2012 (II) ILR - CUT- 538

V.GOPALA GOWDA, CJ.

MACA NO. 766 OF 2003 (Dt.16.03.2012)

KAILASH CHANDRA JENA ……. Appellant.

.Vrs.

SK. KUTABUDDIN & ANR. ……. Respondents.

CONSTITUTION OF INDIA, 1950 – ART.226.
r/w Section 168 MV Act,1988.

Writ Jurisdiction – Writ Court can exercise its jurisdiction as that of the original jurisdiction and pass appropriate award – Since appeal is the continuation of the original jurisdiction this Court can exercise original jurisdiction as there is evidence on record – As the accident is of the year 1991 remanding the matter after 21 years will put the appellant to immence hardship – Tribunal is a special forum and its object is to see the claims of the parties are determined as expeditiously as possible but not latter than six months – Held, long delay in determining the compensation of the claim of the claimant has weighed in the mind of this Court not to remand the case to the Tribunal and can award just and reasonable compensation in exercise of appellate jurisdiction. (Para 4,5)

Case law Referred to:-

AIR 1980 SC 1896 : (Gujarat Steel Tubes Ltd.,etc.etc.-V- Gujarat Steel Tubes Mazdoor Sabha & Ors.)

For Appellant - M/s. A.K.Rao, P.K.Sendh.
For Respondents - M/s. Mohitosh Sinha, P.R.Sinha, P.K.Mahali (for R.2)

V.GOPALA GOWDA, C.J. This appeal is filed by the claimant questioning the correctness of the finding recorded by the Member, Second M.A.C.T., Cuttack in Misc. Case No.757 of 1991 on the contentious issue nos.3, 4 and 5 rejecting the claim petition holding that the claimant has not proved the injury sustained on account of the road traffic accident. Against the said rejection, this appeal is filed contending that the findings recorded on the contentious issue nos.3, 4 and 5 are erroneous in law as the learned

Member of the Tribunal has not properly appreciated the facts and legal evidence on record while recording the finding. Therefore, learned counsel for the claimant-appellant has requested this Court for setting aside the same and to award just and reasonable compensation instead of remanding the matter to the Tribunal applying the legal principle laid down by the Supreme Court in the case reported in the case of ***Gujarat Steel Tubes Ltd., etc. etc. v. Gujarat Steel Tubes Mazdoor Sabha and others***, *AIR 1980 SC 1896*, wherein the Apex Court at paragraph 79 has held that the Writ Court can exercise its jurisdiction as that of the original jurisdiction and pass appropriate award. Since this is an appeal, which is the continuation of the original jurisdiction, this Court can exercise original jurisdiction as there is evidence on record. Therefore, there is no need to remand the matter to the M.A.C.T. for its reconsideration. On the other hand, it can pass appropriate order. Further, learned counsel submits that the accident had taken place in the year 1991 and remanding this case to the M.A.C.T. after 21 years later justice will suffer and the appellant will be put to immense hardship. Learned counsel submits that the M.V. Act confers statutory right upon the appellant under Section 166 of the M.V. Act for claiming compensation either for injury or the dependence on account of the death under the above provisions of the Act, which is a social piece of legislation to mitigate the hardship, therefore, just and reasonable compensation has to be awarded by the Tribunal in favour of the appellant. The Tribunal is a special forum constituted under the statutory provisions of the M.V. Act with the avowed object to see that the claims of the parties are determined as expeditiously as possible, but not later than six months. Having regard to the aforesaid objects facts of the case, learned counsel for the appellant submitted that the remand order to the Tribunal after setting aside the impugned judgment is not justified and therefore requested this Court to award just and reasonable compensation in favour of the appellant by allowing this appeal.

2. Learned counsel Mr Sinha appearing on behalf of opp. party no.2 submits that rejection of the claim petition is perfectly legal and valid as the Tribunal being the fact finding authority has recorded the finding of fact on proper appreciation of facts and legal evidence on record, which cannot be substituted by this Court in exercise of its appellate jurisdiction unless the appellant shows that the findings are erroneous and error in law. Further, Mr Sinha submits that in the medical certificate issued by the Government doctor under the relevant column of the cause of injury it is not mentioned as “road traffic accident”. Therefore, this important aspect of the matter has been taken into consideration by the learned Member of the Tribunal in

coming to the conclusion on facts and evidence on record that the claimant has not sustained injury on account of road traffic accident. Therefore, learned Member of the Tribunal while coming to the conclusion on fact has answered the contentious point that the claimant has not sustained injury on account of road traffic accident and, therefore, he is not entitled to compensation. Further, it is submitted by the learned counsel that if this Court comes to the conclusion that findings and reasons recorded by the Tribunal on the contentious issues framed in the impugned judgment are erroneous and contrary to the legal evidence on record, the matter may be remanded to the Tribunal with liberty to the parties to adduce evidence in support of their respective claim and counter claim and to decide the case on merit. Therefore, learned counsel for the Insurance Company prayed for dismissal of the appeal.

3. With reference to the aforesaid rival legal contentions, the following points would arise for consideration by this Court.

i) Whether the rejection of the claim petition after recording the findings on contentions issue nos.2 to 5 in the impugned judgment by the Tribunal are erroneous or error in law and is liable to be set aside?

ii) Whether the case is required to be remanded to the Tribunal or this Court can decide as an appellate court and award just and reasonable compensation in this appeal?

iii) What award?

4. Point no.(i) is required to be answered in favour of the claimant. It is an undisputed fact that accident has occurred on account of road traffic accident and the G.R. case was filed against the driver of the offending vehicle. It is also an undisputed fact that the claimant suffered an injury of facture of waste bone with other injury. He has been treated by the doctor Tangi P.H.C., who is not examined as a witness in the claim case before the Tribunal. Thereafter he was admitted to SCB medical College & Hospital, Cuttack and undergone the treatment from 14.5.1991 to 31.5.1991 as per Ext. 1 the discharge certificate. The claimant himself was examined as P.W.1 and another witness who is the informant of the accident is examined as P.W.2. Ext.1 is the discharge certificate, Exts 2 to 2/3 are some prescriptions, Ext.4 is the copy of the F.I.R., Ext. 5 is the copy of the seizure list, Ext.6 is the zimanama, Ext.7 is the final report, Ext.B is the M.V.I's. report. On behalf of the opp. partes-respondents none is examined and nor

the evidence adduced by the claimant has been refuted. The Member, Tribunal has committed gross error in not accepting the case pleaded and evidence adduced by the claimant without assigning proper and valid reasons in the impugned judgment even in absence of rebuttal evidence required to be adduced by the insurer denying the claim of the claimant. Opp. party no.1-owner before the Tribunal was set ex parte before the Tribunal. In such circumstances, the defence available for the insured has not been availed of by the insurer to adduce the evidence on record to show that the claimant is not entitled for compensation. By taking a plea that the claimant did not sustain injury in the road traffic accident on account of the involvement of the offending vehicle which is insured with the insurer is not a proof is well established principle of law. Therefore, the Tribunal has not considered the material evidence on record adduced by the claimant and rejected the claim petition erroneously. Therefore, the impugned judgment is liable to be set aside. Having come to the conclusion that the impugned judgment is liable to be set aside, which is accordingly set aside, the second point is also answered in favour of the claimant applying the principle laid down by the Apex Court at paragraph-79 of *Gujarat Steel Tubes's* case (supra), which reads as under:

> "Paragraph-79: The basis of this submission, as we conceived it, is the traditional limitations woven around high prerogative writs. Without examining the correctness of this limitation, we disregard it because while Article 226 has been inspired by the royal writs its sweep and scope exceed hide-bound British processes of yore. We are what we are because our Constitution framers have felt the need for a pervasive reserve power in the higher judiciary to right wrongs under our conditions. Heritage cannot hamstring nor custom constrict where the language used is wisely wide. The British paradigms are not necessarily models in the Indian Republic. So broad are the expressive expressions designedly used in Article 226 that any order which should have been made by the lower authority could be made by the High Court. The very width of the power and the disinclination to meddle, except where gross injustice or fatal illegality and the like are present, inhibit the exercise but do not abolish the power."

5. The above principle can easily be applied to the fact situation of the present appeal as the appeal is a continuation of the original proceedings. Therefore, this Court also can exercise original jurisdiction in exercise of its appellate jurisdiction to mitigate the hardship of the appellant, since the accident had occurred 21 years back. So, the statutory powers are conferred

upon the statutory tribunal, which is special forum, for determination of the compensation within six months from the date of filing of the claim petition. Long delay for determining the compensation of the claim of the claimant has weighed in the mind of this Court not to remand the case to the Tribunal, and award just and reasonable compensation in exercise of appellate jurisdiction for which the claimant is entitled. Accordingly, the second point is answered. Having answered the first and second points in favour of the claimant, then what should be the compensation to be awarded in favour of the appellant/claimant is the question left to be decided in this appeal.

6. It is an undisputed fact that claimant suffered a fracture injury although the cause of injury is not mentioned in Ext.1, the same is not to be attributed to the claimant. The fact remains that the claimant suffered accidental injury is evident from the fact that he had undergone treatment in S.C.B. Medical College Hospital, Cuttack from 14.5.1991 to 31.5.1991, which fact has not been rebutted by the opp. party by adducing evidence. Therefore, the claimant is entitled to compensation from the insurer under the following heads. Therefore, Rs.30,000/- must be awarded towards fracture, Rs.10,000/- towards the pain and suffering, Rs.10,000/- towards loss of amenity, Rs.5,000/- towards the attendant charges and Rs.5,000/- towards nutritious food, the medical expenses and transportation charges. The total compensation amount comes to Rs.60,000/-, which shall carry interest at the rate of 6% from 1.1.2000. The Registry is directed to draw up the award in the above terms. The total compensation shall be computed and paid to the claimant within four weeks from the date of receipt of this order.

Appeal is allowed.

2012 (II) ILR - CUT- 543

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

W.P.(C) NO. 7532 OF 2011 (Dt.20.03.2012)

ORISSA HIGH COURT RETIRED JUDGES' ASSOCIATION & ANR. ….....Petitioners.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.14, 21.

Writ petition – Orissa High Court retired judges Association seeks to extend medical facilities to enhance domestic help allowance, to sanction secretarial assistance and telephone allowance as provided to their counterparts in other states – The allowance sanctioned by the Government vide letter Dt.14.02.2011 is grossly inadequate – Discrimination – Held, direction issued to the State Government to modify the order Dt.14.02.2011 and to provide telephone allowance taking into account such facility extended by other states under Eastern region of the country by framing necessary Rules and guide lines – However such facilities and allowance shall not be made available to the retired judge if he or she is getting such benefit by virtue of holding any assignment/post/commission etc.

(Para 10,11)

For Petitioner - Mr. J. Patnaik, Sr. Advocate,
M/s. H.M.Dhal, B.Mohanty, T.K.Patnaik,
A.Patnaik, R.P.Ray, Ms. Rizvi & B.S.Rajguru.

For Opp.Parties – Mr. S.D.Das, Asst. Solicitor Gen.
(for O.P.No.1)
Mr. R.K.Mohapatra, Govt. Adv.
(for O.P.Nos.2 & 3).

V. GOPALA GOWDA, C.J. This writ petition has been filed by the Orissa High Court Retired Judges Association (hereinafter called "the Association") represented by its President challenging the action of the opposite parties with regard to non-payment of certain facilities and allowances like medical facility, domestic help allowance, secretarial assistance and telephone charges and seeking for issuance of a direction to suitably modify the order under Annexure-3 by extending medical facilities as

was being available to them during the incumbency of judgeship and enhance the domestic help allowance and further to sanction secretarial assistance and telephone allowances to the members of the Association urging various facts and legal contention.

