) Vol-42 OCR 47 : (Jatin Mohpatra @ Mallick-V-State of Orissa)
2.1999 (Vol2) SCC(Crl.)1062 : (Rajendra Prasad-V-Narcotic Sale)
3.(2004) 28 OCR 813 : (P.Chhaganlal Daga-V-M.Sanjay Shaw)
4.2004 SCC (Crl.)999 : (Zahira Habibulla H.Sheikh-V-State of Gujurat)
5.Vol-32(1990) OJD,11(Crl.) : (Gadadhar Mohapatra-V-State of Orissa)
6.(2004)28 OCR-773 : (Karam Chand Mukhi & Ors.-V-Santosh Pradhan & Anr.)

For Petitioner - M/s. S.K.Sahoo, G.Sahoo, B.Dash, M.K.Mallik, D.P.Pattnaik, B.P.Mohanty & A.Mohanty.
For Opp.Party - Addl. Government Advocate

I. MAHANTY, J. This application under Section-482 Cr.P.C. has been filed by the petitioner-accused seeking to challenge the order dated 13.09.2010 passed by the learned Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.33 of 2006 arising out of Athagarh P.S. Case No.49 of 2000, whereby, an application under Section 311 Cr.P.C. to summon one Palu @ Ajaya Kumar Barik, the younger brother of deceased Kalu @ Bijay Kumar Barik filed on behalf of the prosecution, came to be allowed.

2. Mr. Sangam Kumar Sahoo, learned counsel for the petitioner has sought to assail the impugned order dated 13.09.2010, on the ground that the impugned order suffers from error of record and non-application of judicial mind to the ratio of various cited decisions, in the context of the facts and circumstances of the present case and, therefore, is liable to be set aside.

Mr. Sahoo, submitted that the petitioner is facing trial for the alleged offence under Section 302/34 I.P.C. in the court of Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.33 of 2006. During trial, the prosecution has examined 12 witnesses and the defence has examined one witness. After conclusion of evidence from both the sides, arguments were heard and case was posted for judgment on 13.08.2010. On that day i.e. 13.08.2010 the Additional Public Prosecutor prayed for time to argue the case and the case was adjourned to 18.08.2010. Thereafter it was adjourned again to 23.8.2010. On 23.08.2010, a petition under Section 311 Cr.P.C. was filed by the prosecution seeking to summon one Palu @ Ajay Kumar Barik, to record his evidence. The accused-petitioner filed their objections to such petition. The trial court allowed the petition under Section 311 Cr.P.C. vide order dated 13.09.2010 which is the subject matter of challenge in the present petition.

Mr. Sahoo strenuously urged that neither in course of investigation before the investigating agency nor during trial before the trial court, any material evidence has been brought on record to indicate that, Palu @ Ajaya Kumar Barik was ever a witness to the occurrence or that, he had ever disclosed any relevant facts before any witness. Hence, in the absence of any evidence obtained either in course of investigation or in course of the trial indicating as to whether the said Palu @ Ajaya Kumar Barik had any relevant knowledge, either of the occurrence or of any fact connected thereto, the application filed by the prosecution under Section 311 Cr.P.C. and the impugned order dated 13.08.2010 allowing that application, at such a belated stage, when arguments were already made, highly prejudicial to

the interest of the defence. He further submitted that the trial court in the impugned order observed that, it is best known to the erring investigating officer as to why he neither examined a material witnesses such as Palu @ Ajaya Kumar Barik under Section 161 Cr.P.C., nor cited him as a charge-sheeted witness in this case, whose evidence was essential for the just decision of the case. None of the witnesses have stated anything before the investigating officer in course of investigation nor in course of trial before the trial court as to whether Palu @ Ajaya Kumar Barik was ever a witness or that he had ever disclosed anything before them about possessing any knowledge regarding the alleged occurrence. Hence Mr. Sahoo, submitted that without such evidence, any direction to permit the prosecution to examine Palu @ Ajaya Kumar Barik is clearly an attempt to allow the prosecution as a second innings at trying to lead evidence in support of their case, that too at the fag end of the trial of the case. He further submitted that at this stage of the case, the prosecution as well as the defence have already revealed their respective stands during evidence in course of the trial and permitting the prosecution another opportunity to introduce a new witness at such stage, is wholly unknown to law as well as highly prejudicial to the defence of the accused.

3. The case of the prosecution is that Urmila Pradhan (P.W.2) had adopted Bijayalaxmi as her daughter about 25 years ago and had arranged her marriage with one Biswanath Barik. Bijayalaxmi had given birth two sons, namely, Kalu @ Bijaya Kumar Barik (deceased) and Palu @ Ajaya Kumar Barik (witness sought to be summoned). Though Bijayalaxmi was married and staying in her matrimonial house, her deceased son Kalu @ Bijaya Kumar Barik was staying in the house of his maternal grand mother,namely, Urmila Pradhan (P.W.2) at Deulasahi. It is the further case of the prosecution that Urmila Pradhan had some land situated in the village-Machhia and she had given the said land to Laxman Patra (father of the present petitioner) for carrying out agricultural operation. Laxman Patra's grand son, namely, Abhaya Patra (absconding accused) was staying in the house of Urmila Pradhan since his childhood but since he had became wayward, Urmila Pradhan was very much dissatisfied with him. Urmila Pradhan wanted to sell the land which was being cultivated by Laxman Patra in order to obtain funds to purchase a vehicle for the deceased (Kalu @ Bijaya Kumar Barik), for which reason, she had approached Laxman Patra to return those lands in order to enable her to sell the same to another person. The petitioner and the absconding accused-Abhaya Patra protested to the said proposal and wanted to purchase the same land and since they could not arrange the necessary funds to purchase the land from Urmila Pradhan, Urmila Pradhan was looking for some other purchasers and, therefore, the petitioner-

Akashaya Kumar Patra and the absconding accused, Abhaya Kumar Patra were dissatisfied with Urmila Pradhan over this issue.

4. It is the further case of the prosecution that on the date of occurrence i.e. 21.4.2000 while Urmila Pradhan was not in her house, the petitioner Akshaya Kumar Patra and the absconding accused-Abhaya Kumar Patra came and called the deceased, Kalu @ Bijaya Kumar Barik and took him on a scooter but the deceased never returned to his house on that day. On the following day Kalu @ Bijaya Kumar Barik was found in an unconscious state and in severely injured condition on the riverbed of river Mahanadi near Pateni Gaon and was shifted to S.C.B. Medical College & Hospital, Cuttack for treatment, where he ultimately succumbed to his injuries.

5. Mr Sahoo, learned counsel for the petitioner filed a memo in Court enclosing the deposition of all the prosecution witnesses as well as the copies of the statement recorded under Section-161 Cr.P.C. by the Investigating Officer along with the charge sheet submitted in the present case.

Mr. Sahoo further contended that on a reading of paragraph-3 of the impugned order, it is noted therein by the learned Additional Sessions Judge (F.T.C.), Athagarh, that P.W.2, Urmila Pradhan, P.W.8, Bijayalaxmi Barik (mother of the deceased), one Adikanda Pradhan, husband of P.W.2 and Biswanath Barik (father of the deceased) had stated during investigation about the presence of the deceased and the summoned witness, i.e. Palu @ Ajaya Kumar Barik in the house of Urmila Pradhan on 21.4.2000. It is further noted that in the Court Urmila Pradhan (P.W.2) and Bijayalaxmi barik (P.W.8) have also stated about the presence of the deceased and summoned witness Palu @ Ajaya Kumar Barik in the house. The trial court has further noted that P.W.2, Urmila Pradhan had stated that when she returned home Palu @ Ajaya Barik disclosed that the petitioner and the absconding accused-Abhaya Patra had taken the deceased in their scooter to inspect a vehicle. Therefore, it is clear therefrom that the trial court acted on a presumption that the summoned witness Palu @ Ajaya Kumar Barik could throw light upon the last scene theory of the deceased being in the company of the petitioner and absconding accused Abahaya Kumar Patra, for which reason the petition came to be allowed.

6. Learned counsel for the petitioner vehemently submitted that neither of the statement recorded under Section 161 Cr.P.C. nor any deposition in Court supported the findings of the learned trial court as indicated hereinabove.

7. Mr. Kishore Kumar Mishra, the learned Additional Government Advocate on behalf of the State vehemently submitted that the findings of the trial court regarding the evidence of P.W.2, Urmila Pradhan alone is sufficient to justify the impugned order. Therefore, he placed reliance on the evidence of P.W.2, Urmila Pradhan and submitted that the statements of P.W.2 are adequate for the purpose of allowing the prosecution's application under Section 311 Cr.P.C. He further assertted that the allegation that the petition under Section 311 Cr.P.c. has been filed at a belated stage, is of no consequence since such power is vested in the trial court to exercise the same at "any stage" of the trial and, therefore, objection raised by the petitioner's counsel regarding the stage at which the petition is filed, ought not to be entertained. Apart from the above, the learned counsel for the State placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Jatin Mohapatra @ Mallick v. State of Orissa,** (2009), Vol-42 OCR, 47 and submitted that it was the obligation of the trial court to ascertain the truth and, therefore, in course of the trial, the trial court having concluded that the summoned witness Palu @ Ajaya Kumar Barik's presence at the time of P.W.2 came home is established in course of her evidence in court, no challenge to the order summoning such witness who may throw light on the truth of the allegation ought to be entertainable.

8. Learned counsel for the petitioner, on the other hand, submitted that the reliance placed by the trial Court in the case of **Jatin Mohapatra @ Mallick (Supra)** was not applicable to the present case, inasmuch as, in paragraph-18 of the said judgment it is held that though P.W.4 who is a witness to the occurrence and had lodged the F.I.R. but not shown as a charge-sheeted witness, he could be examined by the court. In the present case, Palu @ Ajaya Kumar Barik was not a witness to the occurrence nor had lodged the F.I.R. and, therefore, the present case is clearly distinguishable from the case relied upon and referred to by the trial court.

Insofar as the ratio of the decision in the case of **Rajendra Prasad v. Narcotic Sale,** 1999 (vol.2) S.C.C.(Criminal), 1062 is concerned, learned counsel for the petitioner asserted that the same is not applicable to the present case as the said case has been dealt with the question of "re-summoning" of a particular witness i.e. P.W.21. The present case is not a case of re-summoning of witness already examined.

Insofar as the ratio of the decision in the case of **P.Chhaganlal Daga v. M.Sanjay Shaw**, (2004) 28 O.C.R. 813, is concerned, learned counsel for the petitioner submitted that the said judgment was in the

context of application seeking recalling of the complainant to prove the postal receipt in a case arising out of under Section 138 N.I. Act but the fact of the present case is clearly distinct and have no bearing to the said judgment.

Insofar as the ratio of the decision in the case of **Zahira Habibulla H. Sheikh v. State of Gujurat,** 2004 S.C.C. (Criminal) 999 is concerned, learned counsel for the petitioner asserted that the said judgment is also not applicable to the present case as the summoned witness Palu @ Ajaya Kumar Barik is neither a material witness for the prosecution nor has been proved so during the investigation or trial.

9. He also submitted that Palu @ Ajaya Kumar Barik has never been examined during investigation nor mentioned in the charge sheet as a witness and more importantly, the defence had already examined one witness to negative the last scene theory propounded by the prosecution and the argument from the side of the defence had already been concluded and the case was posted for judgment, whereafter it was reopened for argument on the prayer of the Additional Public Prosecutor. At such a stage, the Additional Public Prosecutor filed an application under Section 311 Cr.P.C. to fill up the lacuna of the prosecution case and also to bring rebuttal evidence on record. Hence it is submitted that the petitioner would be seriously prejudiced as he has placed his entire defence before the trial court and at the fag end of the trial, if such a petition is allowed, then not only it would prolong the conclusion of the trial but also the very purpose of the fairness of the criminal trial would be frustrated.

Learned counsel for the petitioner submitted that it is the settled principle of law that ordinarily when a witness, who supposed to be a vital one and yet has not examined by the police at all, although he was all along available for such purpose, his evidence has to be considered with greatest caution and it would not safe to be relied upon as the sole basis of conviction. For such purpose, reliance is placed on a judgment of this Court in the case of **Gadadhar Mohapatra v. State of Orissa** vol-32 (1990) O.J.D. 11 (Criminal).

10. In the light of the contentions advanced by the learned counsel for the rival parties hereinabove, it is now become imperative to consider to the findings of the learned trial court, particularly in paragraph-3 thereof. Insofar as the materials collected during investigation is concerned, the trial court has noted that P.W.2, Urmila Pradhan, P.W.8, Bijayalaxmi Barik (mother of

the deceased), Adikanda Pradhan, husband of P.W.2 and Biswanath Barik (father of the deceased) have stated about the presence of deceased-Bijaya Kumar Barik and the proposed witness Palu @ Ajaya Kumar Barik in the house of Urmila Pradhan(P.W.2) on 21.4.2000.

On perusal of the statement recorded under Section 161 Cr.P.C. of the aforesaid witnesses, the relevant portions are quoted hereinbelow:

> "**P.W.2(Urmila Pradhan**):- on her return from village Machhia, she enquired from his husband-Adikanda Pradhan the whereabouts of the deceased-Kalu @ Bijaya Kumar Barik and had been informed by him that Kalu & Palu, the two brothers were sleeping inside the house on 21.4.2000 but from 11.00 A.M. to 12 noon, Kalu was absent from her house."
>
> **"Adikanda Pradhan**:- On 21.4.2000 he along with Kalu and Palu were present in the house. He was sleeping earlier after taking his meal and when he awakens came to know from Palu that Kalu was leaving the house from 11 A.M."
>
> Bijaya Laxmi Barik:- On 21.4.2000 when her husband came to Deulasahi to see his two sons, he came to know that Kalu @ Bijaya Kumar Barik was not present there.
>
> Biswanath Barik : On 21.4.2000 when he came to Deulasahi to see his sons, he found that his father-in-law and Palu @ Ajaya Kumar Barik was present there.

11. It is the further finding of the trial court noted in paragraph-3 that in the court P.W.2 and P.W.8 have also stated about the presence of the deceased and Palu @ Ajaya Kumar Barik in the house when P.W.2 left to village Machhia. In the deposition of Urmila Pradhan (P.W.2), she has stated that on her return to the house, Ajaya Barik (summoned witness) disclosed that the accused persons, namely, Akshaya Kumar Patra and Abhaya Kumar Patra had taken the deceased on their scooter to inspect a vehicle. Insofar as Urmila Pradhan (P.W.2) is concerned, in her deposition in court, she has stated as follows:

> "On my enquiry Palu informed me that accused Akshaya Patra and the other accused (absconding) Abhaya Patra had taken Kalu in a scooter to inspect a vehicle"

Insofar as Bijayalaxmi Barik (P.W.8) is concerned, in her deposition she has stated as follows:

"Prior to 4 days of the death of Bijaya my younger son Ajaya was also staying with him in the house of my mother P.W.2."

12. Insofar as the statement under Section 161 Cr.P.C. is concerned, the investigating officer noted that P.W.2, Urmila Pradhan on her return from village Machhia enquired from his husband- Adikanda Pradhan the whereabouts of the deceased-Kalu @ Bijaya Kumar Barik and had been informed by him that Kalu & Palu, the two brothers were sleeping inside the house on 21.4.2000 but from 11.00 A.M. to 12 noon, Kalu was absent from his house. In the charge sheet Adikanda Pradhan, husband of Urmila Pradhan, had been cited as a charge-sheeted witness but had not been examined by the prosecution in course of trial. Similarly although Biswanath Barik (father of the deceased-Kalu @ Bijaya Kumar Barik) had also been cited as a charge-sheeted witness, as a witness to the occurrence but had also not beenexamined by the prosecution in course of the trial. Therefore, no reliance on the 161 statement of Biswanath Barik or Adikanda Pradhan could have been relied upon or never been examined by the trial court to reach his conclusion. Insofar as P.W.8, Bijayalaxmi Barik is concerned, the findings of the trial court that P.W.8, Bijayalaxmi Barik (mother of the deceased) had stated about the presence of the deceased and Ajaya Kumar Barik (summoned witness) is not borne out from records and appears to be an error of record. Therefore, on perusal of the statement recorded under Section 161 Cr.P.C., as well as the evidence recorded in court, except-P.W.2-Urmila Pradhan, no one has spoken a word about the presence of Palu @ Ajaya Kumar Barik in the house when the accused persons are supposed to have come and taken the deceased Kalu @ Bijaya Kumar Barik with them. Further in the face of this statement and when verified with the statement of P.W.2 recorded under Section 161 Cr.P.C., where she has not uttered a single word regarding the presence of Palu @ Ajaya Kumar Barik and had instead stated that she had queried her husband, Adikanda Pradhan regarding the whereabout of Palu @ Bijaya Kumar Barik and later on in the evening learnt from other witnesses that, Kalu had been last seen in the company of the accused-petitioner as well as the absconding accused. There is no whisper about the summoned witness-Palu @ Ajaya Kumar Barik being present in the house at the time when the accused came to meet the deceased or informed any witness regarding any knowledge of any occurrence.

In other words, this is a clear attempt made by the prosecution to try and introduce a new witness into the proceeding, a witness about whom

there is no reference whatsoever by any of the prosecution witnesses, in course of their evidence in the trial.

13. At this juncture, it would be appropriate to take note of the judgment of Our High Court in the case of **Karam Chand Mukhi and others v. Santosh Pradhan and another,** (2004) 28 OCR-773. In the said judgment, Hon'ble Justice P.K.Tripathy (as His Lordship the then was) dealt with the similar circumstances which arises for consideration in the present case and held as follows:

> "13. The above position of law does not authorize either the prosecution, the informant/complainant or the Court to add to the list of witnesses as and when they like in the absence of a convincing reason to invoke the provision in Section 311 of the Code. Whether it is applied to be invoked by the prosecution, informant/complainant or the Courts suo motu, it must be supported by materials available on record to qualify to the term employed in Section 311 that "his evidence appears to it to be essential to the just decision of the case". Thus, this Court finds that contention of the learned Standing Counsel in seeking for invoking the provision in Section 311 by the Trial Court is not incorrect on principle. Beyond that there is a big vaccum in as much as no evidence or materials available in the Trial Court's record has been put forth before this Court to show or suggest that the examination of these three petitioners or any of them is necessary in the above context.
>
> 14. It is stated at the Bar that, Investigating Officer has already been examined. At the stage of examination of the Investigating Officer, if not earlier during examination of other prosecution witnesses, the prosecution should have brought out relevant evidence justifying examination of the petitioners as witnesses to the occurrence. If there is negligence or mischief by the Investigating Officer in omitting the names of the petitioners from the list of charge-sheet witnesses, then that should have been specifically put to him by the prosecution in the shape of leading questions, if permitted by the Trial Court, so as to provide circumstances for consideration of the Trial Court if such additional witnesses should be examined. As noted above, since nothing of that sort have been done either by the prosecution or the complainant and when there is no positive circumstances available to indicate that the three petitioners are eye-witnesses to the occurrence and willing to be examined as such, therefore, merely by filing statements of the

> petitioners in the shape of affidavits, they do not get the credential to be examined as additional witnesses. For the said reasons, this Court finds that the application of the petitioners was rightly rejected by the Courts below."

14. In the light of the circumstances that arises for consideration in the present case as noted in the aforementioned judgment held that law does not authorize either the prosecution, the informant/complainant or the Court to add to the list of witnesses as and when they so like in the absence of a convincing reason to invoke the provision in Section 311 of the Code. Whenever an application is made under Section 311 Cr.P.C., the same must be supported by the materials available on record qualifying the requirement of Section 311 Cr.P.C., i.e. "his evidence appears to it to be essential to the just decision of the case".

Thus, I am of the considered view that the contention of the learned counsel for the State seeking to justify the invocation of the provision of Section 311 Cr.P.C. by the trial court, cannot be held to be correct on principles of law. As noted hereinabove, no evidence or material is available on the trial court's record to show or suggest that the examination of Palu @ Ajaya Kumar Barik is necessary in the above context.

It is equally important to note herein that in the present case evidence on the side of the prosecution had been concluded, defence had also concluded their evidence, arguments from both the sides had also been concluded. It is at such a stage that the prosecution sought time to advance further arguments and it is only after three adjournments thereafter, that the present petition under Section 311 Cr.P.C. came to be filed. Clearly neither at the stage of examination of the Investigating Officer nor during the examination of any of the prosecution witnesses did the prosecution bring about any relevant evidence justifying the examination of Palu @ Ajaya Kumar Barik as a witness. As held in the case of **Karam Chand Mukhi and others** (supra), if it was the case of the prosecution that there is negligence or mischief by the Investigating Officer in omitting the name of Palu @ Ajaya Kumar Barik from the list of charge-sheeted witness, then such a question should have been specifically put to the Investigating Officer by the prosecution in the shape of leading questions, if permitted by the trial court, so as to provide circumstances for consideration of the trial court in the event any such additional evidence is sought to be examined. Admittedly, in the present case nothing has been done by the prosecution and, therefore, when there is no positive circumstances available to indicate that Palu @ Ajaya Kumar Barik is a witness to the occurrence (pre or post), this Court

finds that the application of the prosecution under Section 311 Cr.P.C. ought to have been rejected by the court below.

15. Accordingly, the present application under Section 482 Cr.P.C. is allowed and the order dated 13.09.2010 passed by the learned Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.33 of 2006 arising out of Athagarh P.S. Case No.49 of 2000 is set aside and the trial court is directed to conclude the hearing of the case at an early date.

Application allowed.

2011 (II) ILR- CUT- 665

ARUNA SURESH, J.

S.A. NO.271 OF 1994 (Decided on 20.05.2011)

JYOTIRMAY PANI …….. Appellant.

.Vrs.

STATE OF ORISSA & ORS. ……Respondents.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.68.

Proviso to Section 68 Evidence Act – When the execution of the gift deed was specifically denied, the document was required to be proved by examining an attesting witness – Such a denial could not be made by any person unless he had a right to succeed or any other right in the property. (Para-30)

For Appellant - Mr. B.Mishra, Sr. Advocate
For Respondents – Mr. D.N.Mohanty
Additional Standing Counsel

ARUNA SURESH, J. Appellant has preferred this appeal against the judgment dated 9.8.1994 and decree dated 23.8.1994 passed in T.A. No.4/93 by the First Appellate Court thereby confirming the judgment dated 6.11.1992 and decree dated 11.11.1992 of the Second Subordinate Judge, Cuttack.

2. Plaintiff (appellant herein) filed a suit through his natural mother, Jyostsnamayee Mohapatra against the State (respondents herein) i.e. defendant No.1 to 3 and his adoptive father Jogendranath Pani (defendant no.4) since deceased seeking following reliefs:

(a) that let it be declared that the deed of gift dated 18.2.1981 executed by defendant no.4 in favour of defendant no.2 in respect of schedule "A" of the property is fraudulent and illegal, null and void and to be set aside.

(b) that the possession of the suit property described in schedule "A" of the plaint be delivered to the plaintiff through the process of the Court.

(c) that let the cost of the suit be decreed against the defendants.

(d) that any other relief or reliefs which is deemed and proper be granted in favour of the plaintiff against the defendants.

3. Case of the plaintiff in brief is that he is the natural born son of Biranchi Narayan Mohapatra and Jyotsnamayee Mohapatra. Jyotsnamayee Mohapatra is the natural born daughter of Jogendranath Pani (defendant no.4). He was adopted by Jogendranath Pani. His adoptive father owned ancestral property No.132 Sabik Plot No.129 A0.14 decimal, Plot No.130 A0.07 decimal which was the residential house at District-Cuttack, P.S.-Mahanga, Mouza Jankoti, corresponding to Consolidation Khata No.412, Consolidation Plot No.129, A0.14 decimal; Plot No.130, A0.07 decimal. Plaintiff is legally entitled to get half share in the said properties as the family is ruled under the Mitakhyara Principle of Hindu Law.

4. In the garb of lease deed, a gift deed was executed on behest of Ashalata Das, sister-in-law of Jagannath Pani in favour of defendant no.1 to 3 for running a Homeopathic dispensary. Natural mother of the plaintiff later on came to know of the fact that instead of lease deed, a gift deed dated 18.2.1981 was executed by defendant no.4 when, she obtained a certified copy of the said document. Alleging that the gift deed dated 18.2.1981 is a sham and fraudulent document, the suit was filed.

5. Defendants no.1 to 3 contested the suit of the plaintiff and filed joint written statement. Defendants disputed adoption of the plaintiff by Jogendranath Pani. As per their averment, the gift deed was executed by Jogendranath Pani voluntarily and he put his signatures on the same after knowing its contents and the deed was got registered and was acted upon. It is also averred that Jogendranath Pani had permitted the defendants to run a Homeopathic dispensary in the suit property with effect from 1.1.1981 and the gift deed was executed by him subsequently after the permission was granted by the Government to receive donations for running a Homeopathic dispensary. Jogendranath Pani had none else in the family and therefore, he voluntarily gifted the suit property to the Government for public charitable purpose i.e. for running a Homeopathic dispensary. It was also averred that the suit was barred by period of limitation and the plaintiff had no cause of action to file the suit and also that the suit, as filed was not maintainable.

6. The donor (defendant no.4) was duly served with summons for settlement of issues but he did not care to appear and contest the suit. Hence, he was proceed ex parte by the trial court vide order dated

17.11.1986. He died on 11.5.1989 during the pendency of the suit and his name was deleted from the record vide order dated 19.11.1990.

7. Trial Court held that plaintiff had failed to prove himself to be the adopted son of defendant no.4 at the relevant point of time when the gift deed was executed and the suit was barred by law of limitation because existence of the gift deed was known to the plaintiff as Jyotsnamayee Mohapatra, mother guardian of the plaintiff had filed objection case No.2224/82 under the Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972 before the Consolidation Officer, claiming right, title and interest over the suit property, which was dismissed on 16.10.1982 and the present suit was filed on 29.9.1986 i.e. after expiry of 3 years of the dismissal of the said case. The trial court dismissed the suit of the plaintiff on merit as well, holding that plaintiff had not been able to prove any fraud, misrepresentation or any undue influence exercised by Ashalata on Jogendranath Pani to execute the gift deed (Ex.3). While dismissing the appeal, findings of the trial court were confirmed by the First Appellate Court.

8. Vide order dated 9.2.1995 grounds No.2, 3 and 4 of the appeal were considered as substantial question of law. They are:

> (i) Whether the court below acted illegally in not admitting the certified copy of the judgment passed in T.S. No.77/83 by way of additional evidence u/o.41 Rule 27 C.P.C. particularly when the decree of the said suit has been marked as Ext.1?
>
> (ii) Whether the gift deed dated 18.2.81 marked Ext.3 is valid since the entire homestead has been gifted away by the father without the consent of the plaintiff?
>
> (iii) Whether the suit is barred by limitation?

9. Subsequently, on an application filed by the appellant following additional substantial question of law was formulated on 27.8.2008.

> **"**As to whether on account of non-examination of attesting witness, the deed of gift can be used as evidence and basing upon the same the question of title can be decided.**"**

10. Mr. B. Mishra, learned senior counsel appearing for the plaintiff has submitted that the First Appellate Court committed an error in dismissing the application of the appellant filed under Order 41, Rule 27 of the Code of Civil Procedure (hereinafter referred as 'CPC') for permission to lead additional

evidence as appellant wanted to file certified copy of the judgment delivered in T.S. no.27 of 1983 whereby plaintiff was declared to be the legally adopted son of Jogendranath Pani and the decree sheet pertaining to the said case (Ext.1) had been already proved in evidence before the trial Court.

11. Mr. D.N. Mohanty, Addl. Standing Counsel for the defendants has submitted that the First Appellate Court was right in dismissing the application as plaintiff, who was in the knowledge and possession of the document, withheld the same for the best reasons known to him and he could not be allowed to fill in the lacuna in the appeal by filing certified copy of the judgment passed in the adoption case.

12. Order 41, Rule 27 CPC postulates that a party who, for the reasons mentioned in the application, was unable to produce the evidence in the trial Court, should be enabled to produce the same in the appellate Court. However, it lays down the conditions to be fulfilled for entertaining an application for production of additional evidence in the appeal. They are :-

> 1. the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
>
> 2. the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed; or
>
> 3. the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. The appellate Court may allow such evidence or document to be produced, or witness to be examined.

13. Thus, it is clear that it is but proper for the Court that before entertaining those documents, the party or parties must satisfy that they could not place those documents at the appropriate stage, namely, before the trial Court and there must be a bonafide effort in not filing those documents before the trial Court. It is settled law that unless there is acceptable reason for not placing the required documents at the appropriate stage, the parties cannot be permitted to place the documents as the additional evidence at the appellate stage.

14. It is not the case of the plaintiff that the trial Court refused to admit evidence which ought to have been admitted. The appellate Court did not

require any document to be produced or witness to be examined to enable it to pronounce the judgment. Therefore, plaintiff was required to fulfill the requirement of Rule 27 (1) (aa) of the CPC. Plaintiff was required to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree, appealed against was passed. The appellate Court dismissed the application of the plaintiff with following observations:

> 11. "A party can not adduce additional evidence as a matter of right. The scope of Order 41, Rule 27 C.P.C. is limited according to the Orissa amendment. A document can be admitted, if the lower court has refused to admit, which it ought to have been admitted. The other ground is that the party seeking additional evidence has to satisfy the appellate court that even applying its due diligence, the existence of the document was not within his knowledge. Thirdly, when the appellate court requires a documents to be produced or any witness to be examined to enable it to pronounce a judgment additional evidence should be accepted. In the present case, the document filed is the certified copy of the Judgment of Second Munsif, Cuttack in T.S. No.77/83. This certified copy was received by the Plaintiff on 28.3.84, which is much prior to the filing of the suit, as the suit was filed on 29.9.86. So it can not be said that the document was not in existence and appellant could not procure it in spite of his best effort. Therefore, the petition Under Order-41, Rule-27 C.P.C. is hereby rejected."