2. The case of the petitioner-Association is that it is a registered association of retired judges of the Orissa High Court which espouses the cause of the judges who were appointed by the President of India in terms of Article 217 of the Constitution of India and have retired on attaining the age of superannuation i.e. 62 years. Article 220 of the Constitution of India debars a permanent Judge from practicing in the same High Court after retirement. A judge during his tenure is entitled to salary and other allowances as specified in part-D of the 2nd schedule in terms of Article 221 of the Constitution of India. A judge also receives many privileges during his tenure, however, after retirement a judge is paid only pension and not other allowances and privileges which he was receiving during his incumbency. It is stated by the petitioners that a judge during his incumbency leads a dignified life and is used to a distinct lifestyle. No sooner a judge retires all the privileges and facilities are withdrawn and he is left in lurch. Further, because of the ageing factor a retired judge needs more help and assistance so that he would be useful to render services to the society. It is also mentioned that very often a retired judge associates himself with various social activities in as much as the public at large repose extreme trust and endow them with various responsibility and such judges are looked upon differently than others. Therefore, to facilitate a retired judge to be more functional in conformity with the dignity of the distinguished office he was holding all the facilities and privileges which he was receiving during his incumbency should be provided. In other words a judge becomes immobile; no sooner the privileges and facilities are withdrawn he had to keep himself away from the even tempo of the society. Therefore, taking all these factors into consideration various State Governments have provided medical facilities, domestic help, secretarial assistance, telephone allowances etc. to the retired judges of the High Court and this has been so done keeping in view the fact that a retired judge can play useful role in the society provided his services are utilized by either the State Government or State Legal Services Authority. It is further stated that granting medical facilities and other privileges to the retired judges was the subject matter of long deliberation throughout the country and in many states the same has already been acceded to. In the meeting of 2nd level monitoring committee held on 11.08.2009, which was presided over by the Hon'ble Chief Minister, the then Hon'ble Acting Chief Justice of Orissa High Court suggested that medical facilities to retired Judges as available in other states should also be made

available to the retired Judges of this Court. Accordingly it was resolved that the Principal Secretary, Law Department, Government of Orissa would collect detail information from other States/High Courts regarding availability of medical facilities to the retired High court judges and those information shall be placed before the Hon'ble Chief Minister. It is stated that the petitioner-Association addressed a representation dated 25.8.2010 under Annexure-2 series to the Chief Justice of this Court stating therein that in absence of the facilities such as medical assistance, domestic help, secretarial assistance and telephone charges it is extremely difficult on the part of the members of the petitioner-Association to lead a dignified life. In the said representation the petitioner-association had enclosed a chart showing the facilities which are being extended to the retired judges of other High courts. It is further stated that initially the Government of Orissa declined to accede to the proposal for medical assistance and domestic help, however, vide letter dated 14.02.2011 (Annexure-3) the Government of Orissa in the Home Department has communicated to the Registrar General of this Court indicating therein that the Government has sanctioned domestic help allowance @ Rs.2,500/- per month and medical allowance @ Rs.1,500/- per month to the retired judges and chief Justices of Orissa High court w.e.f. 01.01.2011.

3. It is submitted by Mr. J. Patnaik, learned Sr. Counsel on behalf of the petitioners that the retired judges are entitled to medical facilities as was being enjoyed by them while in office and thus the benefits accorded under Annexure-3 is grossly inadequate. Further, the secretarial allowance and telephone allowance have not been extended which has been causing serious hardship in the retired life of a retired Judge. Learned Sr. Counsel placed reliance on the letter dated 07.12.2005 under Annexure-4 sent by the Registrar General of Kerala High Court to the Registry of this Court wherein it is indicated that the medical reimbursement facilities are being provided to the retired judges of Kerala High Court wherein the retired judges are entitled to free medical treatment in the State and reimbursement of expenditure incurred for the purchase of medicine and for treatment, which facilities not available in the Government Hospital. Apart from that, the Hon'ble Supreme Court in W.P.(C) No. 1022 of 1989 (All India Judges Association & Ors. Vs. Union of India & Ors.) vide order dated 02.08.2010 has accepted the recommendation made by Justice Padmanabhan Committee and directed that retired judicial officers would be entitled to fixed monthly medical allowance @ Rs.1,500/- per month and so far as family pensioners are concerned the medical allowance has been fixed at Rs.750/- per month. In regard to domestic help allowance the same was directed to be increased from Rs.1,250/- to Rs.2,500/- per month and accordingly all the

retired judicial officers are entitled to domestic help allowance of Rs.2,500/- per month and medical allowance of Rs.1,500/- per month. However, the Government of Orissa, by virtue of the order under Annexure-3 sanctioned the domestic help allowance and medical allowance as is admissible to the retired judicial officers. Therefore, it is submitted that, the approach of the State Government is highly unreasonable as the benefits are not extended at par with the retired Judges of the other High Courts in the Country. Learned Sr. Counsel for the petitioner-Association further submitted that the Judges of this High Court who have been transferred to other High Courts and have retired are receiving such medical facilities and all other allowances as available to sitting judges but the judges appointed and retired from this Court are not receiving the same benefits which action of the State Government is are discriminatory and violative of Article 14 of the Constitution of India.

4. One counter affidavit has been filed on behalf of the Union of India sworn to by the Under Secretary in the Department of Justice, Ministry of Law & Justice, wherein it is stated that Section 23-D of the High Court Judges (Salaries and Conditions of Service)Act, 1954 regulates the medical facilities to the retired Judges of the High courts. Under Section 23-D(1), the Central Government has extended the medical facilities under the Central Government Health Scheme (CGHS) to the retired Judges of the High courts, wherever these facilities are available. The Central Government has not imposed any condition or restriction upon the State Governments under Section 23-D(2)., therefore, it is stated that the State Government is free to extend any facility of medical treatment to the retired Judges of their respective High Court. It is further submitted that keeping in view the difficulties of the retired Judges who retired from the High Court of one State and settled down in other State, the Law & Justice Department vide letter dated 14.12.1989 requested all the State Governments to consider providing medical facilities to those Judges who retire from the High court of one State and settled down in another State after retirement if those places are not covered by the CGHS. It is clearly stated that in the past, various requests were received from certain retired Chief Justices of High Courts and other sources for grant of post retiral benefits like secretarial assistance and telephone facilities etc. to retired High Court Judges on the analogy that similar post retrial benefits are being provided to retired Chief Justices of India/Judges of Supreme Court. The said proposals for extending such facilities to retired High Courts Judges were carefully considered but not agreed to by the Union of India.

5. It is stated by the opposite party No.1 that all the facilities and allowances available for a sitting Judge cannot be extended to a retired Judge and a reasonable distinction has to be made. Further, as regards the averments made by the petitioner-Association at paragraph 10 of the writ petition it is stated that the recommendation of Justice Shetty Commission for grant of domestic help allowance of Rs.750/- per month to the retired judicial officers was implemented by the Department consequent upon a direction of the Hon'ble Supreme Court in the case of All India Judges Association (supra). However, the proposal of implementing the recommendation of Justice Padmanabhan Committee in respect of judicial officers of Union Territories is under consideration of the Government.

6. A counter affidavit has also been filed on behalf of the opposite party No.2-Government of Orissa, duly sworn to by its Under Secretary, Home Department, traversing the averments made in the writ petition. It is stated by the opposite party No.2 that according to extract of the Resolution of the meeting chaired by Hon'ble Chief Minister, the Law Department have sought for the information from the Registry of all High Courts in India regarding provision of medical and other facilities extended to retired Judges and accordingly the Registry of some High Courts have furnished their response. O.P. No.2 was furnished a compilation of the views of different High Courts by the Law Department. On examination, as it involves, financial implications, the matter was referred to Finance Department for their views. However, they have sought for clarifications/detailed information on certain points, more particularly on Andhra Pradesh pattern of extending such facilities and allowances. Therefore, the O.P. No. 2 is in correspondence with the Registry of Hon'ble High Court of Andhra Pradesh. It is further submitted that the Government of Orissa is very much concerned with the facilities to be provided to the retired Judges of the State and considering the same, the Government of Orissa vide aforesaid letter under Annexure-3 extended the Medical allowances and domestic help allowance to the retired Judges, however, due to the resource crunch of the State, Government is unable to provide all the facilities and allowances to the retired Judges as demanded by the petitioner-Association. However, in comparison to allowance structure of another High Court, the structure provided by the Government of Orissa is on higher side and it has been done in due consultation with the Finance Department taking into account the financial resources of the State. The allowances given to the retired Judges of this High Court are no less in comparison to the quantum of allowance given to retired Judges of some other High Courts. Therefore, it is submitted that the petitioner-Association cannot say that the allowances extended to them are less in comparison to the other High Courts. It is further submitted that the

State Government has the highest regard for the retired Judges and therefore, from time to time, the State Government is also reviewing the facilities and benefits given to the retired Judges so as to ensure that they lead a dignified and happy retired life and provisions of medial facilities and other allowances are still under the active consideration of the State Government.

7. We have heard learned counsel on behalf of the parties and perused the record. With reference to the aforesaid rival factual & legal contentions, the following points would arise for consideration by this Court.

(1) As to whether the petitioner-Association is entitled for the relief of issuance of a direction to the Government of Orissa to modify the order under Annexure-3 for extending medical facilities and domestic help allowance and further direction to sanction and disburse telephone allowance and secretarial assistance allowance to the members of the petitioner-association ?

(2) What order ?

8. It is an undisputed fact that the retired Judges have discharged their constitutional functions in the State to the public litigant to protect the Rule of Law and while discharging their functions as Judges and Chief Justices of the High Courts in the country, their pay scales and all other allowances throughout the country is uniform. After their retirement, all the High Court Judges and Chief Justices are governed under the provisions of the High Court Judges (Salaries and Conditions of Service) Act, 1954. The Central Government, under Section 23-D(1) of the said Act, has extended the medical facilities under the Central Government Health Scheme (CGHS) to the retired Judges of the High Courts, wherever these facilities are available. However, the Central Government has not imposed any condition or restriction under Section 23-D(2) upon the State Governments to extend any facility of medical treatment to the retired Judges of their respective High Court. Therefore, it is clear that the State Government is free to provide the medical treatment facilities to the retired Judges and Chief Justices of this Court keeping in view the difficulties in getting medical treatment after retirement at par with CGHS. Therefore, it is requested by the petitioner-Association that the required medical facilities as are being provided to the retired Judges by the other States, are required to be provided by the State Government.

9. It would be worthwhile to extract the relevant facilities which are being provided by some other High Courts as per the comparative tabular

chart annexed by the petitioner-Association under Annexure-2 series to the writ petition.

FACILITIES EXTENDED TO THE RETIRED JUDGES IN DIFFERENT HIGH COURTS

Name of High Court.	**Medical Facilities**	**Attendant Allowance**	**Secretarial and Telephone allowance**
Andhra Pradesh	Medical facilities are extended vide Notification dated 8.12.2005 to the retired C.J. and judges and their family members.	No decision has been taken.	No decision has been taken.
Bombay	Medical facilities under consideration of the Government.	Under Consideration of the Government.	Under Consideration of the Government.
Calcutta	Available to a retired judge as are available to the sitting judge.	Allowance of Rs.5000/- per month from Feb.2009 for a Sebak.	No separate allowance is provided.
Chhatisgarh	Medical expenditure and cost of medicines as per order of the Govt. Law & Legislative affairs.	Orderly allowances of Rs.2000/- per month.	Secretarial allowance of Rs. 3000/- and Telephone allowance of Rs.1,500/- per month.
Jharkhand	Jharkhand High Court Judges (Medical facilities) reimbursement Rules, 2004 is applicable to retired judges as per the Rule 3(F).	Orderly allowance of Rs.2000/-	Telephone allowance of Rs.750/-.

Karnataka		Servant allowance @ Rs.2,500/- per month.	Telephone charges @ Rs.1,000/- per month.
Kerala	Free medical treatment in all Govt. Hospital in the State and for reimbursement of expenditure incurred for purchase of medicines and treatment not available in the Government Hospital.	No decision as regards Sebak has been taken.	No decision has been taken for secretarial allowance and telephone charges.
Madhya Pradesh	Decision of Govt. is awaited regarding reimbursement of Medical Expenses.	The decision of Govt. is awaited for orderly allowance of Rs.2000/- per month	Decision of Government is awaited for Secretarial allowance of Rs.3000/- per month and telephone charges of Rs.1500/- per month.
Punjab & Haryana	The Court provides full medical reimbursement to the retired judges and members of their family.	….	Secretarial assistance is provided.

Rajasthan	Retired judges are entitled to get medical facilities as per rule 11 of the Rajasthan Civil Services (Medical reimbursement) Rules, 1970 as well as under the Rajasthan State Pensioner's Concession Scheme.	High Court has directed the State Government to pay a sum of Rs.7,500/- per month to meet expenses of domestic help/peon, driver, telephone expenses and secretarial allowance etc.	
Sikkim (Gangtok)	Same medical benefit as are applicable to a sitting judge.	One residential orderly (sebak/cook) vide notification dated 24.11.99.	Retired Judge shall be entitled to the services of Stenographer Grade-II in lieu of it he may get Rs.3000/- per month.
Uttar Pradesh		Orderly allowance of Rs.2000/- per month.	Secretarial allowance of Rs.3000/- per month and Telephone Allowance of Rs.1,500/-

10. It is needless to mention here that during the tenure as a sitting Judge, the pay scales and other allowances are almost equal all over the country and the services of judges are governed in equal manner. Therefore, after the retirement, it would be feasible for all the State Governments to extend the facilities such as medical facilities, orderly/domestic help allowance, telephone charges to the retired Judges of the High Courts throughout the country uniformly so as to enable them to lead a dignified life after their retirement for the reason that after retirement of a permanent judge or Chief Justice, there is prohibition for their practice in the same High Court from which they retired. Therefore, after the retirement of Judges or Chief Justices, they are required to be treated with due respect and the State Governments have got constitutional obligation to see that they lead a dignified & happy retired life of their remaining period for having

rendered service to the public litigant and facilitated the State Government for good governance. However, from the chart pre-page, it is seen that various State Governments are providing medical facilities and other allowances in different manner to the retired High Court judges of their State. Vide Home Department Letter No. 7056 dated 14.02.2011 the Government of Odisha extended the medical allowances to the retired Chief Justices and Judges of this court @ Rs.18,000/- P.A. w.e.f. 14.02.2011, which is very meager amount taking into consideration of devaluation of a rupee and cost of the facility. In the old age, different ailments may be there and it may not be possible to meet the actual medical expenses with the said amount of Rs.18,000/- per annum. As it appears from the above chart, it is a fact that throughout the country uniform medical facilities are not provided to the retired Judges by the State Governments and different State Governments are providing different medical facilities to the retired Judges as shown in the chart. The Odisha State is coming under the Eastern region of the country. Therefore, we think it would be appropriate to direct the Government of Odisha to take into consideration the medical facilities extended to the retired Judges by the States coming under the Eastern region of the country and take a decision in extending the medical benefits to the members of the petitioner-Association taking into account the Central Government Health Scheme. We think, it will be in conformity with Articles 14 and 21 of the Constitution of India. The Supreme Court in catena of cases has held that right to lead a happy life includes the right to health which is guaranteed under Article 21 of the Constitution of India. In the cases of State of Punjab Vs. Mohinder Singh Chawla, reported in AIR 1997 SC 1225; and Consumer Education & Research Centre & ors. Vs. Union of India & Ors., AIR 1995 SC 922, the Supreme Court has held that right to life includes the right to health.