15. The document sought to be filed is the certified copy of the judgment dated 21.12.1983 of Second Munsif, Cuttack passed in T.S. No.77 of 1983. Plaintiff had filed the present suit being T.S. No.150 of 1986 on 29.9.1986. Plaintiff had filed certified copy of the decree sheet (Ext.1) of the said suit which was obtained on 18.2.1984. The document sought to be produced was applied for by the plaintiff on 27.1.1984. The certified copy of the judgment was ready for deliver on 18.2.1984 i.e. the date when the certified copy of the decree sheet was obtained. However, plaintiff did not collect the copy of the judgment till 28.3.1984, though he collected the certified copy of the decree sheet. Thus, it is clear that at the time when the suit was filed, plaintiff was in possession of the document sought to be filed as additional evidence. Plaintiff continued to retain possession of the document and did not file the same in the trial Court for the best reasons known to him till the judgment was delivered on 6.11.1992. In other words, plaintiff was having

knowledge and possession of the document for eight years and waited for the suit to be decided.

16. Things did not end here. Appeal was filed before the First Appellate Court on 7.1.1993. Proceedings in the said appeal continued for over a period of one and half years before application under Order 41 Rule 27 CPC was filed by the plaintiff before the First Appellate Court on 5.8.1994. It is pertinent that on 5.8.1994, the appellate Court had heard final arguments on the appeal when the application was presented. The Court reserved the case for pronouncement of judgment and listed it for 9.8.1994. Objections to the application were filed by the defendants on 8.8.1994 i.e. a day before pronouncement of the judgment. The document sought to be produced in additional evidence was annexed to the application. Plaintiff having full knowledge and possession of the document chose not to file the document in the trial Court to support his case. Additional evidence could not have been permitted to enable the plaintiff to make out a fresh case or fill in the lacuna. The appellate Court, therefore, rightly did not admit the document nor allowed production of additional evidence. Plaintiff had ample opportunity to give evidence in the lower court but, elected not to do so and based his case on the evidence as it stood, could not have been allowed to give evidence which he could have given below. The application was nothing but an after-thought. It is pertinent that plaintiff did not file the application simultaneously with, or immediately after the filing of the appeal. He filed this application only on the date when final arguments were heard by the appellate Court and the matter was reserved for judgment. Plaintiff failed to give any satisfactory explanation as to why he did not file the document at the relevant stage. He failed to show that despite exercise of due diligence, he could not produce the document at the time when the decree appealed against was passed.

17. To conclude, the appellate Court rightly appreciated the law governing under Order 41, Rule 27 CPC while dismissing the application of the plaintiff. I find no illegality in the observations of the appellate Court which may warrant any interference by this Court.

18. Learned senior counsel for the plaintiff has submitted that suit of the plaintiff is within the period of limitation as his mother guardian acquired the knowledge of the gift deed (Ext.3) only after three years of its execution, on enquiry made from the Registrar and obtained certified copy of the said gift deed and the suit was filed within three years of the said knowledge.

19. I find no force in the aforesaid submissions. The trial Court while concluding that the suit was barred by period of limitation had considered admission of the plaintiff's natural mother guardian, P.W.1 that she had filed an objection case no.2224 of 1982 under the Orissa Consolidation of Holdings and Prevention of Fragmentation of land Act, 1972 before the Consolidation Officer Camp at Srikrishnapur claiming right, title and interest over the suit property. The said objection petition was dismissed vide order dated 16.10.1982 holding that her claim for right, title and interest in the suit property was not maintainable. Therefore, she had knowledge of the impugned gift deed when she filed the objection case in the year 1982. Since she filed the present suit in 1986 i.e. after the expiry of period of four years of the dismissal of the objection petition, the First Appellate Court rightly concurred with the finding of the trial Court that the suit was barred by period of limitation. It being fact finding, no interference is called for nor this Court is competent to interfere in the fact findings of the Courts below based on an earlier litigation, for construing the date of knowledge of the plaintiff about the existence of the gift deed. Period of limitation has to be calculated from the dates available on the record. As plaintiff had the knowledge of existence of the gift deed since after its execution or since before the filing of the objection petition in the year 1982, the suit of the plaintiff is patently barred by period of limitation.

20. In the appeal, validity of the gift deed is also challenged on the grounds that donor could not have gifted entire homestead vide impugned gift deed without the consent of the plaintiff. This issue has not been specifically pressed during the course of arguments. Plaintiff has challenged the legality and the validity of the gift deed (Ext.3) alleging that he is the adopted son of Jogendranath Pani and has half share in the impugned property which is ancestral in nature. The trial Court as well as appellate Court, on analysis of oral as well as documentary evidence placed on record by the parties, did not find the plaintiff to be the adopted son of defendant no.4. Rather, a doubt has been specifically expressed by the Courts below, if the alleged adoption had taken place after the execution of the gift deed or prior to that, as the date of adoption was not disclosed by the plaintiff or her natural guardian, who happened to be the daughter of the donor, neither in evidence nor in the plaint. Therefore, since plaintiff had failed to establish his claim in the suit property as an adopted son, his suit attacking the execution of the impugned gift deed was found not maintainable. The fact remains, T.S. No.77 of 1983 was instituted on 29.6.1983 i.e. after the execution of the gift deed and the present suit was filed after obtaining the decree (Ext.1) passed in the said suit.

21. I find no reason to interfere in the fact findings of the Court below. The certified copy of the decree passed in T.S. no.73 of 1983 (Ext.1) does not find mentioned the date of adoption. Even in the plaint, plaintiff did not disclose the date of his adoption. None of the plaintiff's witnesses including his natural mother disclosed the date of adoption by deceased Jogendranath Pani. When plaintiff had claimed half share in the ancestral property as an adopted son of defendant no.4, it was for him to prove that he was adopted by Jogendranath Pani before the execution of the gift deed and had acquired right of half share in the impugned property being ancestral in nature. In the absence of any evidence, the Courts below rightly held that the gift deed (Ext.3) was valid. Since plaintiff failed to prove his right in the suit property before it was gifted, consent of the plaintiff for transfer of the entire homestead by way of a gift deed was not required.

22. Learned senior counsel appearing for the appellant has submitted that the right, title and interest in the suit property flowed from the respondents from the gift deed (Ext.3) dated 18.2.1981. Defendants have failed to examine an attesting witness to prove the gift deed. He has argued that Section 123 of the Transfer of Property Act (hereinafter referred to as 'T.P.Act') clearly postulates that for the purpose of making a Gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two attesting witnesses. He has referred to Section 68 of the Indian Evidence Act (hereinafter referred to as 'The Act') to argue that it is mandatory requirement of law that a document which requires attestation cannot be used in evidence, unless, at least one attesting witness has been examined for the purpose of proving its execution/attestation, if an attesting witness is alive and capable of giving evidence. However, no evidence has been produced by the defendants to show that both or any of the attesting witnesses to the gift deed were either dead or beyond the process of Court or were not capable of giving evidence. He has emphasized that no attempt was made by the defendants to call any of the attesting witnesses to prove the execution of the gift deed and therefore, in the absence of proof of its execution, it cannot be used in evidence against the plaintiff. He has referred to AIR 2003 Orissa 123 to support to his submissions.

23. The second limb of arguments advanced by the senior counsel for the appellant is that defendants cannot take protection of provisory to Section 68 of the Indian Evidence Act as the execution of the will has been specifically denied by the plaintiff being son and successor of Jogendranath Pani.

24. Mr D.K. Mohanty, Additional Standing Counsel for the respondents while refuting the submissions made by the learned senior counsel for the appellant has argued that certified copy of the gift deed was produced by the plaintiff himself in evidence and there was no denial to the execution of the document by the donor and therefore deed being an admitted document and duly registered did not need to be proved by the defendants by examining one of the attesting witnesses. The court below, therefore, rightly held that gift deed was voluntarily executed by Jogendranath Pani. It was registered and was acted upon as required Section 122 and 123 of the T.P. Act.

25. On analysis of evidence of the parties, the Courts below observed that plaintiff had failed to prove that gift deed was got executed by Ashalata (sister-in-law of the donor) by exercising undue influence and misrepresentation upon Jogendranath Pani and that execution of the gift by Jogendranath Pani in favour of the defendants is not in dispute and also that it was acted upon. It is pertinent that an officer of defendant no.2 had also signed the gift deed in token of having accepted it. Homeopathic Dispensary was being run in the suit premises since 1.1.1981 and the gift deed (Ext.3)was executed by Jogendranath Pani on 27.1.1981. Therefore, defendants were already in possession of the suit property before it was gifted to them by defendant no.4.

26. During the course of arguments, counsel for the appellant only questioned on the prove of the gift deed (Ex.3) in the absence of examination of attesting witnesses. Section 68 of the Indian Evidence Act reads:

> **"S.68.** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of given evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

27. This section lays down that the documents required by law to be attested shall not be used as evidence until one attesting witness at least has been called for proving its execution provided an attesting witness is alive, capable of giving evidence and subject to the process of the Court. By virtue of provisions contained in Section 123 of the T.P. Act, a gift of immovable property is required to be attested by at least two witnesses and the transfer can be made only by a registered instrument. True that, defendants have not examined any attesting witness to the gift deed to prove its execution to meet the requirements of Section 68 of the Indian Evidence Act.

28. However, there is a proviso to the Section. According to it, in the case of a document which is not testamentary in nature, it shall not be necessary to call an attesting witness to prove its execution, if it has been registered under the provisions of the Registration Act, unless its execution by the person by whom it purports to have been executed is specifically denied. So, the position is that, if any document other than a Will is registered, generally it is not necessary to call an attesting witness. However, even if it is registered, if the alleged executant denies its execution, then it would become necessary to comply with the main provision by examining at least one attesting witness. This section applies only where the execution of a document has to be proved. Where, however, the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that attesting witnesses had not witnessed the execution of the document. The necessity of examining an attesting witness would arise only when the document, which is required by law to be attested is sought to be produced in evidence and the execution thereof is questioned. If the attestation is not specifically denied it is not necessary to call any attesting witness.

29. The word “specifically denied” appearing in the proviso means specific denial by the party against whom it is sought to be used and not only by the executant. Attacking a document as a sham and nominal transaction would not amount to a specific denial of execution. A plea that the plaintiff was not aware of the execution of a document does not amount to specific denial. The law requires not a mere denial but a specific denial. In other words not only that the denial must be in express terms but it should be definite and unambiguous what has to be specifically denied is the execution of the document. Other contentions not distinctly referring to the execution of the document by the alleged executant are not covered by the expression denial in the proviso. When execution of a gift deed is specifically denied attesting witness has to be called for proof but, not where

the donor specifically admitted its execution. If it is not denied in the pleadings there is no necessity to call the attesting witness. Where the execution is not specifically denied, attestation can be proved by any other method without taking recourse to the provisions of Section 68 which would come into operation only when the execution is specifically denied.

30. In view of the proviso to Section 68 of the Evidence Act, only when the execution of the gift deed was specifically denied, the document was required to be proved by examining an attesting witness. Such a denial could not be made by any person unless he had a right to succeed or any other right in the property.

31. Coming to the facts of the case, execution of the gift deed is an admitted fact. Rather, certified copy of the document was placed on record by the plaintiff himself. Jogendranath Pani, the executant of the document was arrayed as defendant no.4. He chose to absent himself from the Court proceedings after due service of summons on him. He remained ex parte throughout the proceedings till his death i.e. for about three years. He did not specifically deny the execution of the document by him. Therefore, by virtue of Proviso to Section 68 of the Act, it was not required for the defendants to prove the execution of the gift deed by examining at least one of the attesting witnesses. The plaintiff has claimed his right in the suit property on the plea that he was taken in adoption by Jogendranath Pani and therefore, was his adopted son. Even in the plaint, he has not challenged the execution of the deed. According to him, the deed was not voluntarily executed by Jogendranath Pani but was executed under the undue influence of Ashalata. It was for the plaintiff to prove that the said deed was not voluntarily executed by defendant no.4 but, was executed under pressure or undue influence exercised by Ashalata or misrepresentation by her. Plaintiff had utterly failed to prove that the said deed was executed by Jogendranath Pani under undue influence of, or misrepresentation by Ashalata. Both the Courts below have given a concurrent finding that plaintiff had failed to prove that the deed was not voluntarily executed by defendant no.4 and that it was a sham document. The findings of the Court below that the impugned gift deed was voluntarily executed by Jogendranath Pani thereby gifting the suit property in favour of the defendants no.1 to 3 for running homeopathic dispensary are findings of fact and cannot be interfered with by this Court in the Second Appeal. Besides, aforesaid findings have not been challenged by the plaintiff in this appeal.

32. Since execution of the gift deed was never in question and in fact, the certified copy of the document was placed on record by the plaintiff

himself, Proviso to Section 68 of the Act came to the rescue of the defendants. Hence, no attesting witness was required to be examined to prove the execution of the gift deed by defendant no.4. Denial made by the plaintiff is not to the execution of the document but to its nature. Plaintiff could have recourse to Section 68 to argue that defendants did not examine any attesting witness to prove the execution of the gift, if the execution was specifically denied. Section 68 regulates proof of execution of the deed and not its nature or contents. It was not sufficient to prove merely a relationship wherein one person was in a position to dominate the Will of the other, it must also be proved that the transaction was unconscionable. **In Nishamani Singh Vs. Nishamani Dibya and others,** (supra) as relied upon by the counsel for the appellant, it was the donor who had specifically denied the execution of the gift deed by him and pleaded that donee had taken her signatures on the deed after giving her understanding that it was merely a power of attorney for managing her properties. Under the facts and circumstances of that case, it was held that execution of the gift deed was not conscious. It was also noted that valid execution was not proved by examining of an attesting witnesses and therefore, donee could not drive any interest in the property on the basis of the said document. Proposition of law as laid down in the said case is not in dispute. However, in the present case, as discussed above, neither the donor nor the plaintiff has specifically denied the execution of the gift deed. What is disputed is the voluntary nature of its execution. Therefore, this case is of no help to the plaintiff.

33. Plaintiff has also failed to prove his locus standi to challenge the execution of the gift deed. He claimed a right to succeed or ownership right in the impugned property, as an adopted son of Jogendranath Pani but, has failed to prove that he was legally adopted by Jogendranath Pani before the execution of the gift deed. Under the facts and circumstances of the case, the trial Court and the First Appellate Court adopted correct approach in accepting the gift deed in evidence, in the absence of examination of an attesting witness as examination of the attesting witnesses was not required by virtue of Proviso to Section 68 of the Act, while deciding the claim of the plaintiff in the suit property.

34. Hence, in the light of my discussion as above, I find no merits in the appeal and the same is accordingly dismissed. Parties are left to bear their own cost. The trial Court record as well as Appellate Court record be sent back forthwith along with an attested copy of this judgment.

Appeal dismissed.

2011 (II) ILR- CUT- 677

S.PANDA,J

W.P. (CRL) NO.31 OF 2008 (Dt. 29. 04.2011)

NAMITA PANDA ……Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp Parties

CONSTITUTION OF INDIA ,1950 – ART-226.

Husband of the petitioner killed – One sita behera was apprehended and disclosed the name of other accused persons before the media persons – Petitioner approached the IIC Nayagarh P.S.. for taking action – Thereafter petitioner represented D.G. of police and S.P. Nayagarh to cause investigation – No action yet been taken although the case has been committed to the court of sessions –

It shows that the prosecution is not interested to bring the real fact to the notice of the court and they are not taking any action since 2007 to apprehend the accused persons although ample materials are their against them – Investigating agency failed to discharge their duty – Held, Direction issued to superintendent of police , CID (Crime Branch)to take up the investigation and take steps to apprehend the accused persons

For Petitioner : M/s. Samir Kumar Mishra,M.R. Dash, S.K. Samantaray, A. Kijriwal, O. P. Sahu & S. Mohapatra.

For Opp. Parties : Leaned Standing Counsel (for o.p. nos.1 to 4 and 6)

: Mr. Saurjya Kanta Padhi, Sr. Advocate (for o.p. no.5)

S. PANDA, J. In this writ application (criminal), the petitioner has prayed for a direction to make investigation by the CBI/CID to unravel the truth regarding the death of her husband and apprehend the real culprits.

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

The deceased Prasana Kumar Panda was the Marfatdar Sebayat of Narayani Thakurani Bije at Solapata in whose name the land appertaining to

Plot No.261 under Khata No.431 of Mouza-Machhipara was originally recorded. The specific allegation of the petitioner is that one Narayan Mahapatra, Laxman Behera, Prahallad Behera tried to construct illegal kuchha road over the aforesaid plot of Narayani Thakurani and obstructed the cultivation of the land for which FIR was lodged. Since the police did not take any action, W.P.(C) No.1827 of 2004 was filed to take appropriate steps against the culprits. On 22.2.2005, this Court disposed of the said writ application and giving liberty to the petitioner therein to approach the concerned authority for rederessal of his grievance. As such Laxman Behera and others were very much aggrieved by the said order. On 20.9.2005, they assaulted the deceased and abused him in filthy language and also snatched away his wrist-watch for which ICC Case No.14 of 2005 was filed before the learned S.D.J.M., Nayagarh for commission of offences under Sections 342/343/294/323/379/506/34, IPC. To take revenge, the culprits trapped one Sita Behera for the purpose of materializing their evil intention which ended with a compromise on the active participation of said Sita Behera. However, the culprits in fact narrated the objection raised by the deceased for construction of the road and tried to get rid of him. Accordingly, on 17.9.2007 at about 8.00 P.M. in the evening, the culprits killed Prasana Kumar Panda by pressing his neck, inflicted cut injury on the dead body and threw the dead body to the village pond. After the dead body was discovered, FIR was lodged on 18.9.2007 which was registered as Nayagarh P.S. Case No.307 of 2007 in which Sita Behera and other unknown persons were named as accused persons. The alleged offences are under Sections 302/201/120(b), IPC. On the very day, the media persons put some questions to Sita Behera who described the involvement of the accused persons in the heinous crime and the manner in which they killed the husband of the petitioner. The same was also telecasted in OTV. After knowing all the above facts, the petitioner approached the IIC, Nayagarh Police Station to take action against the culprits. However, only Sita Behera was apprehended on 23.9.2007. Finding no other way, on 24.9.2007 the petitioner filed representation before opposite party nos.2 and 3, the Director General of Police, Cuttack and the Superintendent of Police, Nayagarh respectively by registered post. Again on 4.10.2007, she represented to opposite party nos.2 and 3 to cause an enquiry/investigation with regard to the death of her husband and apprehend the culprits immediately, or else the evidence would be destroyed, but no action has yet been taken. Therefore, she has filed this present application for investigation of the matter by the CBI/CID. In the meantime, the case has already been committed to the Court of Session and registered as ST Case No.59 of 2009 pending before the learned Ad hoc Additional Sessions Judge, FTC, Nayagarh.

3. In pursuance of the application filed under Section 319, Cr.P.C., the court below issued NBW for appearance/production of five more persons namely, Laxman Behera, Manguli Behera, Jaya Behera, Sankar Behera and Natia Behera as accused persons to face trial along with Sita Behera. The said application was allowed and a direction was given to add those persons as accused persons vide order dated 5.12.2009. Challenging the said order, the accused filed CRLMC No.2 of 2010 before this Court. On 14.1.2010, this Court did not interfere with the order impugned therein and directed that if the accused persons surrender before the leaned Ad hoc Additional Sessions Judge, FTC, Nayagarh within three weeks from the date of the order and move for bail, the same shall be considered and disposed of on its own merit. The accused persons instead of complying with the aforesaid direction, filed BLAPL No.2023 of 2011 for grant of anticipatory bail by suppressing the said fact and obtained an order by giving a false certificate that "the matter, out of which this Bail Application arises was never before this Hon'ble Court in any earlier occasion". It shows that the prosecution is not interested to bring the real fact to the notice of the court and they are not taking any action since 2007 to apprehend the accused persons when there are ample materials against them and the trial court has already passed the order to implead them as accused persons.

4. Considering the above conduct of the investigating agency who are duty bound to see that rule of law prevails and the real culprits should be prosecuted in a system of justice administration, this Court is of the view that in this case they have failed to discharge the said duty. Therefore, this Court directs the Superintendent of Police, CID (Crime Branch) to take up the investigation of Nayagarh P.S. Case No.307 of 2007 corresponding to G.R. Case No.567 of 2007 pending before the learned Ad hoc Additional Sessions Judge, FTC, Nayagarh and take steps to apprehend the accused persons. This Court further directs the Superintendent of Police to hand over all the relevant records to the Superintendent of Police, CID (Crime Branch) immediately.

5. The writ application (criminal) is accordingly disposed of.

Writ petition disposedof.

2011 (II) ILR- CUT- 680

S.C.PARIJA, J.

W.P.(C) NO.19285 OF 2011(With Batch) (Decided on 9.8.2011)

ASUTOSH SAHOO .....Petitioner.

.*Vrs.*

REGISTRAR, UTKAL UNIVERSITY & ORS. .....Opp.Parties.

EDUCATION – Counselling for admission in five year Integrated B.A.LL.B (Hon's) Course – Students securing high ranks in the merit list – Depriving them of their right to take admission in the above course solely on the ground of late reporting in the counseling centre was not proper and justified – Direction issued to give admission to the petitioner and others – In order to avoid such exigencies in future let the university and the college authorities formulate a procedure for admission of students in the above course for the next academic session to ensure that meritorious students are not left out.

For Petitioner - M/s. Bhimasen Sahoo.
For Opp.Parties - M/s. Dr. A.K.Rath, B.R.Sarangi & S.P.Sarangi.

These writ petitions have been filed by the students aspiring to take admission in Five Year Integrated B.A,LL.B.(Hons.) Course in the two constituent colleges of Utkal University, i.e., Madhusudan Law College, Cuttack, and the University Law College, Vani Vihar, Bhubaneswar, alleging that they have been illegally debarred by the Principal, M.S. Law College, Cuttack, from participating in the counselling held on 16.07.2011 and thereby depriving them of their legal right to take admission in the said course.

The brief facts common to all the writ petitions are that pursuant to the admission notice dated 06.01.2011, issued by the Utkal University, inviting applications for admission to Five Year Integrated B.A.LL.B. (Hons.) Course in its two constituent colleges, i.e., M.S. Law College, Cuttack and University Law College, Vani Vihar, Bhubaneswar, the petitioners had applied for the same and appeared in the common entrance test held on 5.7.2011 and had secured high ranks in the merit list published by the University. Accordingly, the petitioners were issued with intimation letter by the respective Colleges, intimating them their rank in the merit list drawn up pursuant to the common entrance test conducted by the University and asking them to report to the counselling center at MS. Law College, Cuttack, on 16.7.2011 by 10.30 A.M.

and that the counselling will commence from 11 A.M. onwards. Pursuant to such intimation, some of the petitioners reached the counselling center at M.S. Law College, Cuttack between 10.30 A.M. to 11 A.M., but they were not allowed to enter the premises and participate in the counselling, inspite of the fact that the counselling was to commence from 11 A.M. onwards. It is alleged that though almost all the petitioners have secured very high ranks in the merit list and have reported at the counselling center much prior to the commencement of the counselling, which was scheduled from 11 A.M. onwards, they were illegally debarred from participating in the counselling on the plea that they have not reported to the counselling center in time and thereby students with much lower rank in the merit list have been given admission.

Learned counsel appearing for the two Colleges with reference to the counter affidavit filed submits that Utkal University is imparting Five Year Integrated B.A.LL.B. (Hons.) Course at its two constituent colleges, i.e., M.S. Law College, Cuttack and University Law College, Vani Vihar, Bhubaneswar. The University issued an advertisement for conducting entrance test in the said course for the academic session 2011-12, for selection of candidates for admission on the basis of their career-cum-entrance test. Basing on the entrance test and career evaluation, a merit list of candidates was prepared and thereafter intimations were issued to the candidates stating their rank in the merit list and informing them that the counselling for admission will be held on 16.7.2011 from 11 A.M. onwards at M.S. Law College, Cuttack, and the concerned students were required to report at the counselling center positively by 10.30 A.M. In this regard, reference has been made to Clause 8.3 of the prospectus issued to the aspiring students at the time of issuance of form, which specifically provided the date, time and place of counselling.

It is the case of the Principal, M.S. Law College, Cuttack, that as the petitioners did not report at the counselling center by 11 A.M. on 16.7.2011, they were not allowed to participate in the counselling and that the gates were closed at 11 A.M. for smooth conducting of counselling. It is stated that as the petitioners were not present at the counselling, candidates next in the merit list were given admission.

Learned counsel appearing for the Bar Council of India on instruction submits that M.S. Law College, Cuttack, has been granted approval for imparting Five Years Integrated B.A.LL.B. (Hons.) Course with intake of one section of 60 students. Similarly, the University Law College, Vani Vihar, Bhubaneswar, has been granted approval with intake of 50 students and therefore it is not understood as to why the authorities of M.S.Law College, Cuttack, have offered only 50 seats to the students as per the prospectus

issued by the Utkal University. It is accordingly submitted by the learned counsel for the Bar Council of India that there is no impediment for M.S. Law College, Cuttack, to admit 60 students for its Five Years Integrated B.A.LL.B (Hons.) Course.

Learned counsel appearing for the intervenors while adopting the stand taken by the learned counsel appearing for the Principal, M.S. Law College, Cuttack, have reiterated that as the petitioners did not report to the counselling centre by 11 A.M. as had been specified both in the prospectus as well as in the intimation letter, the authorities rightly debarred them from participating in the counselling and those students who were present at the counselling by 11 A.M., were allowed to participate in the counselling and admission was given to the students present at the counselling on the basis of their rank in the merit list prepared by the University.

Counselling is a procedure being adopted by several States for regulating admission to technical courses like Engineering and Medical and professional courses like MBA and MCA, where a common entrance test is conducted for all aspiring students, in respect of various courses/streams available in different colleges in a State. Hence, counselling procedure is generally adopted where admissions to various technical and professional courses, consisting of several disciplines, which are available in difference institutions/colleges are given on the basis of the rank obtained by the candidates in the common entrance test.

In the instant case as the admission was only in respect of Five Year Integrated B.A.LL.B.(Hons.) Course which is confined to only two constituent Colleges of the Utkal University, i.e., M.S. Law College, Cuttack, and University Law College, Vani Vihar, Bhubaneswar, with each having a intake seat capacity of only 50 students, there was no justification for the authorities to adopt the procedure of counseling for giving admission to the eligible students. Undoubtedly, most of the petitioners have secured high ranks in the merit list and depriving them of their right to take admission in the Five Year Integrated B.A.LL.B.(Hons.) Course solely on the ground that some of them reported late to the counselling centre was not proper and justified. In order to avoid such exigencies in future, let the University and the College authorities formulate a procedure for admission of students in the Five Year Integrated B.A.LL.B.(Hons.) Course for the next academic session to ensure that meritorious students are not left out.

Pursuant to direction of this Court, learned counsel appearing for the Utkal University has produced a letter of the Registrar, Utkal University,

which shows that the University authorities are ready and wiling to approve the enhanced 10 seats in M.S.Law College, Cuttack, which has wrongly been left out, on receiving proposal from the College and that there would be no impediment for admitting students against the said enhanced 10 seats. It is also intimated by the learned counsel that pursuant to interim orders of this Court passed in some of the writ petitions, there are some sets lying vacant in the two Colleges.

As the Bar Council of India has granted approval of affiliation to M.S. Law College, Cuttack, for imparting Five Year LL.B.(Hons.) course with intake of one section of 60 students for the academic sessions 2009-10 to 2010-11, which has now been extended for the academic session 2011-12, the Principal, M.S. Law College, Cuttack, is directed to submit proposal to the Utkal University for approving the enhancement of seats from 50 to 60 and the University authorities are directed to take urgent steps for approval of the said proposal for enhancement of the seats as expeditiously as possible, so as to enable the College to fill up the same.

In view of the discussions made above and keeping in view the fact that all the petitioners have secure high ranks in the merit list and have been debarred from participating in the counselling only due to their late reporting at the counselling centre, the authorities are directed to fill up the vacant seats, including the enhanced 10 seats in M.S.Law College, Cuttack, from amongst the petitioners and other left-out candidates, including the present intervenors, who have already been issued with intimation letter, on the basis of their rank in the merit list and complete the admission process as expeditiously as possible.

Writ Petitions are accordingly disposed of.

Writ petition disposed of.

2011 (II) ILR- CUT- 684

S.C.PARIJA, J.

A.R.B.A. NO.21 OF 2009 (Decided on 09.08.2011)

UNION OF INDIA & ANR. …… Appellants.

.Vrs.

S.N.KANUNGO & ANR. ……Respondents.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – S.34(3).

Arbitral award – Setting aside of – Application to be made within three months from the date on which the applicant has received the arbitral award – Said period can further be extended by another period of 30 days if sufficient ground is shown but not beyond that – Held, no impropriety or illegality committed by the learned District Judge so as to warrant interference by this court.

Case laws Referred to:-

1.(2005) 4 SCC 239 : (Union of India-V- Tecco Trichy Engineers & Contractors).
2.(2008) 7 SCC 169 : (Consolidated Engineering Enterprises-V- Principal Secretary, Irrigation Department & Ors.
3.AIR 2001 SC 4010 : (Union of India-V- M/s. Popular Construction Co.).
4.(2010) 12 SCC 210 : (State of Himachal Pradesh & Anr.-V- Himachal Techno Engineers & Anr.).

For Appellant - M/s. Anindhy Ku. Mishra
For Respondent - M/s. S.K.Sanganeria

This appeal by the Union of India and its functionary is directed against the order dated 12.08.2009, passed by the District Judge, Khurda, Bhubaneswar, in ARB Petition No.135 of 2009, dismissing the appellants application filed under Section 34 of the Arbitration and Conciliation Act, 1996, being barred by limitation.