11. It is an undisputed fact that during incumbency Judges and Chief Justices of the High Courts lead a distinct lifestyle being provided with many facilities and assistance including telephone facilities. Immediately after retirement if all those facilities are withdrawn, it will be definitely difficult on the part of a retired Judge to lead a dignified and happy life without proper assistance from the State Government as it is its constitutional function. Therefore, in our view orderly/domestic assistance as well as telephone facility is also the basic requirement of a retired Judge for decent living. To maintain a good healthy life after retirement as a Judge the minimum requirement is to see that proper medical facilities are provided by the State Government to lead a healthy and happy life during old age, domestic help/assistance is required to assist in the day to day work, and telephone facilities/allowance as an emergency service required for them. These three assistance are very much

essential to a person who has already led a dignified life and retired from the post and at this stage it is the duty of the State Government to provide the above facilities to the retired Judges in the State. Therefore, taking into consideration of all the aforesaid aspects, the State Government is hereby directed to modify the order dated 14.2.2011 under Annexure-3 accordingly and further to provide telephone allowance taking into account such facility/allowance extended by the other States under the Eastern region of the country by framing necessary Rules and guidelines as early as possible, preferably within a period of two months from the date of receipt of a copy of this order. However, such facilities and allowance shall not be made available to the retired Judge if he/she is getting such benefit by virtue of holding any assignment/post/commission etc.

Registry is directed to communicate a copy of this judgment to the Chief Secretary to the Government of Odisha for taking necessary steps in this regard and report compliance. The writ petition is allowed to the extent indicated above. Rule issued.

Writ petition partly allowed.

2012 (II) ILR - CUT- 554

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

W.P.(C) NO. 11898 OF 2011 (Dt.03.04.2012)

DEBENDRA MOHAN SATPATHY ……..Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226.

PIL – Construction of market complex on public garden challenged – Park was inaugurated in the year 1934 and used for recreation of the local people – No conversion of park area in to private property – Permission granted by the NAC in favour of O.P.6 for construction of shop room is impermissible – Held, a cause of action brought before this Court to protect the park in question in the interest of the public– Held, permission granted in favour of O.P.6 is quashed – The Trust and its members are restrained from making any construction on the park in question – Direction issued to NAC to maintain the said park. (Para 6,7)

Case laws Referred to:-

1.AIR 2010 SC 2550 : (State of Uttaranchal-V-Balwant Singh Chaufal & Ors.)
2.(1991) 4 SCC 54 : (Bangalore Medical Trust-V-B.S.Muddappa & Ors.)

For Petitioner - M/s. U.C.Mishra, Asutosh Mishra, B.P.Chhual Singh, D.R.Sendh & A.P.Bose.
For Opp.Parties- Govt. Advocate for O.P.Nos.1,2,4 & 5.
M/s. B.Pujari & G.B.Panda (for O.P.No.3)
M/s .Sarat Kumar Das & N.N.Mohapatra for O.P.6.

V.GOPALA GOWDA, C.J. The petitioner has filed this writ petition challenging the illegal and unauthorized construction of Market Complex on the public garden, namely, Nruplal Udyan, which is situated on the heart of Barapalli Notified Area Council in the district of Bargarh and has prayed for issuance of a mandamus to the opposite parties to take appropriate action against opposite party no.6 Trust Member to stop construction of market complex inside the aforesaid Udyan and also to direct the Notified Area

Council to renovate the garden by planting plants and trees, urging various facts and legal contentions.

2. The petitioner claiming that he is a public spirited person and residing in Barpalli has filed this writ petition ventilating the grievance of the general public of Barpalli town for protection of Nruplal Udyan and against the illegal action of the opposite parties, particularly the Trust and its members as the illegal and unauthorized construction of Market Complex in the garden is not permissible in law. It is stated that the said park is a public garden inaugurated on 11.3.1934 and since then it has been named after the then King Nruplal Singh and has been used by the local residents for recreation. Gradually the garden was developed by the Barpalli Panchayat Samiti. Thereafter some amusement articles were installed for the children so that they can play and enjoy in the said garden. In 1971 Barpalli became a Notified Area Council (N.A.C.) and accordingly the maintenance and beautification of the garden was entrusted to the said N.A.C.and after being taken over by the Barpalli N.A.C. the garden lost its past glory and was ruined for which the public of Barpalli town were unable to take any step to impress upon the NAC to renovate the garden and maintain the damaged amusement articles installed.

3. Opposite party no.6 Trust formed in the year 2006 with an oblique motive and taking advantage of the name of Nruplal Udyan has recently started construction work in the garden. Thereafter the petitioner applied to the NAC under the Right to Information Act to know the actual fact. He was surprised to know that the authorities have accorded permission in favour of Nruplal Udyan Trust to construct a market complex on the garden. The information furnished by the NAC on 21.3.2011 is produced as Annexure-1. It is the case of the petitioner that the garden was meant for the local inhabitants numbering nearly about one lakh people. Some vested interest members of the Trust-opposite party no.6 with a view to make profit are constructing shop rooms illegally inside the garden which is not permissible in law. Therefore, grant of permission by the NAC for the same in favour of opposite party no.6 is illegal. It is stated that the garden is located on Plot No.865 under Khata No.1429 and plot no.866 under Khata No.483 under Barpalli mouza, Thana No.51 having total area of Ac.0.92 and in the remark column of the R.O.R. it is mentioned as “Nruparaj Udyan Sarba Sadharana Byabahara Karanti”. It is the case of the petitioner that some vested interest members of opposite party no.6-Trust are constructing 16 shop rooms of the size of 16”x12” each which covers almost the frontage of the garden land as a result of which Nruplal Udyan will become history for the local inhabitants within a short span of time. It is the further case of the petitioner that the

local M.L.A. has sanctioned Rs.5,00,000.00 from the M.L.A.LAD fund and the improvement work is in progress under the supervision of opposite party no.5 and a sum of Rs.2,70,000.00 has already been spent as on 24.3.2011. This is public money and can never be misutilised by a private trust. Copy of the information furnished to the petitioner by the District Planning and Monitoring Unit, Bargarh so also by Panchayat Samiti Office, Barpalli are produced as Annexure-3 series. It is alleged that the Trust Members have collected good amount of money for construction of the shop rooms and before completion of construction the petitioner has learnt that they have allotted the shop rooms to their near and dear ones. Granting permission by the NAC in favour of the Trust for construction of shopping complex is illegal and opposed to the law as the park which is maintained from 1934 cannot be converted and used for any purpose other than park which is against the interest of the public. If such market complex is constructed inside the garden, no space will be available for public purpose and the plantation and gardening will lose its existence and the people will not get any free air and it will not be possible to maintain ecology. When the trust was created, the public was of the opinion that the garden will be renovated but when the ill-motive of construction of market complex inside the garden came to light, the same created serious concern among the public and they raised their voice against such illegal construction over the Udyan situated over an area of Ac.0.92 decimals.

4. The construction of market complex is sought to be justified by opposite party no.6 by filing counter statement contending that the petitioner was the Chairman of Barpalli, Notified Area Council during 1979-1981. He was removed from Chairmanship before expiry of his tenure. During his Chairmanship, the petitioner did not take any step for improvement of the park in question. Rather, during his tenure the park was destroyed and ruined. He permitted some of his supporters to encroach upon the park from the western side facing National Highway by constructing unauthorized shop rooms which were ultimately removed in the year 2002 by the District Administration. Therefore, there is no bona fide on the part of the petitioner in filing the writ petition ventilating the public grievance and the writ petition is not maintainable in view of the decision of the Supreme Court in the case of State of Uttaranchal v. Balwant Singh Chaufal and others, AIR 2010 SC 2550. In that case, the apex Court after referring to various decisions on the question of PIL has laid down the principle as to which type of public interest litigation petitions can be entertained by the High Court and the Supreme Court in exercise of their judicial review power under Article 226 and 32 of the Constitution of India respectively. It is further submitted that the opposite party no. 6, being the rightful l owner of plot no.866, has rightly and validly

created a trust in the name of Nruplal Udyan Trust in respect of his own raiyati land taking some respectful persons of Barpali town as its members including government officials. The main purpose and object of the Trust is to develop the entire land of Ac.0.92 decimals covered under plot nos.865 and 866 for the purpose of park which has been completely ruined. It is the further case of the Trust that the Managing Trustee of the Trust, opposite party no.6, is the descendant of Nruplal Singh, the donor of the park land under plot no. 865 after whom the park has been named. The Managing Trustee being a public spirited person, so also for his emotional attachment with the park sincerely wanted to develop and renovate the ruined park which was lying completely barren, approached all concerned for necessary co-operation and permission. Opposite party no.6 after obtaining necessary permission under section 121 of the Orissa Municipal Act from the elected body and the Executive Officer of the N.A.C. has undertaken the construction work of 10 shop rooms, urinals, rest room and drinking water facility only on Ac.0.12 decimals of land out of the total area of Ac.0.92 decimals; Ac.0.07 of plot no. 865 and Ac.0.05 dec. of plot no.866, which covers the western boundary of the two plots. It is further stated that opposite party no.4, the Tahsildar, Barpali has already initiated O.L.R.Case No.44/2011 under section 8-A of the OLR Act in respect of plot no.866 and Encroachment Case No. 33/2011 in respect of plot no. 865. However, in the meantime OLR Case No.44/2011 has been dropped by the Tahsildar, Barpali vide order dated 1.11.2011 with conversion of the land to Gharbari (Homestead) after payment of due premium by opposite party no.6. So far as Encroachment Case No.33/2011 is concerned, when the same is pending before the Statutory Authority, i.e. Tahsildar, Barpali and there is provision of appeal, revision, etc. against the order that would be passed therein, a PIL is not maintainable.

5. With reference to the aforesaid rival legal contentions, this Court is required to examine as to whether the NAC has got power to grant permission to opposite party no.6 for the purpose of construction of shop rooms in a portion of the park which had been inaugurated way back in the year 1934 and whether a portion of the park can be converted by opposite party no.6 into a shopping complex and what order ?

6. The aforesaid points are required to be answered against opposite party no.6 and in favour of the public residents of Barpali town for the following reasons.