Learned counsel for the appellants submits that as the signed copy of the award had not been delivered to the appellant no.2, who was the signatory to the Agreement of which, the Arbitral Tribunal is a creature and he was also a necessary party to the arbitration proceeding before the

Arbitral Tribunal, learned Court below erred in ignoring the said fact while passing the impugned order. Learned counsel for the appellants has referred to Section 34(3) and Section 31(5) of the Arbitration and Conciliation Act, 1996 (for short 'The Act') in support of his contention that the period of limitation as prescribed under Section 34(3) of the Act would only commence from the date the signed copy of the award is served on appellant no.2. It is submitted that the signed copy of the award was served only on the appellant no.1, i.e., General Manager, East Coast Railway, on 21.01.2009, who only sent a copy of the same to the appellant no.2 on 08.06.2009, which was received by him on 09.06.2009 and as the application under Section 34 of the Act was filed on 22.06.2009, the same was well within the time. In support of his contention learned counsel for the appellants has filed a copy of the letter dated 08.06.2009 as Annexure-3 to the affidavit to show that only a copy of the award had been sent to him by the General Manager, which was received by him on 09.06.2009. In this regard, learned counsel for the appellants have relied upon a decision of the apex Court in the case of ***Union of India –Vrs–Tecco Trichy Engineers & Contractors***, (2005) 4 SCC 239, wherein the Hon'ble Court had observed that in the context of a huge organization like the Railways, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34 of the Act.

Learned counsel for the respondent no.1 on the other hand submits that as the award was passed on 08.01.2009, signed copy of which was delivered to the appellant no.1 on 21.01.2009, the application under Section 34 of the Act should have been filed by 21.04.2009 or latest by 21.05.2009, allowing one month grace period as provided under Section 34(3) proviso of the Act. It is submitted that as the application under Section 34 of the Act has been filed on 22.06.2009, the same is barred by limitation. Learned counsel for the respondent no.1 has further relied upon a letter of the appellant no.2 addressed to the petitioner dated 21.05.2009, filed as Annexure-B to the affidavit, to show that the appellant no.2 was well aware of the award passed by the Arbitral Tribunal and sanction of the competent authority has been obtained to make part payment of the admitted amount as per the items of award.

Learned counsel has relied upon a decision of the apex Court in the case of ***Consolidated Engineering Enterprises –Vrs– Principal Secretary, Irrigation Department and Others***, (2008) 7 SCC 169, in support of his contention that an application for setting aside an award has to

be made within three months, as provided under Section 34(3) of the Act and that the said period can further be extended on sufficient cause being shown by another period of 30 days, but not thereafter. Accordingly, it is submitted that the reasons assigned by the court below, while rejecting the appellants' application under Section 34 of the Act cannot be faulted.

On a perusal of the impugned order it is seen that learned District Judge, has taken into consideration the plea now raised by the appellants regarding delivery of signed copy of the award and after considering the materials on record has come to find as under:

> "It was strenuously contended by the learned counsel for the petitioner that the Arbitration Tribunal had not supplied the copy of the signed award to the petitioner no.2 and the petitioner no.2 received a copy only on 08.06.2009 from the office of the petitioner no.1. As against this the learned counsel for the opposite party has filed a copy of the letter dated 21.05.2009 of the petitioner no.2 addressed to the opposite party (Annexure-B to the present petition) making part payment of the awarded amount, wherein in the caption "Ref!", it has been clearly mentioned that the copy of the award was received by the petitioner no.2 has no answer to this. Secondly, the letter filed on behalf of the petitioners along with the original application in support of the contention that the petitioner no.1 supplied a copy to the petitioner no.2 only on 09.06.2009, being an internal correspondence, cannot be ruled out to have been manufactured for the purpose of the case. Further in view of the Annexure-B of the present petition of the opposite party admitting the receipt of the award on 21.01.2009 by the petitioner no.2, it no more lies in the mouth of the petitioner no.2 that he had not received a copy of the award till 09.06.2009. Secondly, the copy of the award was received by the petitioner no.1 on 21.01.2009 undisputedly. That being so and if it is contended that the petitioner no.2 actually looked after the affairs to be treated as the officer directly connected and involved in the proceeding, it is not explained as to why the petitioner no.1 kept the matter pending with him till 08.06.2009. Having latches on their own part, the petitioners can never be permitted to take advantage of the same with the plea that the petitioner no.2 did not know about the award till 09.06.2009. Thus, in any view of the matter the petition u/s.34 of the Act has been filed much after the prescribed period of limitation, which cannot be condoned even granting the benefit under the proviso to Sec.34(3) of the Act."

Undoubtly, Sub-Section 3 of Section 34 of the Act prescribes the period of limitation for filing an application for setting aside an award as three months from the date on which the applicant has received the arbitral award. The proviso thereto vests in the Court discretion to extend the period of limitation for a further period not exceeding 30 days if the Court is satisfied that the applicant was prevented by sufficient cause for not making the application within three months. The use of the words 'but not thereafter' in the proviso makes it clear that even if sufficient cause is made out for a longer extension, the extension cannot be beyond 30 days. This is the view taken by the apex Court in ***Union of India –Vrs– M/s. Popular Construction Co.,*** AIR 2001 SC 4010, which has been affirmed in ***Consolidated Engineering Enterprises*** (supra) and reiterated in a recent decision in ***State of Himachal Pradesh and another –Vrs– Himachal Techno Engineers and another***, (2010) 12 SCC 210.

In the present case, from the letter of the appellant no.2 dated 21.05.2009, as per Annexure-B to the affidavit filed by the respondent, it is seen that he was fully aware of the award passed by the Arbitral Tribunal on 08.01.2009, which was received by his office on 21.01.2009. Moreover, from the said letter it further reveals that the appellant no.2 has made part payment of the admitted amount in terms of the said award. Hence, the plea of the appellants that the signed copy of the award has not been duly served on appellant no.2, as provided under Section 31(5) of the Act cannot be accepted. Therefore, the decision relied upon by the appellant in ***Tecco Trichy Engineers & Contractors*** (supra), has no application to the facts of this case.

Applying the principles of law as discussed above to the facts of the present case and considering the findings of the learned District Judge, as given in the impugned order and the reasons assigned in support of the same, no impropriety or illegality can be said to have been committed by the learned District Judge, so as to warrant any interference.

The appeal being devoid of merits, the same is accordingly dismissed.

Appeal dismissed.

2011 (II) ILR- CUT- 688

B.K.PATEL, J.

W.P.(C) NO.10802 OF 2011 (Decided on 29.7.2011)

PRAMOD KUMAR NAYAK ……..Petitioner.

.Vrs.

SRIPATI CHARAN BADAJENA ….....Opp.Party.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39, RULE 1 & 2.

Granting of temporary injunction – Discretion of the trial Judge – Interference of the appellate Court – Even an appellate Court has no jurisdiction to substitute its own discretion with the judicial discretion exercised by the trial Court simply because it is reasonably possible to take another view of the fact of the case – Once the judicial discretion is exercised the appellate Court ought not to set it aside lightly.

(Para 11)

Case laws Referred to:-

1.(2006) 5 SCC 353 : (Prem Singh & Ors.-V-Birbal & Ors.)
2.(1996) 8 SCC 357 : (Lakhi Baruah & Ors.-V-Padma Kanta Kalita & Ors.)
3.AIR 2003 SC 1561 : (Sadhana Lodh-V-National Insurance Co.Ltd. & Anr.)
4.AIR 2004 SC 3892 : (Ranjit Singh-V-Ravi Prakash)
5.(2010)2 SCC 432 : (Abdul Razak-V- Mangesh Rajaram Wagle & Ors.)
6.AIR 1976 SC 2621 : (The Municipal Corporation of Delhi-V-Suresh Chandra Jaipuria)
7.AIR1973 SC 1451 : (The Saharanpur Co-operative Cane Development Union Ltd. & Ors.-V-The Lord Krishna Sugar Mills Ltd. & Ors.)
8.(XXIV) 1958 CLT 269 : (Bhaskar Chandra Sahu & Anr.-V-Honnu Sahu & Anr.)

For Petitioner - M/s.S.K.Padhi, M.Padhi, A.Das, B.Panigrahi & S.S.Mohanty.
For Opp.Party - M/s. Akhil Mohapatra, J.M.Rout & S.C.Nayak.

B.K.PATEL,J. In this writ application, petitioner has assailed legality of order dated 9.3.2011 passed by the learned District Judge, Khurda at Bhubaneswar in F.A.O.No.110 of 2010 by which order dated 6.10.2010

passed by the learned Civil Judge(Junior Division),Bhubaneswar in I.A.No.647 of 2009, arising out of C.S.No.478 of 2009, rejecting petitioner's application under Order 39 Rules 1 and 2 read with section 151 of the C.P.C. for temporary injunction was confirmed.

2. C.S.No.478 of 2009 is a suit for declaration and permanent injunction filed by the plaintiff against opposite party and others. Petitioner is the sole plaintiff and opposite party is the defendant no.1 in the suit. Prayer of the plaintiff in the suit is to:

> "a)declare that Natabar Samantray was alive on 17.2.84 and death certificate issued on 1.7.2008, bearing Registration No.288 shown in the Registrar, Birth & Death maintained in the P.H.C., Mendhasal showing date of death as on 10.11.83 of said Natabar Samantray is void under law,
>
> (b)that the defendant no.1 to 18 be permanently restrained from interfering in any way with plaintiff's possession of the suit lands and from entering upon any part of the same forcibly or from creating any mischief whatsoever in respect of the suit land."

3. Suit land measuring area of Ac.0.182 decimals is a part of suit plot no.252/1040 under Khata No.105 (total area A.1.225 decimals) originally belonging to late Natabara Samantaray. Plaintiff's case is that said Natabara Samantray sold entire land in the suit plot in favour of pro forma defendant Laxmidhar Paikaray by executing Registered Sale Deed dated 17.2.1984. Plaintiff purchased the suit land from said Laxmidhar Paikaray and is in possession on the strength of Registered Sale Deed dated 23.2.1996 executed by power of attorney of pro forma defendant. Defendant nos. 2 to 18 are legal heirs of late Natabar Samantaray. It is alleged that defendant nos. 2 to 18 in connivance with defendant no.1 managed to fraudulently obtain death certificate from Executive Magistrate, Bhubaneswar in Misc.Case No.1946 of 2008 indicating the date of death of late Natabar Samantaray as 10.11.1983 though said Natabara Samantray was alive and did execute sale deed dated 17.2.1984 in favour of pro forma defendant. Thereafter, defendant no.1 attempted to trespass into the suit plot including the suit land which was under peaceful possession of the plaintiff. In I.A. No.647 of 2009 plaintiff made prayer for grant of temporary injunction restraining defendant no.1 from interfering with his possession over and entering into the suit land.

4. Defendant no.1 filed written statement resisting plaintiff's claim. It is contended that the suit for permanent injunction simplicitor without seeking declaration of right, title and interest over the suit land is not maintainable. Disputing the very execution of registered sale deed by late Natabar Samantray in favour of pro forma defendant, it is pleaded that said Natabara Samantray died on 10.11.1983. Plaintiff's claim to the suit land is thus resisted on the ground, *inter alia*, that sale deed dated 17.2.1984 purported to have been executed by the said Natabara Samantray in favour of plaintiff's vendor is a fraudulent and void document. It is asserted that after due enquiry death certificate has been issued to the effect that late Natabara Samantray died on 10.11.83. It is also asserted that defendant no.1 has right, title, interest and possession over the suit land on behalf of successors-in-interest of late Natabara Samantaray by virtue of Registered Power of Attorney dated 9.11.2009.

5. In assailing the orders passed by learned courts below refusing to issue temporary injunction, it was contended by the learned counsel for the petitioner that the contents of death certificate obtained 25 years after death should not have weighed with the learned courts below in refusing to protect plaintiff's right, title and interest over the suit land acquired by virtue of Registered Sale Deed. No legal action having been initiated by defendant no.1 assailing the Registered Sale Deed executed by late Natabara Samantaray in favour of pro forma defendant, plaintiff is entitled to temporary injunction restraining the defendant no.1 from interfering with plaintiff's peaceful possession over the suit land. It is contended that both the learned courts below held the plaintiff to have a *prima facie* case. It is argued that petitioner being in possession over the suit land, balance of convenience is in his favour and in case defendant no.1 is allowed to disturb the balance of convenience, plaintiff shall be put to irreparable loss. Referring to decisions of the Hon'ble Supreme Court in **Prem Singh and others –vrs.- Birbal and others**: (2006) 5 SCC 353 and **Lakhi Baruah and others –vrs.- Padma Kanta Kalita and others** : (1996) 8 SCC 357 as well as some other decisions, it was argued that learned courts below ought to have presumed the genuineness of Registered Sale Deed executed by late Natabara Samantaray until the same was found to be fraudulent.

6. Learned counsel for the opposite party supporting and defending the orders passed by learned trial court and appellate court contended that both the courts below have assigned cogent reasons in support of their concurrent conclusion that the plaintiff is not entitled for temporary injunction. Placing reliance on the decisions of the Hon'ble Supreme Court in **Sadhana Lodh –vrs.- National Insurance Co. Ltd and another** : AIR 2003 SC 1561, **Ranjit**

Singh –vrs.- Ravi Prakash: AIR 2004 SC 3892 and **Abdul Razak –vrs.- Mangesh Rajaram Wagle and others** : (2010) 2 SCC 432, it was argued that where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, writ petition would lie under Article 227 and not under Article 226 of the Constitution. A mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. There is no scope to review or re-weigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision. It was contended that neither of the learned courts below found any of the three requirements for grant of injunction to be in existence in favour of the plaintiff. Registered Sale Deed of the year 1984 by which late Natabara Samantaray is asserted to have transferred his right, title and interest over the suit plot is a void document. The document being a nullity and void *ab initio*, there is no need of a decree. Death certificate indicating date of death of late Natabara Samantaray as 10.11.1983 has been issued by the competent authority in due discharge of official duty. Therefore, the impugned orders are immune from interference.

7. Having perused the materials on record upon reference to rival contentions, it is apparent that the learned courts below have simply observed that the parties have genuine dispute to be adjudicated. Learned District Judge has rightly observed that parties are at issue regarding genuineness of the sale deed stated to have been executed by late Natabara Samantaray as well as genuineness of death certificate. However, neither of the courts below was satisfied regarding existence of *prima facie* case or balance of convenience in favour of the plaintiff.

8. In **Sadhana Lodh –vrs.- National Insurance Co. Ltd and another** (supra) it has been pointed out that where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, the writ petition would lie under Article 227 and not under Article 226 of the Constitution. While exercising supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution, jurisdiction of the High Courts is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to

correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible for a High Court on a petition filed under Article 227 of the Constitution to review or re-weigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision. Scope and ambit of writ jurisdiction under Articles 226 and 227 of the Constitution have also been highlighted in the decisions of Hon'ble Supreme Court relied upon on behalf of the opposite party.

9. There is no scope for the petitioner to avail any benefit out of the fact that no action has been brought so far to assail the sale deed purported to have been executed by late Natabara Samantaray in the year 1984. Case of the defendant no.1 is that late Natabara Samantaray never executed the sale deed. He died much prior to the date of alleged execution of sale deed. It is categorically contended that sale deed purported to have been executed by late Natabara Samantary is a void document. In **Prem Singh and others –vrs.- Birbal and others** (supra), relied upon by the learned counsel for the petitioner, it has been pointed out that when a document is a nullity and void *ab initio,* there is no need of a decree for setting aside the document. In fact, being well aware of the position, plaintiff has instituted the present suit. Plaintiff has filed the suit only for declaration with regard to death certificate and for permanent injunction. He has not prayed for relief of declaration of right, title and interest over the suit land. Validity of sale deed purported to have executed by late Natabara Samantaray is dependent upon the validity of the death certificate. It is not disputed that the death certificate has been issued by competent authority. Plaintiff is yet to bring on record any circumstance which would undermine the presumptive value attached to the certificate in any manner. Both the learned courts below have come to the conclusion that it would not be proper to adjudicate regarding validity of the death certificate while considering the application for temporary injunction. The dispute has to be adjudicated in the suit on the basis of evidence adduced in trial. The findings and conclusion appear to be reasonable.

10. Moreover, in course of hearing it was brought to the notice of the Court that pro forma defendant Laxmidhar Paikaray has instituted W.P.(C) No.8958 of 2010 before this Court assailing the genuineness of the death certificate. By the order dated 3.5.2011 passed in W.P.(C) No.8958 of 2010 it has been observed that issuance of death certificate shall be subject to the result of the writ petition.

11. That apart, in a number of authoritative pronouncements, the Hon'ble Supreme Court has disapproved interference by superior courts with the orders under Order 39, Rule 1 of the C.P.C. passed by subordinate courts. In this connection, decisions in **The Municipal Corporation of Delhi –vrs.- Suresh Chandra Jaipuria** : AIR 1976 SC 2621 and **The Saharanpur Co-operative Cane Development Union Ltd., and others –vrs.- The Lord Krishna Sugar Mills Ltd. and others** : AIR 1973 SC 1451 may be referred to. Even an appellate court has no jurisdiction to substitute its own discretion with the judicial discretion exercised by the trial court simply because it is reasonably possible to take another view of the fact of the case. It has been held by this Court in **Bhaskar Chandra Sahu and another –vrs.- Honnu Sahu and another** : (XXIV) 1958 CLT 269 that granting of temporary injunction is at the discretion of the trial judge. Once the judicial discretion is exercised, the appellate court ought not to set it aside lightly.

12. For the reason stated above, there appears no ground warranting interference with the impugned orders by invoking writ jurisdiction. There is no merit in the writ petition. Accordingly, the writ petition stands dismissed.

Writ petition dismissed.

2011 (II) ILR- CUT- 694

S.K.MISHRA, J.

CRP. NO.6 OF 2009 (Decided on 16.09.2011)

ALOMINA EKKA ……..Petitioner.

.*Vrs.*

MIKHAIL EKKA & ANR. ……Opp.Parties.

LIMITATION ACT, 1963 (ACT NO. 36 OF 1963) – S.14.

Condonation of delay – Delay is 1216 days – Petitioner claims to be an illiterate lady and was ignorant of the procedural law and due to wrong advice she preferred appeal against the impugned order before the learned District Judge, F.T.C. Rourkela, where in the appeal was dismissed as not maintainable.

Section 14 of the Limitation Act provides for exclusion of time of proceeding bonafide in the Court without jurisdiction.

In the present case petitioner has failed to establish that she has been prosecuting the Civil appeal in due diligence and in good faith – Held, the period consumed in prosecuting such appeal will not be excluded from computing the period of limitation.

For Petitioner - Ranjan Ku. Rout
For Opp.Parties - Dinabandhu Naik

The revision is preferred against the order passed by learned Civil Judge (Senior Division), Rourkela in Misc. Case No.1 of 2003, wherein the application under Order 9, Rule-13, C.P.C. filed by the defendant was allowed and the exparte decree passed by the trial court on 26.11.2002 was set aside. Thereafter, the petitioner filed an appeal bearing FAO No.8/2 of 2006-08 before the learned Ad hoc Addl. District Judge Rourkela, which was rejected as not maintainable. Thereafter, the present Civil Revision Petition has been filed along with a misc. case to condone the delay in filing the appeal. The Office has reported that there is a delay of 1216 days in filing the appeal.

The petitioner has filed an application for condonation of delay on the ground that she is an illiterate lady and was ignorant of the procedural law and the lawyer at Rourkela advised her to file an appeal against the said

order dated 07.07.2005. Accordingly, she filed an appeal before the learned Addl. District Judge, F.T.C, Rourkela, which was registered as FAO No.8/2 of 2006-08. The said appeal was dismissed on 11.12.2008 as not maintainable.

The petitioner submits that she obtained the certified copy of the order in FAO No.8/2 of 2006-08 on 18.12.2008 and the certified copy of the order in Misc. Case No.1 of 2003 on 19.12.2005. Thereafter, she consulted the lawyer at Rourkela, who advised her to file a civil revision before the Hon'ble High Court, and thereafter, she arranging money to file Civil revision came to Cuttack on 31.01.2009 and filed the revision on 02.02.2009. It is further submitted that the petitioner under wrong premises and unaware of the procedural law has prosecuted the litigation with bonafide intention that the appeal is maintainable before the learned Addl. District Judge, FTC, Rourkela. Hence, it is prayed that the delay in filing the appeal be condoned.

No objection has been filed by counsel for the opposite parties.

However, in course of argument, the opposite parties raised the question of limitation and argued that it has not been properly explained.

Section 14 of the Limitation Act, 1963 provides for exclusion of time of proceeding bonafide in the court without jurisdiction. In sub-Section (2) it is provided that in computing the period of limitation for any application, time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

Thus, it is clear that the petitioner must establish that she had been prosecuting the appeal before the learned Addl. District Judge, FTC, Rourkela in good faith and with due diligence. In this case the petitioner has failed to establish that she has been prosecuting the civil appeal in due diligence and in good faith. Therefore, the period consumed as such in prosecuting such appeal will not be excluded from computing the period of limitation.

Moreover, it is seen that the petitioner is assailing the order setting aside exparte decree passed against the opposite parties. It is well known that the provision of Order 9, Rule-13 CPC is a benevolent statute, which needs liberal interpretation.

Keeping in view the unexplained delay and the aforesaid consideration, this Court is not inclined to interfere with the order passed by the learned Civil Judge (Senior Division), Rourkela in Misc. Case No.1 of 2003, arising out of C.S. No.95 of 2001.

Hence, the revision petition is dismissed. No costs.
Send back the L.C.R. to the lower court forthwith.

Revision dismissed.

2011 (II) ILR- CUT- 697

C.R.DASH, J.

MISC.CASE NO.1126 OF 2011
(Arising out of BLAPL NO.15124 OF 2011)
(Decided on 9.9.2011)

SUMAN PATRA …… Petitioner.

.Vrs.

STATE OF ORISSA ……Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF 1974) – S.439.

Bail – Offence U/s.509, 354, 323, 307, 379, 506 & 34 I.P.C. – Bail granted with conditions that the petitioner shall appear before the I.O. twice in a week till conclusion of trial and the petitioner shall do "Kara Seva" by cleaning the shoes of the devotees for two hours every Sunday for 12 weeks – Application for modification of condition No.2.

This Court marked the spark of realization in the innocent eyes of the petitioner – Petitioner has also donated blood to the blood bank Voluntarily as a mark of social service – The concept of "Kar Seva" in the shoes stand of a shrine has not yet been recognized as an honourable community service and the shoes-Stand here being managed on contract basis for profit only the impugned condition No.2 is substituted. (Para 18)

Case law Referred to:-

.AIR 1978 SC 429 : (Gidikanti Narasimhulu & Ors.-V-Public Prosecutor, High Court of Andhra Pradesh)

For Petitioner - M/s. Maitrijit Mohanty
For Opp.Party - M/s. Saswata Patnaik

BLAPL No. 15124 of 2011

Mr. Saswata Patnaik and associates enter appearance for the informant.

Heard learned counsel for the parties.

The petitioner is shown to be a boy aged about 19 years. He is implicated in offence punishable under sections 509/354/323/ 307/379/506/34 I.P.C.

Considered the materials including the injury report in respect of the victim.

Learned counsel for the petitioner submits that there is no record of past criminal antecedent against the petitioner and in view of such fact there is possibility of reform in him. The petitioner is stated to be in custody sine about two months.

Regard being had to the facts and submissions, factum of permanent residence of the petitioner, his tender age, possibility of reform in him and substantial progress in investigation, it is directed that the petitioner shall be released on bail by executing bond of Rs.20,000/- (Twenty thousand) with two sureties each solvent for the like amount to the satisfaction of learned S.D.J.M.(S), Cuttack in G.R. Case No.835 of 2011, subject to such conditions as deemed just and proper by the learned Court below including the following conditions:-.

i) The petitioner shall appear before the concerned I.O. twice in a week on the day and time fixed by the said I.O. till conclusion of trial of this case; and

ii) Every Sunday at 4.00 P.M. the petitioner shall appear before the I.O., who shall make arrangement to take the petitioner to Cuttack Chandi temple, where the petitioner shall do the “Kara Seva” by cleaning the shoes of the devotees for two hours. He shall continue to do the same for 12 weeks. The Executive Officer of Cuttack Chandi Temple shall make necessary arrangement in the matter.

The Bail Application is disposed of.

Misc, Case No.1126 of 2011

Heard learned counsels for the parties.

2. The petitioner has filed this Misc. Case for modification of condition no.(ii) of the order dated 09.09.2011 passed in the Bail Application.

3. Petitioner Suman Patra @ Tiki and his father Akhaya Patra @ Banka having appeared in the Court in person on 22.09.2011 have filed their respective affidavits.

4. The petitioner himself, besides the facts averred in the affidavit, submitted before the Court that he is repentant for the alleged act without, however, admitting the same and he is ready to correct himself by doing some voluntary service to the society. The father of the petitioner also submitted in person before the Court that he shall take proper care of the petitioner to groom him up to be a better citizen.

5. It is submitted by Mr. K.P. Mishra, learned counsel for the petitioner that condition no.(ii) may amount to punishment under the law and it may also stigmatize the petitioner. It is further emphatically submitted that when the principles of Criminal Jurisprudence is to the effect that a person is presumed to be innocent till his guilt is proved, condition no.(ii) imposed for release of the petitioner on bail sounds like stamping the petitioner guilty before his trial. Lastly, it is submitted that the petitioner is repentant for his alleged mistakes / misdemeanor, and asking him to undergo the ordeal of "KAR SEVA'" may be counter-productive especially when the petitioner has not yet crossed his teens and he is prone to imagine things beyond proportion. Elaborating his submissions in clear terms, Mr. Mishra, learned counsel for the petitioner submits that the petitioner and his entire family are under stress for the apprehended humiliation, and the petitioner under such stress may also take some untoward step to even commit suicide.

6. Learned Addl. Govt. Advocate on the other hand submits that condition no.(ii) imposed as a condition of bail is just and proper in the facts and circumstances of the case. He submits that the petitioner is alleged to have committed offence under Sections 509/354/323/307/379/506/34, I.P.C. along with his friends. The sequence of events constituting the entire occurrence speaks loudly about uncontrolled arrogance of the petitioner and his friends, and such arrogance could have been subdued only by the impugned condition imposed by this Court. He emphatically submits that the impugned condition no.(ii) imposed by this Court is just and proper in the peculiarity of the facts and circumstances of the case and it needs no modification.

7. Before adverting to address the contentions raised by learned counsels for the parties, I feel persuaded to make Mr. Mishra, learned counsel for the petitioner, remember that before imposing the impugned condition, this Court in clear term had asked Mr. Mishra about the condition proposed to be imposed just to imbibe corrections in the petitioner by arousing his sense of humility.

8. We, as a society, love status quo. We usually refuse to learn from others' mistakes till we ourselves commit the same mistake. A person ignores the trauma of a victim of molestation or rape just as a passing news

and he only becomes vocal when such misfortune befalls on him. General apathy to everything around us is our character. Coming to the family, the present generations with the advent of technologies are more exposed to the society than we were in the past. They, no doubt, have a better understanding than us, but they also inherit this general apathy as a character. More the exposure, more become their attraction to deviants than discipline. Education, grooming, discipline and technology have shaped some of the youths to be more aware and more concerned compared to what we were in the past. But that is only a tip of the iceberg. The bond of family for some reasons (which is a matter of study by sociologists and psychologists) is found to be loosened. Our youths are over-reactive and the parents are forced to tread cautiously while dealing with them. An affectionate slapping or twisting of ears, which may bring positive changes in errant child or youth, have been designedly spared by the parents and elders of the family for the sheer fear that the child / youth may over-react. We, the parents try to cover up the mistakes or misdeeds of our children instead of correcting them, blissfully forgetting or ignoring the age old adage that a cup of water at the right time could extinguish the largest fire in the world. In such situation the Court is left with no option but to step in to make such a child / youth realize the pain of humiliation just to arouse his sense so that probation or punishment, whatever be the product of the verdict, shall be effective and the youth shall loathe before even thinking of repeating such offence. With such view in my mind, condition no.(ii) was imposed while releasing the petitioner on bail.

9. Father of the petitioner, on appearing before this Court, submitted that the petitioner registered realization on his face on looking at the impugned condition and has started analyzing the same in his mind. I also marked the spark of realization in the innocent eyes of the petitioner. If such realization is a feigned one and the submissions advanced by the petitioner, his father and his counsel are conduct to cover up the mistakes / misdemeanor of the petitioner, both petitioner and his father shall have to pay the price for that in the long run and at that time there shall be no scope for the father or the petitioner to repent any more, as the petitioner shall have no mind to register realization in order to experience repentance after he has totally slipped. But the petitioner having donated blood to the Blood Bank voluntarily as a mark of social service on 23.09.2011 and the social service rendered, even if induced by apprehension of humiliation being truly a noble deed, such a conduct of the petitioner makes me believe his bona fides without suspecting his intention or his father's intention.

10. In course of argument, I asked learned counsel for the petitioner to persuade the petitioner to keep the light of realization burning in him till the verdict day after trial so that he can accept with a positive mind whatever happens to him, be it punishment, probation for his reform, or an acquittal. I also suggested some methods to keep the petitioner engaged in social activities and some methods learned counsel for the petitioner also suggested. I shall take those matters into consideration after addressing the contentions raised by learned counsels for the parties.