It is an undisputed fact that the property described in the narration of facts of the case originally belonged to the King who donated the same

for a park and the same has been named after him and the park was inaugurated on 11.3.1934. It is an undisputed fact that from 1934 till this date, the property in question has been maintained initially by the erstwhile Panchayat Samiti and thereafter the NAC, Barpali after it came into existence in the year 1971. Public residents and their children have been using the said property as a park and the children of the residents have also been enjoying the same by installation of amusement articles by the NAC. Apart from the said purpose, the park is required to be maintained by the NAC which is a local self government governed by the provisions of the Orissa Municipal Act and the provisions of the Act cast a statutory obligation on the part of the NAC to see that some space is ear-marked in the midst of the town or NAC for the purpose of breathing good oxygen. To counter the environmental hazards caused by increasing population, motor vehicles, factories and concrete buildings the places like garden and orchards are required to maintain ecological equilibrium. Therefore, maintenance of a park in the midst of the NAC area is a must and maintaining and planting plants and trees inside the park is a statutory obligation of the NAC. The same is sought to be frustrated by opposite party no.6 and its members who have got vested interest by constructing shop complex which is not permissible in law. In this regard, the apex Court has held in Bangalore Medical Trust v. B.S. Muddappa and others, (1991) 4 S.C.C. 54, that open space reserved for public park in development scheme duly approved and published under the Act cannot be converted into a civic amenity site for the purpose of hospital/nursing home and allotted to a private person or body of persons for that purpose. The said principle with all applicable to the fact situation. The grant of permission by the NAC is in utter violation of the statutory provision. Facilitating opposite party no.6 in the guise that the trust has been registered and came into existence in the name of King Nruplal Singh who has donated the land in question for the purpose of development of a park by the erstwhile Barpali Panchayat Samiti, the same came into existence in 1934. Till this date, in the record of NAC it is maintained as a park and it is an undisputed fact that from MLA LAD fund Rs.5,00,000.00 has been granted and the improvement work is in progress under the supervision of opposite party no.5 and a sum of Rs.2,70,000.00 has already been released according to the petitioner. So when the Government is taking care of the park, opposite party no.6 cannot be allowed to construct a market complex on it. When the park is in possession of the NAC, without there being conversion of the park area into private property, grant of permission to opposite party no.6 for construction of shop rooms over a portion of the park is totally impermissible and violative of the provisions of the Act. Therefore, the action of the NAC is bad in law. In view of the undisputed fact that the area in question is a park, the same has been

donated by the ex-King of Barpali and has been named after him, opposite party no.6 Trust is not entitled to put up any market complex inside the park which is not permissible in law. The action of the Trust and its members is illegal and unlawful. The same cannot be permitted to carry on the construction work in the guise of the permission granted by the NAC. Further it is an undisputed fact that the Tahsildar has rightly initiated proceedings against opposite party no.6. Mere dropping of OLR Case No.44 of 2011 does not confer any right on opposite party no.6 to proceed with the construction of commercial compex which is illegal. Therefore, action of the NAC in granting permission to opposite party no.6 for construction of shop rooms in a portion of the park area is illegal and change of the nature and character of the park is impermissible in law and hence this writ petition has been filed by the petitioner to protect public interest. Permitting opposite party no.6 to convert a portion of the park into a shopping complex and lease out the same in favour of the near and dear ones of the trust members is wholly illegal. Therefore, public interest is involved which is sought to be protected by the petitioner. Allegation against the petitioner that he was the Chairman of Barpali NAC and before expiry of the term he was removed shall not deny him to bring to the notice of the Court the grievance of the public. In our considered view, a cause has been brought before this Court to protect the park in question in the interest of the residents of Barpali town. Therefore, the ratio of the decision of the apex Court in the case of State of Uttaranchal v. Ballwant Singh Chaufal and others (supra) relied upon by opposite party no.6 is not applicable to the fact situation, but on the other hand, the said decision supports the case of the petitioner.

7. For the reasons stated supra, this writ petition is required to be and is accordingly allowed. The permission granted in favour of opposite party no.6 is quashed. The Trust and its Members are restrained from making any construction on the park in question. The NAC is directed to see that the park in question is maintained and developed by renovating the same, planting plants and trees thereon to provide good air to the residents of the area and the amount released from the MLA LAD fund is properly utilized for maintenance and development of the said park. There shall be no order as to costs.

Writ petition allowed.

2012 (II) ILR - CUT- 560

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

W.P.(C) NO. 8966 OF 2011 (Dt.24.04.2012)

M/S. TATA SKY LTD. ……..Petitioner.

.Vrs.

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

A. CONSTITUTION OF INDIA, 1950 – ART, 226. r/w Orissa Entertainment Tax, Act, 2006

Amendment brought by the Orissa Entertainment Tax (Amendment) Act, 2010 and Orissa Entertainment Tax (Amendment) Rules 2010, authorizing to levy tax on entertainment through DTH Broad Casting Service – Vires challenged - Ground is that it is beyond the competency of the State legislature.

Levy of entertainment duty falls under Entry 62 of List-II of seventh Schedule is completely different from levy of tax on broad casting service which falls under Entry 92C, List-I of Schedule-VII – Held, Levy of entertainment tax on entertainment through DTH Broad Casting Service is not ultravires the powers of the State Legislature. (Para 44,45)

B. **"Aspect Theory" means on the basis of different aspects of particular transaction, the same can fall within the legislative competence of two legislature and both would have the power to tax a transaction on its different aspect – Thus the same transaction may involve two or more taxable events in different aspects – There may be overlapping but that does not detract from the distinctiveness of the aspect.**

In the present case by application of aspect theory levy of tax on entertainment through DTH broad casting service as well as levy of service tax on broad casting service is constitutionally valid and perfectly justified. (Para 37,44)

C. **Principle of federal supremacy can be invoked only if there is irreconcilable conflict in Entries in union and State lists – If two Entries can be reconciled by harmonious construction or by applying principle of pith and substance, there is no occasion to apply the principle of federal supremacy – Concept of repugnancy under Article 254 relating**

to List-III is different from repugnancy arising due to overlapping in List-I and List-II in which case principle of pith and substance is applied to determine legislative competence. (Para 33)

D. CONSTITUTION OF INDIA, 1950 – ART.246.

Distribution of legislative power between the Union and State Legislature – Parliament has exclusive powers to legislate with respect to matters in List-I – State Legislature has exclusive power to make laws for the matters in List-II – Both Parliament and State Legislatures have concurrent power of legislation with respect to matters in List-III subject to Central Legislation prevailing in case of repugnancy – Art.254 of the Constitution of India provides the method of resolving conflicts between a law made by Parliament and a law made by the legislature of a State with respect to a matter falling in concurrent list. (Para 29 to 32)

Case laws Referred to:-

1.(1988)2 SCC 299, P-329 : (M/s.Doypack Systems Pvt.Ltd.-V-Union of India & Ors.)
2.(2005)2 SCC 515 : (Godfrey Philips India Ltd.-V-State of U.P.).
3.(2011)37 VST 1(P&H) : (Tata Sky Limited-V-State of Punjab & Anr.)
4.(2004)10 SCC 201 : (State of West Bengal-V-Kesoram Industries Ltd.)
5.(2009)4 SCC 94 : (Central Bank of India-V- State of Kerala & Ors.)
6.AIR 1949 FC 81 : (Ralla Ram-V-Province of East Punjab).
7.(2008)2 SCC 614 : (Imagic Creative Pvt. Ltd.-V-Commissioner of Commecial Taxes).
8.AIR (32)1945 P.C. 98 : (Governor General in Council-V-Province of Madras)
9.(1989)3 SCC 634 : (Federation of Hotel & Restaurant Association of India -V- Union of India)
10.(2007)7 SCC 527 : (All India Federation of Tax Practitioners-V-Union of India)

For Petitioner - M/s. Jagabandhu Sahoo, D.Panda, P.Mohapatra & A.Mohapatra.
For Opp.Parties - Mr. R.P.Kar, Standing Counsel (Revenue).

B.N.MAHAPATRA,J. In this writ petition, challenge has been made to certain provisions of The Orissa Entertainment Tax Act, 2006 (for short, "Entertainment Tax Act, 2006"), The Orissa Entertainment Tax (Amendment)

Act, 2010 (for short, "E.T. Amendment Act, 2010") (Annexure-5) and The Orissa Entertainment Tax (Amendment) Rules, 2010 (for short, "E.T. Amendment Rules, 2010") (Annexure-6) as being illegal, arbitrary and unconstitutional and *ultra vires* Articles 246, 265, 301 & 19(1)(g) read with Entry 92C/97 of List I and Entry 62 of List II, Seventh Schedule of the Constitution of India, to the extent entertainment tax is sought to be levied on DTH broadcasting Service. Further prayer of the petitioner is to quash notice bearing No.1428(2)/CT dated 16.03.2011 (Annexure-10) issued by opposite party no.4-Dy Commissioner of Entertainment Tax, IV-Circle, Bhubaneswar and notice No.1279 dated 17.03.2011 (Annexure-8) issued by Deputy Commissioner of Entertainment Tax, III Circle, Bhubaneswar, as they suffer from illegality and are without jurisdiction.

2. Petitioner's case in a nutshell is that it is a company registered under the Companies Act, 1956. It provides DTH broadcasting services to the subscribers across the country. The Government of India has granted licence to the petitioner under Section 4 of the Indian Telegraph Act, 1885 (for short, "Act, 1885") and the Indian Wireless Telegraphy Act, 1933 (for short, "Act, 1933") on the terms and conditions contained in the licence agreement for a period of 10 years. The petitioner has paid Rs.10,00,00,000/- (Rupees Ten Crores) as non-refundable Entry Fee and has also furnished a Bank Guarantee of Rs.40,00,00,000/- (Rupees Forty Crores) as security, which is valid for the entire period of the licence. The terms of licence further provide for payment of annual fee equivalent to 10% of its gross revenue, as reflected in the audited accounts of the Company for a particular financial year within one month from the end of that financial year. The petitioner is also required to obtain a Wireless Operational Licence for establishment, maintenance and operation of the DTH Platform/facility from Wireless Planning and Coordination Wing of Ministry of Communication and IT and pay licence fee, royalty for spectrum use as prescribed by the Wireless Planning and Coordination Wing (WPC) under the Department of Telecommunications. Pursuant to fulfilment of the eligibility conditions, assurance and payment of requisite permission fee by the petitioner, as per the "Guidelines for up linking from India" notified on 2nd December, 2005 by the Union Government, the petitioner has also been granted permission on non-exclusive basis for a period of ten years to establish, maintain and operate an uplinking hub(Teleport).

3. Subsequent to obtaining licence, the petitioner launched its services through out India from August, 2006 including the State of Orissa. The petitioner has a single broadcasting centre at Chattarpur, Delhi. In view of the teleport licence/permission granted by the, Ministry of Information and

Broadcasting, Government of India, the petitioner has set up an uplinking hub (Teleport) which enables the petitioner to downlink signals from various satellites of different Broadcasters of TV channels and then uplinks to its own satellite Ku Band (INSAT 4A Satellite), the designated transponders for transmission of signals in Ku Band. These signals are received by the dish antenna installed at the subscriber's premises. The T.V. signals uplinked from the broadcasting Centre at Chhattarpur, Delhi are in encrypted format and are then decrypted/decoded by the Set Top Boxes and the viewing card inside the Set Top Box makes the customers able to view the service.

4. When a new connection is given to the premises of a consumer, such consumer/subscriber pays one time charges applicable for installation of dish antenna in the premises of the petitioner. After installation, the subscriber is required to pay monthly subscription/service charges for the DTH broadcasting services availed by him. The service comprises of transmission of DTH signals of T.V. channels which a subscriber has opted directly to his home and are received by the Set Top Box of the subscriber which is connected to his TV via a cable. A subscriber may purchase a Set Top Box from a retailer, which becomes the property of the subscriber. The service provided thereafter, to the customer is a prepaid service wherein the subscriber is required to purchase a recharge voucher to top up his connection balance. The monthly charges vary from Rs.150/- to Rs.350/- per month depending on the number of channels subscribed by a customer. On 15th March, 2001, the Government of India issued Guidelines for obtaining Licence to provide DTH Broadcasting Service in India.

5. The DTH services were brought within the purview of service tax with effect from 16th June, 2005 by the Finance Act, 2005. Under Section 65 (105) (zk) of the Finance Act, as amended, DTH service is covered under the category of "Broadcasting service" and the service tax at the rate of 10.3% (including 0.3% Education Cess) is currently payable on the services covered under this category.

6. The Entertainment Tax Act, 2006 got assent of His Excellency the Governor of Orissa on 30th May, 2006 and for general information it was published in the Orissa Extra Ordinary Gazette vide Gazette No.759 dated 02.06.2006. The said enactment was done by the State of Orissa in exercise of power under Entry 62, List-II of the State List (Seventh Schedule) of the Constitution of India which provides for "Taxation on luxuries including taxes on Entertainments, Amusement, Betting and Gambling." It was enacted to provide for levy and collection of Luxury-cum-Entertainment and Amusement Tax in the State of Orissa for raising additional resources. The principal Act

was enacted, inter alia, for levy and collection of entertainment tax and the said Act, as originally framed, did not cover DTH operators.

7. The principal Act has now been amended vide Notification which has been published in the Orissa Extraordinary Gazette bearing Notification No.10568/1-2/10/Legis dated 24th September, 2010. By the said amendment, the concepts of "service provider" "subscriber" and "cable service" have been introduced with substantial amendment. The newly added Section 2(a) defines cable service with several modifications. In the aforesaid notification, Sections 7,9 and 15 of the Entertainment Tax Act have been amended by including Direct to Home (DTH) Broadcasting Service for the purpose of liability to pay Entertainment Tax and procedural provisions under Sections 9 and 15 of the said Act. Thus, by virtue of the said amendment the "Cable Service" now includes DTH broadcasting service. The Orissa Entertainment Tax (Amendment) Act, 2010 came into force w.e.f. 01.10.2010 as per Finance Department Notification dated 30th September, 2010. The E.T. Rules originally framed by the State Government in exercise of power conferred under Section 36 of the Entertainment Tax Act, 2006 was also amended in 2010 which came into force on the date of publication of the said amended Rules in the Orissa Gazette on 05.10.2010. Rule 12 of the said amended Rules, 2010 provides provisions for obtaining permission from the Commissioner in Form-XIIIA to operate cable television network or connection for the DTH broadcasting service.