11. It is worthwhile to analyze the impugned condition now. "KAR SEVA" is a recognized 'community service' among Punjabi community, Hindu community in Punjab and some parts of North India. I am told that even billionaires vie for an opportunity to do "KAR SEVA" in Golden Temple of Punjab and other Gurudwaras. Every aspect starting from manning the shoes-stand to cleaning up the dishes are done through "KAR SEVA". It is considered to be an honourable service. Such a thing is not prevalent in Orissa. But our culture teaches us to imbibe good things from other cultures. If a thing is good and honourable in one place or community, it cannot be considered to be bad or dis-honourable in another place or community of the same country, especially, if we look behind to perceive the psychology and attitude of the persons doing the "KAR SEVA" in other community and places with a strict secular attitude. With such things in mind, the "KAR SEVA" at the shoes-stand of Cuttack Chandi Temple was imposed as a condition to take care of the petitioner as a social aberrant. My focus while imposing the condition was on the petitioner as an individual and my goal was to salvage him for the society. While imposing the condition, I took cognizance of the definition of 'punishment' in the Indian Penal Code, under which the petitioner is charged, the humanitarian spirit of law and the objective of redemption of the petitioner as a crime doer with a view to restore his whole personality. An argument may be advanced that voluntariness cannot be aroused by sanction of law. But my answer is when the family fails to arouse the best senses of an individual and provide condition for that individual to realize his best self, when the society prefers to be reactive to a crime doer, who is only indulged in a social aberration or prefers to ignore him or prefers to be apathetic towards him, the Court as a human institution is left with no option but to take step to arouse the senses of a wrong doer in whatever way, which, of course, is not inconsistent with any law. It is the duty of the Court in such a situation to compel the accused to put his right step forward. If he opts to put the right step (though under compulsion) forward, it becomes the duty of the family and the society to help him walk the right way. He should be taught then through care or

affection of the family and elders, while the rod is still hot, to learn to honour the rights of others, if he wants to enjoy the rights guaranteed to him.

12. Punishment is prescribed in Section 53 of the Indian Penal Code under Chapter-3. The impugned condition imposed may be viewed mistakenly as a punishment, if considered in isolation without reading Section 53 of the I.P.C. along with it. Viewed in the light of Bentham's Principles of "Pain and Pleasure", the impugned condition may partake the character of pain if viewed negatively that too in isolation without taking into consideration the high-handed acts of the petitioner. But, viewed positively from a societal perspective of "KAR SEVA" as prevalent in other parts of our country and from a punitive therapeutic angle, the impugned condition is only a step to arouse 'introspection' and 'understanding' in the petitioner to experience the finer human values in life. Understanding of anything by us depends on how we take it or how we look at it. It depends on our mind set and attitude. Pain and pleasure have their relativity. Taken positively, a pain may result in pleasure and, taken negatively, a pleasure may also result in pain. Taken positively, humiliation may end up in shaping an individual to experience the finer human values like humility, empathy, sympathy, etc. Taken negatively, humiliation may end up in arousing the sense of avenge, hatred and withdrawal, etc. in the same individual. Acceptance of anything with proper perspective / proper implication or proper attitude depends how we are groomed in our family and the society to take up things coming in our life. If we ponder deeply, we may end up in the finding that we, as a society, are passing through a phase of "faith crisis". We look at everything with suspicion and train our mind to accept everything with initial negativity. Any of us, if asked to find a single fault in ourselves, we may fail to find out even one; but, if we are asked to find out a single virtue in another, we may end up in finding out twenty faults in him/her. This is because we have forgotten totally to employ 'introspection' and 'understanding' as tools for knowing ourselves and others. We are certainly failing to understand others as they are. 'Introspection' and 'Understanding' are the tools given to the world by our culture for realization of one's best-self. Those tools need to be employed and perfected for looking at things and people coming in our way everyday. But, unfortunately our family systems as well as the society have failed to a great extent in shaping up our personality and mind to accept things as they are. The impugned condition is only a step to provoke realization in the petitioner and to keep him in the track of reformation. It is never a punishment. It is the duty of the family and the society now to come forward to arouse the positive sense in the petitioner without misleading him in any manner. Just as any other decision, happiness also is a decision and it now depends on the petitioner to take or not to take that decision. When

the impugned condition imposed is not a punishment in Indian Penal Code or any other Statute, it cannot therefore be held to be a punishment in the present case.

13. *"An accused is innocent till his guilt is proved"* is a salutary principle of criminal jurisprudence. The principle is to be borne in mind by the Judges trying cases so that they may not proceed on a wrong premise and have to proceed on the fixed premise that "the accused is innocent till his guilt is proved". The principle stares at the face of the Judge throughout the process of trial and the appeal or revision arising out of such trial. That is why the principle addresses the evidentiary aspect like 'burden', 'proof' and of course the position of the accused throughout the trial, who, even has the right to keep mum throughout the trial. The principle, however, does not arm the accused to preach his innocence before the society. So far as bail proceeding is concerned, the principle has little application beyond the mind of the Judge, who, as an impartial auditor, has to find out a prima facie case before granting or refusing bail. Had the principle got an application beyond the trial to arm the accused with substantive innocence as claimed, there would not have been any provision for bail, because an account could not have been taken to custody till his guilt is proved.

14. Coming to the question of power of the Court to impose conditions while releasing the accused on bail, the subject is no more res integra. Hon'ble Supreme Court of India in the case of **Gudikanti Narasimhulu and others *v.* Public Prosecutor, High Court of Andhra Pradesh,** AIR 1978 S.C. 429, has ruled thus :-

> "12. A few other weighty factors deserve reference. All deprivation of liberty is validated by social defence and individual correction along an anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimized. **Restorative community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned 'free enterprise', should be provided against.** No seeker of justice shall play confidence tricks on the court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution."
>
> (emphasis is given by me)

The Hon'ble Supreme Court has further observed thus :-

> "……The corrective instinct of the law plays upon release orders by strapping on to them protective and curative conditions."…

15. In view of the aforesaid observation of the Hon'ble Supreme Court, there remains no doubt that in exercise of its power under Section 439 read with Section 482 of the Code of Criminal Procedure, the Court can impose any condition which is protective and curative. "Community Service" as a condition, which was imposed in this case, has also been recognized by Hon'ble Supreme Court way back in 1978. In the premises as aforesaid, I do not find any merit in the contentions of learned counsel for the petitioner on law and on power of this Court to impose the impugned condition.

16. Coming to the last contention, I feel constrained to say with emphasis that the petitioner cannot be allowed to barter his stress, which may lead him to commit suicide, for the relief he has claimed. If he had the slightest apprehension that the condition imposed has stress for him and his family members in store, he should not have availed the benefit of bail. He could have filed petition for modification of the condition while still in custody or he could have approached Hon'ble the Supreme Court against the order. But, having executed the Bond on acceptance of the condition, he cannot say that the condition pricks and he is now under stress. He cannot blow hot and cold at the same time. The ground, if insisted, may land the petitioner again in custody for the lone reason of his safety. Learned counsel for the petitioner, in course of hearing, however abandoned the plea and harped on voluntary correction of the petitioner.

17. Coming to the contention on the point of steps by the petitioner to correct himself, it is submitted by learned counsel for the petitioner that the petitioner had donated blood in the Blood Bank of S.C.B. Medical College & Hospital, Cuttack on 23.09.2011 purely out of his own volition and that speaks of his proceeding in the right way to correct himself.

18. The action of the petitioner is a stray incident, which he might have designed to play confidence tricks on the Court or the community. He may forget the good work he has done after getting the relief claimed, and a stray incident cannot be held to be sufficient to bring correction in the petitioner as desired by the Court in imposing the impugned condition no.(ii). My discussion supra shows that the condition impugned is not against law or it has not been imposed as a punitive measure. Still the petitioner having not yet crossed his teens and he being prone to imagine things out of

proportions for the Media glare on the issue, the concept of "KAR SEVA" in the shoes-stand of a shrine having not yet been recognized as an honourable "community service" in the culture of our State and the shoes-stands before the shrines, as I am told, being managed on contract basis for profit only, I feel persuaded to give a rethinking into the matter. Accordingly, impugned condition no.(ii) is substituted by the following conditions :-

(ii) The petitioner shall not threaten, induce, coerce or intimidate the informant or any witness of this case in any manner whatsoever;

(ii)(a) He shall not involve himself in similar or any other offence during currency of this order; and

(ii)(b) The petitioner shall do any two of the followings :-

(i) He shall save a part of his pocket money each day and shall spend his month's savings by providing chocolates, pencils, clothings, or study materials etc. to the children of any orphanage of his choice situated in Cuttack town or Cuttack Sadar area.

(ii) He having already undertaken the service of donating blood in the Blood Bank, he shall associate himself with any voluntary organisation or group of Cuttack town engaged in collection of blood to augment the needs of patients suffering from various diseases.

(iii) He shall report before the Executive Officer of Cuttack Chandi Temple or any other temple of his choice in Cuttack town to do "KAR SEVA", like sweeping the floor of the temple, preparing garlands to be offered to the deity, collection of flowers, preparation of sandal pastes, removing the used flowers offered to the deity to its appointed place, serving food in the community feast or any welfare work or 'Seva' of the temple, as entrusted to him by the concerned authorities. This "KAR SEVA" shall be confined to once in a week.

19. Besides abiding the aforesaid conditions, the petitioner may take steps with the help of his father to renew his study in any college or in the IGNOU.

20. Condition nos.(ii)(b)(i) and (ii)(b)(ii), if opted by the petitioner, shall be effective from 1st day of October, 2011. Condition No.(ii)(b)(iii), if opted by the petitioner, shall be effective from Sunday or any other day of the choice of the petitioner, from the first week of October, 2011. The duration of

conditions in (ii)(b) supra shall be for one year or till conclusion of the trial, whichever is earlier.

21. The Investigating Officer of the case is directed to monitor the aforesaid conditions imposed accordingly during appearance of the petitioner before him in compliance of condition no.(i) of the bail order.

22. Before parting with the order, I feel persuaded to request learned Advocate General to solicit views from the D.G. of Police, Commissioner of Police, Chief Secretary, N.G.Os. engaged in the field, Editors of widely published Daily News Papers and other groups on the points of availability of different Community Services where young offenders may be engaged for their correction in appropriate case. A compilation containing suggestions and views be filed within four months, which may be used as reference in other cases.

The Misc. Case is accordingly disposed of.

A copy of this order be supplied to learned Advocate General, Orissa.

Application disposed of.

2011 (II) ILR- CUT- 707

B.K.MISHRA,J.

CRA.NO.163 OF 2001 (Decided on. 08.09.2011)

ALOK @ JITENDRA PANI ……Appellant

.Vrs.

STATE OF ORISSA ……Respondent

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 (ACT NO. 56 OF 2000) – Ss.15 (g), 64.

Conviction of the appellant U/s. 448 & 376 I.P.C. – He was sentenced to under go R.I. for 10 years U/s.376 I.P.C. – Appellant is below 18 years when offence was committed – In view of Sec.2(k), 2(l) and 7-A read with Section 20 of the Juvenile Justice Act, 2000 as amended in the year 2006 the appellant is held to be a Juvenile on the date of the alleged incident.

In this case the appellant was arrested and forwarded to Court on 19.05.2000 and he was in custody till he was granted bail on 30.09.2005 and as such he remained in custody for morethan 5 years and 4 months and he has already undergone imprisonment for more than the maximum sentence provided U/s.15 of the Act and Rule 98 of the Juvenile Justice Rules, 2007 – Held, the appellant be discharged from his bail bond and set at liberty forthwith.

(Para 16,17,18)

Case laws Referred to:-

1.AIR 2010 SCW 2881 : (Mohan Mali & Anr.-V-State of M.P.)
2.(2009) 13 SCC 211 : (Hari Ram-V-State of Rajasthan)
3.(1983)3 SCC 217 : (Bharwada Bhoginbhai Hirjibhai-V-State of Gujrat)
4.(2011)48 OCR (SC) 559 : (State of U.P.-V-Chhoteylal).
5.(2005) 3 SCC 551 : (Singh-V- State of Jharkhand).
6.(2009) 13 SCC 211 : (Hari Ram-V- State of Rajasthan).
7.(2010) 47 OCR (SC) 855 : (Ajaya Kumar-V- State of M.P.).
8.(2002) 2 SCC 287 : (Rajinder Chandra-V-State of Chhatisgarh).

For Appellant - M/s. D.Panda & Associates
For Respondent - Addl. Govt. Advocate

B.K. MISRA, J. This appeal is directed against the judgment and order of conviction passed by the learned Assistant Sessions Judge-cum-Chief

Judicial Magistrate in S.T. Case No.132-232 of 2000. By virtue of the said judgment the present appellant was convicted under Sections 448 and 376 of the Indian Penal Code (for short, 'I.P.C.'). The appellant was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1000/- in default to undergo further rigorous imprisonment for six months for the offence under Section 376 of the I.P.C. Besides that the appellant while being convicted for the offence under Section 448 of the I.P.C. was sentenced to undergo rigorous imprisonment for six months. The Court directed the substantive sentences to run concurrently.

2. The case of the prosecution is that on 16.5.2000 at about 6.30 in the evening the present appellant had come to the house of Debendranath Pani (P.W.9), who happens to be elder brother of the informant Srikanta Pani (P.W.3). It is alleged that the appellant on the pretext of asking for a book entered into the house of P.W.9 and taking advantage that the prosecutrix was alone in the house ravished her by gagging her. It is alleged that at the time of occurrence the mother of the victim had gone to wash the clothing and when returned to the house heard the cries of her daughter and when she entered inside her house found the appellant after leaving P.W.1 standing in a corner of the house and at that time the victim girl was lying naked and bleeding. The victim narrated the facts before her mother. The informant (P.W.3) after ascertaining the facts from the prosecutrix (P.W.1) presented a written report i.e. Ext.1 before the O.I.C. Raibania Police Station. Police on receipt of the F.I.R. Ext.1 registered Raibania P.S. Case No.20 of 2000 under Sections 448 and 376 of the I.P.C. and investigation was taken up. On completion of the investigation, charge sheet was placed against the appellant to stand his trial.

3. The plea of the appellant was of complete denial of the occurrence and it is his further plea that the father of the victim had taken money from his father for which there was a village meeting and for that he has been falsely entangled in the case.

4. The prosecution in order to bring home the guilt of the appellant examined 11 witnesses in all and the defence examined one witness.

5. Learned trial court on analyzing the evidence on record came to the conclusion that the prosecution was able to establish its case against the appellant and therefore recorded the order of conviction and passed the impugned sentences. Learned counsel appearing for the appellant in course of his argument raised the plea of juvenility and contended that even if the plea of juvenility was not raised before the courts below but such a claim of

juvenility can be raised before any Court at any stage even after final disposal of the case and the same shall be determined in terms of the provisions contained in the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short the 'J.J.Act') as amended in 2006 and in particular within the meaning of Section 7-A which was introduced to the parent Act by the Amending Act, 2006. It was also contended that since the appellant was a juvenile when the offence was committed he cannot be sentenced to undergo any sentence rather he should be released in view of the provisions of Sections 15 and 64 of the J.J.Act read with Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short the 'J.J.Rules'). In support of such contention the learned counsel for the appellant placed reliance in two judgments of the Apex Court as reported in **AIR 2010 SCW 2881 Mohan Mali & another –v- State of M.P. and (2009) 13 SCC 211 Hari Ram –v- State of Rajasthan** and another. Besides raising the aforesaid question of law it was also very strenuously urged by the learned counsel for the appellant that the learned court below should not have placed reliance on the testimony of prosecutrix which lacks corroboration. Besides that since there was no injury on the private part of the appellant the question of ravishing a minor girl should have been disbelieved by the learned trial court.