8. Pursuant to the said amended provisions of the Act and Rules, opposite party No.5 vide Memo No.1279/CT dated 17.03.2011 called upon the petitioner to obtain permission under the Orissa Entertainment Rules and to deposit tax due for the months from October, 2010 to February, 2011 within seven days from the date of receipt of the notice failing which it has been further stated that action as deemed proper shall be taken against the petitioner as per the provisions of law. Responding to the said notice dated 17.03.2011 issued by opposite party No.5, the petitioner submitted its objection. Similarly, opposite party No.4 by notice No.1428(2)CT dated 16.03.2011 also directed the petitioner to obtain permission in Form-XVIII from opposite party No.3 under the Amended Rules, 2010 as a DTH Service Provider failing which the tax liability would be assessed to the best of judgment with appropriate penalty under Section 17(1a) of the said Act. Responding to the said notices dated 16.03.2011 and 17.3.2011 issued by opposite party Nos.4 and 5, petitioner submitted its objection challenging the legality and validity of the impugned levy of entertainment tax on DTH Broadcasting Service and proceedings for enforcement of such levy of tax. It

also requested the said opposite parties to clarify the aforesaid issues and keep the proceedings in abeyance and filed the present writ petition.

9. Mr. Jagabandhu Sahoo, learned counsel appearing for the petitioner submitted that "Entertainment" in the Amended Act is defined in Section 2(f) to mean exhibition, includes exhibition of news reels, performance, amusement, and entertainment through DTH Broadcasting service. The Proprietor of DTH Broadcasting service, itself is not undertaking any of the activities included in the expression 'entertainment'. The said expression can only refer to "dissemination of (this) form of communication" in the shape of "pictures, images and sounds transmitted through space" and "intended to be received by the general public". This is the meaning assigned to "broadcasting" in Section 2(c) of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990. The definition of broadcasting, as contained in Section 2(c), is incorporated in Section 65(15) of the Finance Act, 2001 and further includes programme selection, scheduling or presentation of sound or visual matter for public viewing through space, cable direct to home signals. "Any service" by a broadcasting agency or organization "in relation to broadcasting in any manner" is taxable service under Section 65(105)(zk) of the Finance Act, 2001 as amended with effect from 16.06.2005. "In relation to" are words of comprehensiveness and need to be expansively construed. In respect of his contention, Mr. Sahoo relied upon the judgment in the case of *M/s Doypack Systems Pvt. Ltd. vs. Union of India and others, (1988) 2 SCC 299 at page 329.* Thus, the expression "entertainment" is in fact "taxable service" covered under Article 246(1) read with Entry 92C/97 of List I of the Seventh Schedule and in the exclusive domain of Parliament beyond the legislative competence of the Orissa State Legislature. The "entertainment through DTH Broadcasting Service" transmitted by proprietor of direct to home Broadcasting service is nothing but the pictures, images and sound transmitted through space. Thus, the Amendment Act insofar as it defines "entertainment" as "entertainment through direct to home Broadcasting Service" and consequently imposes entertainment tax is in its pith and substance dealing with the prohibited field, i.e., "taxable service" and under the guise of entertainment indirectly encroaches upon "taxable service". The activity sought to be taxed being "taxable service", the Orissa State Legislature cannot assume competence to tax it by deeming it to be an entertainment ("entertainment through direct to home Broadcasting service") as mere nomenclature of a tax is not conclusive unless the activity is taxable.

10. The List of Seventh Schedule being a limitation on legislative authority cannot be unilaterally enlarged. The activity of transmission, thus,

cannot be segregated from pictures, images and sound transmitted as exhibitions and performance being capable of categorization under a single head of power under Entry 92C/97 read with Article 246, cannot fall in List II of the Seventh Schedule. The real purpose of the Amendment Act as extended to entertainment through DTH Broadcasting service is, thus, different from the one that appears on its face and the real object of the said legislation in fact lies within the exclusive field of Parliament. The amended Act is a disguised, conversion and indirect transgression into a prohibited field and clearly amounts to colourable legislation. If the form of the impugned Act as amended and its outward appearance is disregarded and reference, instead, is made to the subject matter of the statute the same would be revealed as beyond the competence of the Orissa State Legislature. A Legislature cannot violate the constitutional prohibitions by employing any subterfuge and the effect of the legislation can always be examined to decide upon the issue of competence. The State Legislature cannot assume competence over a prohibited matter by deeming the prohibited matter as one which is permitted as it has done in the instant case by artificially defining service through DTH as entertainment through DTH.

11. Mr. Sahoo further submitted that under Article 270 of the Constitution of India, all taxes and duties referred to in the Union List (with certain exception) are levied and collected by the Government of India and distributed between the Union and the States as per the recommendations of the Finance Commission. Based on the recommendations of the 12th Finance Commission, 30.5% of net proceeds of the service tax are distributed among the States. The State of Orissa receives 5.229% of service tax collected by Centre on the DTH broadcasting service and as the proceeds of the service tax on broadcasting service is being shared between the Centre and the States, the State Legislature is not authorized to levy another tax on the same taxable event or activity. The levy of such entertainment tax by the State violates the scheme of revenue administration between the Union and the States, which is one of the basic features of the Constitution of India. Such a levy by the State Government is unconstitutional and ultra vires and infringes Articles 270 of the Constitution of India. The amended Act seeking to impose tax upon DTH operator is extra territorial, illegal and unconstitutional. The licence granted to the petitioner under Section 4 of the Telegraph Act, 1885 is one of service and not for providing entertainment. The substance of the contract in the present case is of service and not of entertainment and if the DTH service is deemed as entertainment under Entry 62 of List-II the same would be violative of Article 268-A of the Constitution.

12. Any State levy on "Entertainment" and/or "Amusement", to be valid/intra vires, it has to be one relating to entertainment as understood in common parlance. Entry 62 of List II of the Seventh Schedule should have a direct and sufficient nexus with the factum of entertainment. Until such a direct and proximate nexus between the transaction sought to be taxed and the person who is required to pay the tax is clearly established, the levy cannot be held to be constitutionally valid. The dominant position and intention of a DTH operator such as the petitioner is to act as a conduit for receipt and transmission of broadcasting signals and thus, in essence it performs the role of a "carrier" and not an "entertainer". Therefore, as far as the petitioner is concerned, there is neither intent to "Entertain" nor the taxable fact of "Entertainment". Both animus and factum are therefore missing. If all aspects of broadcasting services for the purposes of levying the service tax are covered under the Finance Act, the State cannot tax broadcasting services under Entry-62 of List-II as that would not only allow the State to levy entertainment tax in contravention of Article 268-A but would also amount to trespass upon the Legislative field of the Union under Entry 92-C of List-I. The taxation of an object can only be with respect to taxable events and all taxable events can be covered under single legislative entry. Entry 62 speaks of tax on entertainment but it does not include the right to impose taxes on the provision of DTH Broadcasting service as a taxable event as in the case of broadcasting service taxable event is separately provided under Entry 92-C. There cannot be overlapping in the field of taxation and since the tax on provision of broadcasting service is specifically provided under Entry-92C it narrows down the field of taxation available under Entry 62 of List-II. No State can levy entertainment tax on services covered under Section 65(15) of the Finance Act, 1994 as amended from time to time in respect of the same taxable event, i.e., provision of broadcasting services under the guise of entertainment. DTH services have been categorically brought under the ambit of "Broadcasting Services" and made liable for levy of service tax under Entry 92C of List I (Union List) of the Seventh Schedule read with Article 246 of the Constitution. The subscription payment made by the subscribers is towards the availment of 'broadcasting service' and not for any "entertainment". The subscription paid by the customer is liable to service tax under Entry 92C of List-I of the VII Schedule and service tax @ 10.3% is paid on the said subscription amount received from subscribers for availing DTH Broadcasting service and as such there is no question of levy of 'entertainment tax' by the State on the said subscription charges. Notices issued and penalty proposed to be imposed by opposite party Nos.4 and 5 on the basis of the Amended Act are liable to be quashed.

13 Referring to the views of the Administrative Reforms Commission constituted on 9th July, 1983 under the Chairmanship of R.S. Sarkaria, Mr. Sahoo submitted that the demand for either a concurrent or an exclusive power to the States with respect to broadcasting cannot be supported.

Further drawing attention of this Court to the Notification No.S.O.44(E) dated 9th January, 2004, it was submitted that the broad casting services and cable services are to be telecommunication service. Levy of entertainment tax on DTH Broadcasting services, is an arbitrary action on the part of the State Government and hence violative of Article 14 of the Constitution of India and such levy of entertainment tax is an unreasonable restriction on right to trade of the petitioner under Articles 19(1)(g) and 301 of the Constitution.

14. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Godfrey Philips India Ltd. vs. State of U.P. (2005) 2 SCC 515,* Mr. Sahoo, submitted that the Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation of Centres and States. This mutual exclusivity is reflected in Article 246(1). Therefore, taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass.

15. Mr. R.P. Kar, learned Standing Counsel appearing on behalf of the Revenue placing reliance on the judgment of the Punjab and Haryana High Court in the case of *Tata Sky Limited vs. State of Punjab and Another, (2011) 37 VST 1 (P & H),* submitted that provisions of the Orissa Entertainment Tax (Amendment) Act, 2010 and the Amendment Rules, 2010 to the extent providing for levy of entertainment tax on entertainment through DTH broadcasting services is constitutionally valid. It is further submitted that the Central levy as well as State levy is on different aspect and State levy could not be held to be in conflict with the Central levy. Entertainment is the main activity and broadcasting service is only a medium for entertainment.

16. On the rival contentions, the questions that fall for consideration by this Court are as follows:

(i) Whether entertainment through DTH broadcasting service is covered by Entry 62 of List II and Entertainment Tax is leviable on such

service or the same is covered by Entry 92C of List I on which service tax is leviable?

(ii) Whether there can be two levies i.e. (i) levy of service tax on service provided or to be provided to a client by a broadcasting agency or organization covered under Section 65(15) of the Finance Act, 1964 by the Union Government and (ii) another levy of Entertainment Tax by the State Government on entertainment through DTH broadcasting service on the ground that such levy is on a different aspect/sphere and covered under Entry 62 of List II ?

17. The above two questions being interlinked, they are dealt with together.

18. To deal with the above questions, it is felt necessary to refer to some of the constitutional provisions and statutory provisions of the Finance Act, 2001, the Prasara Bharati (Broadcasting Corporation of India) Act, 1990 and the Orissa Entertainment Tax Act, 2006 as amended by Orissa Entertainment (Amendment) Act, 2010 and the Orissa Entertainment Rules, 2006 as amended by The Orissa Entertainment (Amendment) Rules, 2010, which are relevant for our purpose. The same are extracted below:

19. **The Constitution of India -**

"**Article 245. Extent of laws made by Parliament and by the Legislatures of States.**—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

"Article 246- Subject matter of laws made by Parliament and by the Legislature of States. (1) Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the ("Union List")

(2) Notwithstanding anything in clause (3) Parliament and subject to clause(1), the legislature of any State also, have power to make laws with respect to any of the matters enumerated in List-III in

the Seventh Schedule (in this Constitution referred to as the "Concurrent List")

(3) Subject to clause (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II in the Seventh Schedule (in the Constitution, referred to as the "State List")
(4) Parliament has power to make law with respect to any matter for any part of territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

"248. Residuary powers of legislation.—(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

"**Entry 92C List I: "Taxes on services**"
From the above, it is clear that the Parliament has the exclusive power to tax DTH Broadcasting services."

"**Entry 62, List II:** "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

20. **Finance Act, 2001 :**
"**Section 65(15):**

"Broadcasting" has the meaning assigned to it in clause (c) of Section 2 of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 and also includes programme selection, scheduling or presentation of sound or visual matter on radio or TV channel i.e. in India for public listening or viewing as the case may be; and in the case of broadcasting agency or organization , having its head office situated in any place outside India, includes the activity of selling of time slots or obtaining sponsorships for broadcasting any form of communication or collecting the broadcasting charges or permitting the rights to receive by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to cable operator including multi-system operator or any other person or behalf of the said agency or organization, by its

branch office or subsidiary or representative in India or any agent appointed in India or by any person who acts on its behalf in any manner."

"Section 65(105) (zk) of the Finance Act, 2001 as amended w.e.f. 16th June, 2005 'the taxable service' in relation to Broadcasting agency means as follows :

"Taxable Service" means any service provided or to be provided to a client, by a broadcasting agency or organization in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, having its head office situated in any places outside India, includes service provided by its branch office or subsidiary or representative in India or any agent appointed in India or by any person who acts on its behalf in any manner, engaged in the activity of selling of time slots for broadcasting of any programme or obtaining sponsorships for programme or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture, image and sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to cable operator, including multi-system operator or any other person on behalf of the said agency or organization.

Explanation : For the removal of doubts, it is hereby declared that so long as the radio or television programme broadcast is received in India and intended for listening or viewing, as the case may be, by the public, such service shall be taxable service in relation to broadcasting, even if the encryption of the signals or beaming thereof through the satellite might have taken place outside India;"

21. The Prasar Bharati (Broadcasting Corporation of India) Act, 1990.

"Section 2 (c): 'broadcasting' means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations and all its grammatical variations and cognate expression shall be construed accordingly."