6. Learned counsel appearing for the State while agreeing with the learned counsel for the appellant that the question of juvenility can be raised at any stage, but contended that in view of the evidence on record the order of conviction cannot be faulted and sentences recorded need not be disturbed.

7. I have gone through the evidence of the witnesses on record and also perused the impugned judgment in this case. The victim who has been examined as P.W.1 has categorically stated that on 16.5.2000 the accused had come to their house to collect book from his brother Dasa @ Babu but since her brother was not present then her mother told the appellant about non-availability of the book and also stated that her son was not present in the house and so saying proceeded to the 'Gadia' (Pond) to wash the cloth and thereafter the appellant called her and after gagging her mouth removed her pant and top for which she became naked and made her to lie in the kitchen and forcibly inserted his penis into her vagina for which there was bleeding from her private part for which she cried and raised hullah. It is also her further evidence that the accused had caught hold of her hand. It is also the evidence of P.W.1 that on hearing her cries when her mother came she found the appellant trying to wipe blood with a piece of cloth. P.W.1 further deposed that she narrated the incident to her mother and the appellant was

confined in a room. P.W.1 further deposed that she told the incident to her uncle when he came around 9 P.M. and the matter was reported to police. P.W.1 deposed that Police sent her for medical examination and seized her pant and top and also collected the blood stained earth and cloth used for cleaning blood. Though P.W.1 has been examined and cross-examined at length but nothing could be elicited from her mouth to disbelieve her evidence. On the other hand she remained firm in stating in her cross-examination that the appellant immediately caught hold of her when her mother left the house towards the 'Gadia', removed her dress and cohabitated with her for 5 to 10 minutes. This evidence of P.W.1 about the injury on her private part gets overwhelming corroboration from the evidence of P.W.8, the Medical Officer who had examined her (the victim) on 17.5.2000. P.W.8 deposed that there was a recent injury in the hymen at 5-O' clock position and she proved her report as Ext.5. P.W.8 also opined the age of the victim to be within 11 to 14 years. Ext.5 shows that there was sign and symptom of recent sexual intercourse. There was bleeding injury on the hymen with tenderness. Thus, the evidence of P.W.8 and the injury report Ext.5 lends all material corroboration to the evidence of P.W.1 that she was ravished by the appellant. P.W.2 is the mother of the victim. P.W.2 also deposed that on 16.5.2000 evening the appellant had come to their house to take a book of his son Dasa. But at that time her son Dasa was not present and she told the appellant about non-availability of her son and the book and further informed the appellant that he can come after return of her son to take the book and so saying she proceeded to a 'Gadia' for washing her cloth and at that time the appellant was sitting on a 'Khatia' (Charpoy) which was lying in front of their house. P.W.2 also deposed that on hearing cry when she returned to house and proceeded towards kitchen found the victim lying naked and the appellant was washing the vagina of her daughter with a piece of cloth and the appellant was also found covering his penis with a piece of cloth. P.W.2 further deposed that she caught hold of the appellant and confined him in a room. P.W.2 deposed that her daughter told her that the appellant brought to her to the kitchen and told that he would give Rs.5/- per day and also she saw bleeding from the private part of her daughter. P.W.2 deposed that she informed the incident to her brother-in-law Srikanta and instructed him to go to the Police Station.

8. P.W.3 is the informant, who deposed that on 16.5.2000 around 8.30 P.M., he returned to the house and on being called by her elder sister-in-law he came and saw his niece lying in the kitchen and on hearing the incident that the appellant ravished her, he proceeded to the Police Station and submitted the F.I.R. (Ext.1). P.Ws.4,5,6 & 9 are all post occurrence witnesses and they heard that the appellant had forcibly cohabitated with

P.W.1. P.W.11 is the I.O. P.W.7 is the doctor who had examined the appellant on police requisition. P.W.7 deposed that there was no injury on the penis or any other part of the body of the appellant, but he found him capable of having sexual intercourse and he has proved his report as Ext.4. After perusing the entire evidence as laid by the prosecution, I do not find any compelling reason to disbelieve the evidence of P.W.1 the prosecutrix whose evidence not only has remained unshaken in her cross-examination but also gets overwhelming corroboration from the evidence of P.W.8, the doctor, who found the injury on the private part of the victim which was also bleeding and she has also specifically opined that there was sign and symptom of recent sexual intercourse. There is nothing on record to disbelieve the evidence of P.W.1, the prosecutrix.

9. The contention of the learned counsel for the appellant that the case has been foisted against the appellant as the father of the prosecutrix could not repay the loan which he had taken from the father of the appellant and could not execute the 'Kabala' (sale deed) and when such demand was made by the father of the appellant, P.W.9 has foisted this case. In support of such plea one witness has been examined as D.W.1 and Ext.B has been pressed into service. But very surprisingly when P.W.9 the father of the prosecutrix was examined and cross-examined in Court Ext.B was never confronted to him and therefore the evidence of D.W.1 and Ext.B cannot make the case of the prosecution unbelievable. The evidence of D.W.1 cannot demolish the foundation of the prosecution case and the evidence of P.W.1.

10. It is needless to mention here that in a number of judicial pronouncements the Apex Court have held that conviction can be based on the solitary testimony of a single witness where such evidence suffers from no infirmity and appears believable and trustworthy. There is nothing on record to disbelieve the evidence of P.W.1 and there is no reason or rhyme for a minor girl to falsely implicate the appellant in this case. In a non permissive society of ours it is hardly believable that a minor girl would be set up by her parent to falsely implicate an innocent man and that too in an heinous offence like rape and thereby putting the reputation of the family and especially the girl at a stake. It is the established position of law that the evidence of the prosecutrix does not need corroboration and where the evidence of prosecutrix inspires confidence and appears reliable it must be acted upon without seeking corroboration of her statement in material particulars. The testimony of the prosecutrix must be appreciated in the background of the entire case. It is observed in umpteen number of cases by the Apex Court :-

> "The important thing that the Court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the Courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the leveling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge."

11. Thus, in the Indian setting reluctance or refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. It is also observed by the Hon'ble Apex Court in the case of **Bharwada Bhoginbhai Hirjibhai –v- State of Gujrat (1983) 3 SCC 217** and has been relied upon by the Apex Court in a recent pronouncement as reported in **(2011) 48 OCR (S.C.) 559 State of U.P. –v- Chhoteylal**;

> "In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its

own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical……."

"…….Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India made false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face

interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

In the above touch stone of settled position of law regarding appreciation of evidence of the victim in a case of rape as I have already discussed above, the solitary evidence of P.W.1 establishes the guilt of the appellant and when the victim soon after the occurrence without any loss of time narrated the incident before her mother and uncle, namely P.Ws.2 and 3 and when P.Ws.2 and 3 deposed that they heard from P.W.1 that she was ravished by the appellant the same can be relied upon under Section 6 of the Indian Evidence Act. The learned trial Court has dealt with the matter very vividly and I do not find anything wrong in such appreciation of evidence and therefore, there is nothing to interfere with the said findings of the learned trial Court.

12. Now coming to the plea of the juvenility which has been raised before this Court by the appellant, from the material placed before this Court i.e. the original certificate granted by the Board of Secondary Education, Orissa in respect of the appellant, who passed the H.S.C. Examination from Dinakrushna Panchayat High School, Garhsahi, Balasore in the year, 2000 it is found that the appellant was born on 1st February, 1983. The learned counsel for the appellant also drew my attention to the charge sheet which has been placed against the appellant on completion of the investigation by the Investigating Agency which shows that the Investigating Officer recorded in the charge sheet that the appellant was born in the year, 1982. The most reliable evidence with regard to the date of birth of the appellant would be the date of birth which has been recorded in the certificate granted by the Board of Secondary Education, Orissa wherein it has been mentioned that the appellant was born on 1st February, 1983. According to the case of the prosecution, the occurrence took place on 16.5.2000. By simple calculation, it is seen that when the offence was committed the appellant was 17 years, 3 months and 15 days old and therefore, he had not completed the age of 18 years.

13. The question now arises as to whether a male person who was above 16 years on the date of commission of the offence prior to 1.4.2001, would be entitled to be considered as a juvenile for the said offence if he had not completed the age of 18 years on the said date. In other words, could a person who was not a juvenile within the meaning of 1986 Act when the offence was committed, but had not completed 18 years, be governed by the provisions of the Juvenile Justice Act, 2000 and be declared as a juvenile in

relation to the offence alleged to have been committed by him? This question came into consideration before the Constitution Bench of the Hon'ble Apex Court in a case as reported in **(2005) 3 SCC 551 Pratap Singh –v- State of Jharkhand** and also in the case of **Hari Ram –v- State of Rajasthan (2009) 13 SCC 211.** By analyzing several decisions the Apex Court have categorically come to the conclusion that in view of the provisions of Section 3 and Section 20 of the Juvenile Justice Act, 2000 and considering the same along with the definition of Juvenile in Section 2(k) of the Juvenile Justice Act, 2000 as contrasted with the definition of a male juvenile in Section 2(h) of the 1986 Act and in view of the majority view in Pratap Singh's case (supra) the Juvenile Justice Act, 2000 would be applicable to a proceeding in any court/authority initiated under the 1986 Act which is pending when the Juvenile Justice Act, 2000 came into force when the person had not completed 18 years of age as on 1.4.2001. In other words, a male offender who was being proceeded with in any court/authority initiated under the 1986 Act and had not completed the age of 18 years on 1.4.2001, would be governed by the provisions of the Juvenile Justice Act, 2000. It is to be remembered that for the purpose of attracting Section 20 of the Juvenile Justice Act, 2000 it has to be established that (i) on the date of coming into force, the proceedings in which the petitioner was accused was pending; and (ii) on that day he was below the age of 18 years. The unanimous view of the Constitution Bench in Pratap Singh's case (supra) was that the provisions of the Juvenile Justice Act, 2000 have prospective effect and not retrospective effect except to cover cases where though the male offender was above 16 years of age at the time of commission of the offence, he was below 18 years of age as on 1.4.2001. Consequently, the said Act would cover earlier cases only where a person had not completed the age of 18 years on the date of its commencement and not otherwise.

14. The decision of the Pratap Singh case (supra) led to the substitution of Section 2(l) and the introduction of Section 7-A of the Juvenile Justice Act, 2000 which was amended in the year 2006 and the subsequent introduction of Rule 12 in the Juvenile Justice Rules, 2007 and the amendment of Section 20 of the Juvenile Justice Act. The harmonious reading of Section 2(k), 2(l), 7-A and Rule 12 and Section 20 of the Juvenile Justice Act, 2000 as amended in the year 2006 clinches the question which has been raised in this appeal and especially when the case was pending on 1.4.2001 when the Juvenile Justice Act, 2000 came into force. Section 20 of the Juvenile Justice Act, 2000 specially provides for the procedure to be followed in the pending cases and reads as follows:-

"20. Special provision in respect of pending cases-Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

(Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation-In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

15. Section 64 of the Juvenile Justice Act, 2000 deals with a situation where a juvenile in conflict with law is already undergoing sentence at the commencement of the Act.

In **Mohal Mali –v- State of M.P. as reported in 2010 AIR SCW 2881**, the Hon'ble Apex Court Court taking into consideration the ratio propounded in Hari Ram case (Supra) has held that the provisions of Section 64 of the Juvenile Justice Act, 2000 has to be read along with Section 7-A and 20 of the Juvenile Justice Act, 2000 together with Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Rule 98 of the Juvenile Justice Rules 2007 says:-

"98. Disposed of cases of juveniles in conflict with law- The State Government or as the case may be the Board may, either suo motu or on an application made for the purpose, review the case of a person or a juvenile in conflict with law, determine his juvenility in terms of the provisions contained in the Act and Rule 12 of these rules and pass an appropriate order in the interest of the juvenile in

conflict with law under Section 64 of the Act, for the immediate release of the juvenile in conflict with law whose period of detention or imprisonment has exceeded the maximum period provided in Section 15 of the said Act."

The Apex Court also in a decision as reported in **(2010) 47 OCR (S.C.) 855, Ajaya Kumar V. State of M.P.** also reiterated the aforesaid position of law and directed release of the juvenile as he had undergone sentence more than the maximum period of detention as provided under Section 15 of the Juvenile Justice Act and by following Rule 98 of the Juvenile Justice Rules, 2007 read with Section 15 of the Juvenile Justice Act.

16. The learned counsel appearing for the State very fairly conceded to the position of law as has been enunciated by the Hon'ble Apex Court in Hari Ram case (Supra), Mohan Mali case (Supra) and Ajaya Kumar (Supra).

In the instant case, in view of the original matriculation certificate which has been produced before this Court at the appellate stage shows that the appellant was 17+ on the date of commission of the alleged offence and even if taking into consideration the year of birth 1982 as has been mentioned in the charge sheet, it can be held that the appellant had not completed 18 years of age. Even otherwise also in view of the decision of the Apex Court as reported in the case of **Rajinder Chandra –v- State of Chhatisgarh (2002) 2 SCC 287,** when a claim of juvenility is raised and on the evidence available two views are possible, the Court should lean in favour of holding the offender to be a juvenile in borderline cases. In the instant case as I have already discussed above, the appellant can be held to be a juvenile as he had not completed 18 years of age in view of the date of birth as recorded in the Matriculation Certificate. In view of Section 2(k), 2(l) and 7-A read with Section 20 of the Juvenile Justice Act, 2000 as amended in the year 2006, the appellant is held to be a juvenile on the date of the alleged incident. In the instant case, it is seen that the appellant was arrested and forwarded to Court on 19.5.2000 and he was all along in custody till he was granted bail by this Court on 30.9.2005 that is to say that by 30.9.2005 the appellant had remained in custody for more than five years and 4 months.

17. Section 15(g) of the Juvenile Justice Act, 2000 prescribes that where the Juvenile Justice Board is satisfied on inquiry that a juvenile has committed an offence, the Board may if it thinks fit make an order directing the juvenile to be sent to a special home for a period of 3 years and the

Board may, for the reasons to be recorded reduce the period of stay to such period depending upon the nature of offence and circumstances of the case as it thinks fit.

18. Thus, having regard to the fact that the appellant was a juvenile on the date of commission of the offence and has already undergone imprisonment for more than the maximum sentence provided under Section 15 of the Juvenile Justice Act, 2000 by adding the provision of Rule 98 of the Juvenile Justice Rules, 2007 read with Sections 15 and 64 of the Juvenile Justice Act, 2000 and keeping in mind the ratio propounded by the Apex Court in the case of Mohan Mali, Ajaya Kumar and Hari Ram case (supra), the appeal stands allowed and it is directed that the appellant be discharged from his bail bond and set at liberty forthwith.

Appeal allowed.