22. DTH Broadcasting Service has been described in the Guidelines issued by Government of India on 15th March, 2012 as under:

"Direct-To-Home (DTH Broadcasting service) refers to distribution of multi-channel TV programmes in Ku Band by using a satellite system by providing TV signals direct to subscriber's premises without passing through an intermediary such as cable operator."

23. The Orissa Entertainment Tax Act, 2006 as amended by E.T. Amendment Act, 2010:

"**Section 2 (a):** "***ADMISSION TO AN ENTERTAINMENT"*** includes admission to any place in which the entertainment is held and in case of entertainment through cable service [or Direct-to-Home (DTH) Broadcasting Service] each connection to a subscriber shall be deemed to be an admission for entertainment".

"Section 2 (d): "***CABLE TELEVISION NETWORK"*** means any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers."

"Section 2(e1): "***DIRECT-TO-HOME (DTH) BROADCASTING SERVICE"*** means system of distribution of multi-channel television programme in KU Band by using a Satellite System, by providing television signals to a television set with the aid of set-top box direct to subscribers without passing through an intermediary such as Cable Operator.

Explanation.—

For the purpose of this clause and clause (k1) **"KU BAND"** ordinarily means the 11.7-12.7 Ghz. (Gigahertz) frequency band which splits into two segments viz. the first having the frequency of 11.7-12.2 Ghz. Known as FSS (Fixed Satellite Service) and the other having the frequency of 12.2-12.7 Ghz. Known as BSS (Broadcasting Satellite Service),or it may have such other brand width as may be approved by the Government of India from time to time."

"Section 2(f) ***"ENTERTAINMENT"*** means any cinematographic exhibition including exhibition of news reels, documentaries, cartoons, advertisement shots or slides, whether before or during exhibition of a feature film or separately, and includes any other exhibition, performance, amusement and entertainment through cable service (or Direct-to-Home (DTH) Broadcasting service)"

"Section 7. Tax on cable and DTH service.-

(1) The proprietor of a cable television network providing cable service (and of a Direct-to-Home (DTH) Broadcasting Service) shall be liable to pay entertainment tax at such rate as specified in Part II of the Schedule.

(2) The tax payable under this section shall be paid, collected or realized in such manner as may be prescribed."

"Section 9. Intimation before holding entertainment.-

(1) No entertainment on which tax is leviable shall be held without prior information being given to the Commissioner in the manner prescribed.

(2) No proprietor of a cable television network (or Direct-to-Home (DTH) Broadcasting Service) shall provide entertainment, unless he obtains permission from the Commissioner in the manner prescribed.

xx xx xx

(3a) Notwithstanding anything contained in sub-sections (2) and (3) where any proprietor of a Direct-to-Home (DTH) Broadcasting Service is providing entertainment immediately before the commencement of the Orissa Entertainment Tax (Amendment) Act, 2010 he may continue to provide entertainment,-

(a) for a period of three months from the date of commencement of said amendment Act, or

(b) till the permission under sub-section (2) is granted by the Commissioner, if an application to that effect is made in the prescribed manner within the period specified in clause (a)."

24. The Orissa Entertainment Tax Rules, 2006 as amended by Orissa Entertainment Amendment Rules, 2010.

"Rule 12. Permission to operate cable television network or connection for the Direct-to-Home (DTH) Broadcasting Service.-

(1) The proprietor of a cable television network or a Direct-to-Home (DTH) Broadcasting Service shall submit to the Commissioner an application in Form XA within fifteen days from the date of

commencement of these rules bringing the Direct-to-Home (DTH) Broadcasting Service under purview of the Act or at least fifteen days before the date of such entertainment and shall furnish any other information which may be so required by the Commissioner for the purpose.

(2) The Commissioner, after making such enquiry as he may deem proper and after being satisfied that the application is in order, shall issue certificate in form XIIIA permitting the proprietor of a cable television network or a Direct-to-Home (DTH) Broadcasting Service."

25. The Entertainment Tax Act, 2006 has been amended vide Notification No.10568/1-2/10/Legis dated 24th September, 2010 and by the said amendment, the concepts of "service provider" and "subscriber" and "cable service" have been introduced with substantial amendment. The newly added Section 2(a) defines cable service with several modifications. In the aforesaid notification Sections 7, 9 and 15 of the Orissa Entertainment Tax has been amended by including DTH broadcasting service for the purpose of liability to pay Entertainment Tax and procedural provisions under Sections 9 and 15 of the said Act. Section 7 of the Orissa Entertainment Tax Act is the charging provision which has also been amended and by virtue of the said amendment "cable service" now includes DTH broadcasting service. Section 7(2) of the Act provides that the tax payable under the Entertainment Tax Act shall be paid, collected or realized in the manner prescribed by Entertainment Tax Rules. Under Section 9(1) of the Entertainment Tax Act, the proprietor of cable television network providing cable service and DTH broadcasting service shall be liable to pay Entertainment Tax at such rate as specified in Part II of the Schedule. As per Part-II of the Schedule, the proprietor of the cable television network providing cable service and DTH broadcasting service shall be liable to pay Entertainment Tax @ 5% of his monthly gross receipt. The State Government vide Finance Department Notification dated 30.10.2010 has notified the date of effect of the Act w.e.f. 1.10.2010.

26. The State Government in exercise of power conferred by Section 36 of the E.T. Act framed rules vide Entertainment Tax (Amendment) Rules, 2010 which came into force w.e.f. 5.10.2010. Rule 12 of the said amendment Rules, 2010 provides for obtaining permission from the Commissioner in Form XIII-A to operate cable Television network or connection to DTH broadcasting service.

27. Mr. Sahoo, learned counsel for the petitioner though argued the questions involved in this case from different angles, the essence of the

argument is same i.e. levy of entry tax on DTH Broadcasting service is beyond the competency of State legislature. According to Mr. Sahoo, broadcasting service is covered by Entry 92C of List I and not covered by Entry 62 of List II. Under Article 246 (3) of the Constitution, legislative power of States is subject to legislative powers of the Centre under Article 246(1). Since the subject-matter of broadcasting service is covered by Entry 92C of List I, the same cannot be covered by Entry 62 of List II of the Seventh Schedule. The same is excluded from List II on the principle of federal supremacy. In pith and substance, the levy is on broadcasting service as apart from broadcasting, no other taxing event has taken place. The event of broadcasting service itself has been covered in the definition of entertainment which is the basis for levy for entertainment tax. When there is no separate taxing event, aspect theory cannot be invoked to justify State levy on an event which is covered by Central levy.

28. On the contrary, the contention of the State is that the Central levy as well as the State levy is on different aspects and by applying principles of harmonious construction, the State levy could be held not to be in conflict with the Central levy. In pith and substance, the State levy is not on broadcasting service but on entertainment and falls under Entry 62 of List II. Entertainment is the main activity for which chargers are collected by the petitioner and broadcasting service is only a medium for the entertainment.

29. At this juncture, it would be beneficial to have an idea about distribution of legislative power between the Union and the State Legislature.

Article 246 of the Constitution of India deals with distribution of legislative powers between Union and the State Legislatures. Parliament has exclusive power to legislate with respect to matters in List I. The State Legislature has exclusive power to make laws for the matters in List-II. Both Parliament and State Legislatures have concurrent power of legislation with respect to matters in List III subject to central legislation prevailing in case of repugnancy.

30. In ***Hoechst Pharmaceuticals Ltd. vs. State of Bihar and others, (1983) 4 SCC 45,*** the Hon'ble Supreme Court held as under:

> **"38.** It is obvious that Article 246 imposes limitations on the legislative powers of the Union and State legislatures and its ultimate analysis would reveal the following essentials:

1. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The non obstante clause in Article 246(1) provides for predominance or supremacy of Union legislature. This power is not encumbered by anything contained in clauses (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246 (1). The combined effect of the different clauses contained in Article 246 is no more and no less than this: that in respect of any matter falling within List I, Parliament has exclusive power of legislation.

2. The State legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III. The exclusive power of the State legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State legislature.

3. Both Parliament and the State legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III.

39. Article 254 provides for the method of resolving conflicts between a law made by Parliament and a law made by the legislature of a State with respect to a matter falling in the Concurrent List, and it reads:

254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law,

shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

xx xx xx

41. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the entries in the Union and State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

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46. The general scheme of the British North America Act, 1867 with regard to the distribution of legislative powers, and the general scope and effect of Sections 91 and 92, and their relations to each other were fully considered and commented upon in the case of *Citizens Insurance Company case*[8]. Sir Montague Smith delivering the judgment for the Board evolved the rule of reconciliation observing:

In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective power. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the Section, so as to reconcile the respective powers they contain and give effect to all of them.

xx xx xx

74. It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control."

31. The Hon'ble Supreme Court in the case of ***State of West Bengal vs. Kesoram Industries Ltd., (2004) 10 SCC 201,*** held as under:

"31. Article 245 of the Constitution is the fountain source of legislative power. It provides — subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for

the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List". Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament."

32. In ***Central Bank of India v. State of Kerala and others***, (2009) 4 SCC 94, the Hon'ble Supreme Court has held as under:

"30. While negating challenge to the State legislation, a three-Judge Bench laid down the following principles:

(*1*) The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. *There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States*.

(*2*) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(*3*) *Taxation is considered to be a distinct matter for purposes of legislative competence*. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of

taxation in a separate group. *The power to tax cannot be deduced from a general legislative entry as an ancillary power*.

(*4*) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere *simplex enumeratio* of broad categories. *A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters*.

(*5*) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(*6*) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over

> Lists III and II and List III has priority over List II. However, still, *the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I*."

33. The principle of federal supremacy can be invoked only if there is irreconcilable conflict in Entries in Union and State Lists. If two Entries can be reconciled by harmonious construction or by applying principle of pith and substance, there is no occasion to apply the principle of federal supremacy. Concept of repugnancy under Article 254 relating to List III is different from repugnancy arising due to overlapping in List I and List II in which case principle of pith and substance is applied to determine legislative competence.

34. In ***Ralla Ram v. Province of East Punjab, AIR 1949 FC 81,*** the Federal Court made it clear that every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the Provincial legislation and the Federal legislation. Unless the Court forms an opinion that the extent of the alleged invasion by a Provincial Legislature into the field of the Federal Legislature is so great as would justify the view that in pith and substance the impugned tax is a tax within the domain of the Federal Legislature, the levy of tax would not be liable to be struck down.

35. The Entries in List-I and List-II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from the non obstante clause 'subject to' does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

(1) Is it still possible to effect reconciliation between the two Entries so as to avoid conflict and overlapping?

(2) In which entry does the impugned legislation fall by finding out the pith and substance of the legislation? And

(3) Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

[See ***Kesoram Industries Ltd. (supra)]***

36. In ***Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes***, (2008) 2 SCC 614, the Hon'ble Supreme Court held that while

interpreting tax statues involving applicability of Article 246 of Constitution of India read with Seventh Schedule thereof, Court should take various theories including 'aspect theory'.

37. 'Aspect Theory' means on the basis of different aspects of particular transaction the same can fall within the legislative competence of two legislature and both would have the power to tax a transaction on its different aspect.

Thus, the same transaction may involve two or more taxable events in different aspects. There may be overlapping, but that does not detract from the distinctiveness of the aspect.

38. In case of manufacturing and sale of a commodity, the taxable event for excise duty is manufacture of goods and the taxable event for sales tax/value added tax is sale of goods. Since the manufacture takes place earlier than the sale of goods, the excise duty is levied first and thereafter sales tax / value added tax is paid on the value including excise duty.

39. The Hon'ble Supreme Court in ***Inre, Sea Customs Act (1878), S.20(2),*** AIR 1963 SC 1760 held as under.

> "25.This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. In this connection sales-tax may be contrasted which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other, it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income."

40. In the case of ***Governor General in Council Vs. Province of Madras***, reported in AIR (32) 1945 Privy Council 98, it was held as under:-

> "….. The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of, his sales, may, as is

there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale…"

41. The Hon'ble Supreme Court in the case of ***Federation of Hotel & Restaurant Association of India v. Union of India, [1989[3 SCC 634,*** held as under:

"26…..Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other.

27. The Judicial Committee in *Prafulla Kumar Mukherjee* v. *Bank of Commerce*[7] referred to with approval the following observations of Sir Maurice Gwyer, C.J., in *Subrahmanyan Chettiar case*[4]:

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that."

28. This necessitates as an "essential of federal Government the role of an impartial body, independent of general and regional

Governments", to decide upon the meaning of division of powers. The court is this body.

29. The position in the present case assumes a slightly different complexion. It is not any part of the petitioners' case that "expenditure tax" is one of the taxes within the States' power or that it is a forbidden field for the Union Parliament. On the contrary, it is not disputed that a law imposing "expenditure tax" is well within the legislative competence of Union Parliament under Article 248 read with Entry 97 of List I. But the specific contention is that the particular impost under the impugned law, having regard to its nature and incidents, is really not an "expenditure tax" at all as it does not accord with the economists' notion of such a tax. That is one limb of the argument. The other is that the law is, in pith and substance, really one imposing a tax on luxuries or on the price paid for the sale of goods. The crucial questions, therefore, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly, whether "expenditure" laid out on what may be assumed to be "luxuries" or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation.

30. In Lefroy's *Canada's Federal System* the learned Author referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution i.e. British North America Act, 1867 observes that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power". Learned Author says:

"... that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

In *Union Colliery Co. of British Columbia* v. *Bryden*[8] Lord Haldane said:

It is remarkable the way this Board has reconciled the provisions of Section 91 and Section 92, by recognising that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall under Section 92."

31. Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in *Governor General-in-Council* v. *Province of Madras*[9] in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

"... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of, his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale...."

32. Referring to the "aspect" doctrine Laskin's *Canadian Constitutional Law* states:

"The 'aspect' doctrine bears some resemblance to those just noted but, unlike them, deals not with what the 'matter' is but with what it 'comes within'.... (p. 115)

... it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its 'matter'), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterising it the particular use proposed to be made of it determines what it is. (p. 116)

"... I pause to comment on certain correlations of operative incompatibility and the 'aspect' doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a 'matter' bring it within a class of subjects...." (p. 117)

38. Indeed, as an instance of different aspects of the same matter, being the topic of legislation under different legislative powers, reference may be made to the annual letting value of a property in the occupation of a person for his own residence being, in one aspect, the measure for levy of property tax under State law and in another aspect constitute the notional or presumed income for the purpose of income tax."

42. In ***All India Federation of Tax Practitioners v. Union of India, (2007) 7 SCC 527,*** the Hon'ble Supreme Court observed here under:

"34. As stated above, Entry 60, List II refers to taxes on professions, etc. It is the tax on the individual person/firm or company. It is the tax on the status. A chartered accountant or a cost accountant obtains a licence or a privilege from the competent body to practise. On that privilege *as such* the State is competent to levy a tax under Entry 60. However, as stated above, Entry 60 is not a general entry. It cannot be read to include every activity undertaken by a chartered accountant/cost accountant/architect for consideration. Service tax is a tax on each activity undertaken by a chartered accountant/cost accountant or an architect. The cost accountant/chartered accountant/architect charges his client for advice or for auditing of accounts. Similarly, a cost accountant charges his client for advice as well as doing the work of costing. For each transaction or contract, the chartered accountant/cost accountant renders profession based services. The activity undertaken by the chartered accountant or the cost accountant or an architect has two aspects. From the point of view of the chartered accountant/cost accountant it is an activity undertaken by him based on his performance and skill. But from the point of view of his client, the chartered accountant/cost accountant is his service provider. It is a tax on "services". The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced by the

assessee and cleared by the assessee for home consumption under the Central Excise A

xx xx xx

43. As stated above, every entry in the Lists has to be given a schematic interpretation. As stated above, constitutional law is about concepts and principles. Some of these principles have evolved out of judicial decisions. The said test is also applicable to taxation laws. That is the reason why the entries in the Lists have been divided into two groups, one dealing with general subjects and other dealing with taxation. The entries dealing with taxation are distinct entries vis-à-vis the general entries. It is for this reason that the doctrine of pith and substance has an important role to play while deciding the scope of each of the entries in the three Lists in the Seventh Schedule to the Constitution. This doctrine of pith and substance flows from the words in Article 246(1), quoted above, namely, "*with respect to* any of the matters enumerated in List I". The bottom line of the said doctrine is to look at the legislation as a whole and if it has a substantial connection with the entry, the matter may be taken to be legislation on the topic. That is why due weightage should be given to the words "with respect to" in Article 246 as it brings in the doctrine of "pith and substance" for understanding the scope of legislative powers.

44. Competence to legislate flows from Articles 245, 246 and the other articles in Part XI. A legislation like the Finance Act can be supported on the basis of a number of entries. In the present case, we are concerned with the constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament and the State Legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to

taxes on professions, trades, callings, etc. Therefore, Entry 60 of List II and Entries 92-C/97 of List I operate in different spheres."

43. The Hon'ble Supreme Court in the case of ***Imagic Creative (P) Ltd. (supra) ,*** has held hereunder"

> "31. The court, while interpreting a statute, must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The court must also bear in mind that where the application of a parliamentary and a legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the Acts are made applicable."

44. In view of the discussions made in the preceding paragraphs, the amendment brought by The Orissa Entertainment Tax (Amendment) Act, 2010 and The Orissa Entertainment Tax (Amendment) Rules, 2010 authorizing to levy tax on entertainment through Direct-to-Home (DTH) Broadcasting falls under Entry 62 of List II of Seventh Schedule. This is completely different from the levy of tax on broadcasting service which falls under Entry 92C, List I of Schedule VII. By application of aspect theory levy of tax on entertainment through DTH broadcasting service as well as levy of service tax on broadcasting service is constitutionally valid and perfectly justified. Entry 62 of List II and Entry 92 C of List I operate in two different spheres. Tax on entertainment cannot be held to be encroachment upon List I pertaining to tax on service. Levy of tax on broadcasting service which falls under Entry 92C of List I does not exclude levy of entertainment covered by Entry 62 of List II. Entertainment is not same as taxable service covered by Article 246(1) read with Entry 92C/97 of List-I of Seventh Schedule. The Amendment Act so far it defines "Entertainment" as entertainment through Direct-to-Home broadcasting service and consequently imposes entertainment tax is not taxable service. The activity sought to be taxed under the Entertainment Tax Act, 2006 as amended by E.T. Amendment Act, 2010 read with E.T. Amendment Rules, 2010 is within the legislative competency of Orissa State Legislature. There is no transgression or encroachment upon the field of Union Legislation. Levy of entertainment tax on entertainment through DTH is not ultra vires the power of State Legislature provided under Entry 62 of List II.

45. The decision of the Punjab & Haryana High Court in ***Tata Sky Limited v. State of Punjab and another*****, (2011) 37 VST 1 (P&H),** wherein it is held that levy of entertainment duty falls under Entry 62 of List II and not

hit by Entry 92C of List I and that such levy is not ultra vires the powers of State Legislature is squarely applicable to the present case.

46. For the reasons indicated supra, the various decisions of the Hon'ble Supreme Court relied upon by the petitioner are of no help to it in the fact situation.

47. In the result, the writ petition is dismissed. No order as to costs.

Writ petition dismissed.

2012 (II) ILR - CUT- 590

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

W.A. NO. 420 OF 2011 (Dt.29.06.2012)

SAMBARI NAYAK …….Appellant

.Vrs.

THE CHIEF GENERAL MANAGER,
TELECOM ORISSA CIRCLE, BBSR & ORS. …… Respondents

ELECTRICITY – Compensation due to electrocution – Deceased while lifting telephone receiver it was burst and caught fire – Accident occurred as 11 KV electric line came in contact with telephone line due to storm - Distance between the two lines is 8 to 10 inch – No protective measure taken by CESU as required Under Rule 87 of the Indian Electricity Rules, 1956 – Held, death due to electrocution – Negligence on the part of the Respondent Nos.3 & 4 - Since 16 years have been passed in the meantime no fruitful purpose will be served if the petitioner who is an old widow is directed to approach the Civil Court – Deceased aged about 27 years and survived by his widow mother, minor sister and minor brother – Held, direction issued to respondent Nos.3 & 4 to pay compensation of Rs.5 lakh to the appellant with interest at the rate of 10% P.A. from the date of death till the date of payment.

(Para 15 to 18)

Case laws Referred to:-

1.2011(II) OLR-708 : (CESU-V- Hema Sethi)
2.2005(II) OLR-389 : (Nirmala Nayak-V- Chairman, GRIDCO)
3.1996(II) OLR-99 : (Uttam Sahoo-V- Chairman, OSEB)
4.2011(3) TAC-153 : (Shriram Education Trust-V- Mitaben).

For Appellant - M/s. T.C.Mohanty, Sr. Adv.
For Respondent - Mr. P.R. Barik (for O.P.1 & 2)
Mr. S.C.Dash (for O.P.3 & 4)

B. N. MAHAPATRA, J. This writ appeal has been filed with a prayer to set aside the judgment dated 13.05.2011 passed by the learned Single Judge of this Court in O.J.C. No.11723 of 1996 by which the respondents-opp. parties are directed to pay Rs.50,000/- to the appellant-petitioner as an interim relief and liberty was given to the appellant-petitioner to approach the Civil Court for grant of compensation in accordance with law. The further

prayer of the appellant-petitioner is to award Rs. 10,50,000/- towards compensation together with interest @ 10% per annum on the said amount w.e.f. the date of filing of the writ petition till the date of payment in favour of the appellant.

2. The appellant-petitioner's case in a nutshell is that on 23.05.1996 at about 3.30 P.M. an unprecedent historic accident took place in the house of the appellant through the telephone receiver. When the receiver of the telephone was lifted by the appellant's son late Samarendra Nayak on hearing of ringing sound, there was a big noise and the telephone was burst and caught fire and the deceased was burnt. Consequent upon the said accident, the deceased lost his sense on the spot. The telephone line was immediately disconnected through a dry bamboo. The injured Samarendra Nayak was immediately shifted to Head Quarter Hospital, Dhenkanal where after preliminary treatment he was referred to S.C.B. Medical College and Hospital, Cuttack and was admitted in the Surgery Department. Despite treatment given in the S.C.B. Medical College and Hospital, Cuttack, the said Samarendra Nayak expired on 23.06.1996 while undergoing treatment in the said Hospital. The appellant has spent more than Rs.1 lakh for treatment of the deceased son. The fact of the accident was published in the daily newspapers i.e. The Sambad" and "The Samaj". Post-mortem on the dead body of Samarendra Nayak was done in S.C.B. Medical College and Hospital, Cuttack vide Mangalabag Police Station U.D. Case No. 370/96. On enquiry as regards the cause of accident, it was found that an 11 KV Electric line has crossed the telephone line at a distance of 250 metre from the house of the appellant as a result of which the telephone line came in contact with the electric line in heavy storm and was charged as there was no guard in between the electric line and the telephone line nor any protection was given in between the said two lines as a preventive measure from the safety point of view nor the electric line was insulated. The appellant-petitioner's further case is that the CESU and the Telecom Department of Govt. of India were jointly and severally liable for the cause of this unprecedent accident for which notice under Section 80 of C.P.C. was issued to the respondents. In reply to the said notice, the Telecom Department denied all the allegations and their liabilities to pay compensation on the ground that the 11 KV line was not charged by the time telephone connection was given. But the CESU did not give any reply to the notice under Section 80, C.P.C.

3. According to the appellant, the CESU gave electric connection to dozen of consumers in the nearby village after telephone connection was given to the appellant's house for which the CESU is mainly liable to

compensate the death of the appellant's son who died in electrocution. The date of birth of the deceased was 19th July, 1969 and at the time of his death, he was about 27 years. He was a practicing lawyer having License No.98 of 1996. He had a bright future. The deceased was earning Rs.7,000/- per month even though he was very young. The appellant being the old mother was fully dependant on the earning of the deceased son. Apart from that the minor sister-Sukanti Nayak and minor brother-Sheshadev Nayak were fully dependant on the earnings of the deceased. With the above averments, the appellant claims compensation of Rs.11 lakhs including medical expenses with 12% interest per annum from the date of death of the deceased till the date of payment.

4. Dr. T.C. Mohanty, learned counsel appearing for the appellant submits that the judgment of the learned Single Judge in awarding interim relief of Rs.50,000/- and directing the appellant to approach the civil court is arbitrary, illegal as well as bad in law since the human rights of victim parents have been snatched away by narrow interpretation of law. The appellant has given ample evidence regarding the death of her son in electrocution by filing the copy of F.I.R., Final Form and report of the medical officer of which the learned Single Judge has failed to appreciate the same and grant the relief. So far the occurrence of this electrocution accident is concerned, the respondents have deliberately failed to provide safety and protective devices as required under Rule-91 of the Indian Electricity Rules, 1956. The respondents have taken a false plea and filed false counter affidavit so as to divert the attention of this Court taking the stand that the writ petition involves disputed question of facts as such not maintainable. In the meantime, 15 years have passed. The victim being a Lawyer and died at the age of 27 years, the compensation should be calculated taking monthly income of Rs.7,000/- accepting the same to be true for the reason that a lawyer can easily earn so much amount, when the mason can earn that amount per month and again adding 50% for future loss of income basing on the decision of the Hon'ble Supreme Court in Sarala Varma Case with 12% interest from the date of filing of the writ petition till the date of payment. In support of his contention, Dr. Mohanty relied upon the decisions of this Court and other High Court in the cases of CESU v. Hema Sethi reported in 2011 (II) OLR-708, Nirmala Nayak v. Chairman, GRIDCO reported in 2005 (II) OLR-389, Uttam Sahoo, Chairman, OSEB, reported in 1996 (II) OLR-99 and Shriram Education Trust v. Mitaben 2011 (3) TAC-153.

5. Mr. S.C.Dash, learned counsel appearing for respondent nos.3 & 4-CESU submitted that there is no negligence or laches on the part of respondents-opp. Party nos.3 & 4 for which they are not liable to pay any

compensation. The appellant has no knowledge about such incident. No application has been made indicating the allegation of inquiry as provided under Section 33 of the Indian Electricity Act to find out the truth. The newspaper cuttings do not in any manner establish that the cause of death of the appellant's son was due to negligence of the Electricity Authorities. If at all there was any such negligence, then the same has been attributed to the Telecom Department. The appellant-petitioner does not admit the various documents such as medical reports and medical bills filed as Annexure-1 series to the writ petition since they do not relate to the deceased at all. The death might have been occurred in some other manner such as due to lightning or other cause. At the time of occurrence, the electricity supply was disconnected a day prior to such occurrence owing to cyclone and line was only charged about a year thereafter i.e. on 23.5.1997. It is humbly submitted that one 11 KV High Tension Line passes through the alleged spot of occurrence since long which is called as "Bautiberena Feeder" linked to Dhenkanal Feeder No.II Line. The telephone line was drawn by the Telecom Department to the house of the deceased much after the electric line was drawn on 2.2.1986 to village Bautiberena. On the point of intersection of the 11 KV electric wire and the telephone wire, the gap/clearance is 6 to 8 feet and sufficient insulated guarding was provided by the GRIDCO authorities as an abundant precaution. It is wrong to allege without any proof that the incident happened due to the contact of the electric wire with the telephone wire. The point of intersection would be clearly evident as shown in the rough sketch map produced by the respondents. The electricity supply to village Bautiberena from the tapping point 'A' as shown in the sketch map was disconnected much before the alleged incident occurred. The villagers of Bautiberena filed representations before the S.D.O. (Electrical), Gondia for revision/exemption of their electric bills due to non-supply of power to their village from 22.5.1996 to 22.5.1997 within which period , the alleged incident happened. Therefore, the question of death due to electrocution by touching the telephone line with the 11 KV line does not arise since the charging of 11 KV line with that of the telephone line is not at all possible as the said tapped 11 KV Feeder line was dead during the alleged occurrence of the accident. Assuming but not admitting for the sake of argument, had there been touching of telephone line conductor with 11 KV line, it would have either melted or grossly affected the telephone exchange situated at village Kaimati at a distance of 3 km from the point of occurrence under whose jurisdiction village Bautiberena comes. Therefore, flowing of electric current to the telephone receiver by any fault of GRIDCO is not trustworthy. Again the H.T. line network is maintained at a height of 21 ft. from earth to wire throughout including that of the spot of occurrence. Due to jumper disconnection on 22.5.1996 from the Kandhapada tapping point,

there was no supply of electricity. As there was no power supply during the alleged incident, respondents-opp.party nos.3 & 4 have no role to play and no negligence can be attributed either to the GRIDCO authorities and the departmental task force also committed no wrong in maintaining the routine works. The pleader's notice dated 1.8.1996 under Section 80 C.P.C. was duly replied by the S.D.O., Electrical Sub-Division, Gondia, Dhenkanal through Under Certificate Posting on 23.08.1996. The deceased was never acting as a practicing lawyer under the local judgeship. It is not known if he was a licence holder as claimed and he had never entered into practice and practically had no source of income. There being disputed questions of facts, the writ appeal is not the appropriate remedy.

6. On the rival contentions of the parties, the questions that fall for consideration by this Court are as follows:-

(i) Whether there is no material on record to show that the death of the deceased had occurred on 23.6.1996 due to electrocution and there is no negligence or laches on the part of the respondent-opp. party nos.3 and 4 for which they are not liable to pay any such compensation?

(ii) If respondent-opp. party nos.3 and 4 are held to be liable to pay compensation then what should be the just and proper compensation?

7. The appellant's case is that on 23.05.1996 at about 3.30 P.M., the deceased attended a telephone call and when he lifted the receiver, there was a big noise, bursting of telephone, catching of fire which made the deceased to fall down. The deceased was immediately removed to the Headquarters Hospital, Dhenkanal, where after getting preliminary treatment he was shifted to S.C.B. Medical College and Hospital, Cuttack and admitted in the Surgical Department. Despite best treatment given by the treating doctors, on 23.6.1996, he succumbed to the injuries. The cause of accident of the deceased was that a 11 KV electric line has crossed the telephone line at a distance of 250 metre from the house of the appellant-petitioner as a result of which the telephone line came in contact with the electric line and the telephone line was charged with electric current and no protective measure for the safety point of view was taken either by the CESU authorities or by the Telecom authorities. The Telephone Department denied the allegation. The CESU authorities alleged that the telephone line was drawn after the electric line was drawn, i.e. on 2.2.1986. Their main plank of argument is that there was no supply of electric power in 11 KV electric wire for the period from 22.5.1996 to 22.5.1997 during which period the alleged accident occurred. To support their stand, the CESU authorities referred to

the villagers' request letter to CESU authorities for revision/exemption of their electric bills due to non-supply of power to their village from 22.5.1996 to 22.5.1997. It is further submitted that at the point of intersection of the 11 KV electric wire and the telephone wire, the gap/clearance is 6.8 feet and sufficient insulated guarding was provided by the electricity department as an abundant caution. The incident in question which caused the death of deceased on 23.5.1996 was not timely informed to the respondents-authorities. No application has been made indicating the allegation of enquiry as provided under Section 33 of the Indian Electricity Act to find out the truth.

8. The very stand of respondent nos.3 and 4 denying their liability on the ground that the appellant had not lodged any complaint timely before the electricity authority as a result of which no inquiry as provided under Section 33 could be made to find out the truth is not at all sustainable for the simple reason that soon after the accident took place, the news with regard to death of the deceased because of passing of current through telephone wire was published on 29th June, 1996 in the daily newspaper "The Sambad" and thereafter on 1.7.1996 and 6.7.1996 in the daily newspapers. On the basis of publication of the news in the newspaper, the respondent-CESU should have conducted an inquiry to find out the truth. The same has not been done. Therefore, the opp.parties-CESU cannot take advantage of their own inaction. Apart from this, respondent nos.3 and 4 should not expect from the appellant, who is a widow and whose son was severely injured in electrocution and who was busy for the treatment of her son in S.C.B. Medical College and Hospital, Cuttack to go and inform respondent nos.3 and 4 regarding the incident.

9. The final report has been annexed to the writ petition as Annexure-9. In the said report at page 65 of the writ petition it is reported that the cause of death was due to electric shock. The inquest report is available at page 66 of the writ petition. Column 9 of the said report contains that the death was due to electric and telephone line connection by touching telephone receiver. Further column 10 of the said report shows that the cause of death was due to accidental electric shock connected with telephone line. The UD FIR available at page 68 of the writ petition states that it so happens as the telephone line came in contact with electric line due to storm as stated by the witness. This resulted in burn injuries on the person of the deceased. The P.M. report enclosed to the writ petition at page 70 shows the remarks given by Civil Surgeon revealing that the deceased was admitted to Surgery ward of S.B.C. Medical College Hospital, Cuttack vide Regd. No.1511/23.5.1996

as a case of electric burn of about 30% and expired while during treatment on 23.6.1996 at 11.15 p.m.

10. From the contents of above documents and in absence of any contrary evidence, it can be said that the death of the deceased-Samarendra Nayak was due to electrocution which happened as the telephone line came in contact with the electric line during storm. Further the newsprint of Samaj under Annexure-2 at page 53 of the writ petition clearly shows that the accident occurred due to contact of both telephone line and electric line which had only a distance of 8 inch and 10 inch between them.

11. Further case of the appellant is that the drawal of electric line and telephone line is not in conformity with Rule 87 of the Indian Electricity Rules, 1956. The said Rule is extracted hereunder.

"87. Lines crossing or approaching each other –

(1) Where an overhead line crosses or is in proximity to any telecommunication line, either the owner of the overhead lie or the telecommunication line, whoever lays his line later, shall arrange to provide for protective devices or guarding arrangements, in a manner laid down in the Code of Practice or the guidelines prepared by the Power and Telecommunication Coordination Committee and subject to the provisions of the following sub-rules:-

(2) When it is intended to erect a telecommunication line or an overhead line which will cross or be in proximity to an overhead line or a telecommunication line, as the case may be, the person proposing to erect such line shall give one month's notice of his intention so to do along with the relevant details of protection and drawings to the owner of the existing line.

(3) Where an overhead line crosses or is in proximity to another overhead line, guarding arrangements shall be provided so as to guard against the possibility of their coming into contact with each other".

In paragraph 6 of the counter, the CESU takes a stand that the telephone line was drawn by the Telecom Department to the house of the deceased much after the electric line was drawn on 2.2.1986 to village Bautiberena and sufficient insulated guarding was provided by the GRIDCO authorities as an abundant precaution.

Rule 87 of the Indian Electricity Rules, 1956 provides for protective devices of guarding arrangements where an overhead line crosses or is in proximity to any telecommunication line. It is not understood as to why the Electricity Department-GRIDCO provided sufficient insulated guarding when there was no line drawn by Telecom Department which was only drawn after the electric line was drawn on 2.2.1986. Veracity of the statement made in paragraph 6 of the counter affidavit filed on behalf of respondent nos.3 and 4 is doubtful.

12. The main defence of the respondent-opp. parties-CESU is that on the date of occurrence there was no power supply in the 11 KV line which crosses the telephone line. Annexure-E/3 attached to the counter affidavit filed by CESU clearly shows that there was no power interruption on 23.5.1996 in the 11 KV line of Dhenkanal No.II Feeder which crosses the telephone line. As per the said report on 22.5.1996 at about 5.20 PM to 7.05 PM, Dhenkanal No.II Feeder was shut down and again on 26.5.1996 at about 4.20 PM to 4.25 PM, the said line was shut down. Hence it is very much clear that 11 KV line of Dhenkanal No.II Feeder was very much active and there was electric supply on 23.5.1996.

13. The appellant-petitioner with his written note of argument has annexed copy of the Annexure-E/3 and marked the relevant portions in red pencil to prove that there was no power interruption on 23.5.1996 so far the 11 KV line of Dhenkanal No.II Feeder is concerned which crosses the telephone line.

14. CESU has filed written statement of the villagers to show that there was no line in the locality on the date of incident. Appellant's case is that the representation of villagers relates to domestic line which has no relevance to the 11 KV line which crosses the telephone line. In view of Annexure-E/3 attached to the affidavit of respondent-opp. party nos.3 and 4-CESU, there is nothing to disbelieve that the representation of villagers relates to non-supply of power in some other line and not the 11 KV line of Dhenkanal No.II Feeder which crosses the telephone line.

15. The impugned judgment passed by the learned Single Judge reveals that the petitioner was directed to approach the civil court for obtaining compensation basically on the ground that the respondents-CESU denied the allegation of the appellant that the death of the deceased occurred due to electrocution as the 11 KV line came in contact with the telephone line and the case of CESU is that there was no power supply on the date of occurrence in 11 KV electric wire. However, the learned Single Judge has

not considered the information and report and observation of I.O., remark of Civil Surgeon and Annexure-E/3 attached to the counter affidavit of respondent-opp. party nos.3 and 4, which is their own document, revealing that there was no power interruption so far 11 KV line of Dhenkanal No.II Feeder is concerned, which crosses the telephone line.

Thus, negligence and laches on the part of respondent nos.3 and 4 is proved on the face of the documents submitted by them before this Court. Moreover, in the meantime 16 years have passed. No fruitful purpose will be served if the petitioner, who is an old widow, is directed to approach the civil court for any relief.

16. For the reasons stated above, we are of the view that the death of the deceased-Samarendra Nayak was occurred on 23.6.1996 due to electrocution and there was negligence and laches on the part of the respondent-opp. party nos.3 & 4 for which they are liable to pay the compensation.

17. It is pertinent to mention here that the death occurred on 23.6.1996. Considering that the deceased was the only earning member of the family and at the time of death, he was 27 years and was survived by his widow mother, minor sister and minor brother, who were fully dependent on him, we feel it just and proper to award compensation of Rs.5(five) lakhs to the dependants of deceased-Samarendra Nayak. Keeping in view the judgments of the Hon'ble Supreme Court and this Court referred to supra upon which the learned Senior Advocate for the appellant has rightly placed reliance in support of the quantum of compensation to be awarded.

18. In view of the above, respondent-opp.party nos.3and 4-CESU is directed to pay a compensation of Rs.5 lakhs (Rupees five lakhs) to the appellant-petitioner within a period of eight weeks from today along with interest at the rate of 10% per annum from the date of death of the deceased till the date of payment. Out of the total amount of compensation along with interest, 50% shall be kept in a fixed deposit in the name of the mother of the deceased in any Nationalized Bank for a period of 5 years with a condition that the monthly interest on such fixed deposit shall be paid to the mother of the deceased regularly. Twenty per cent of the compensation amount along with interest shall be kept in a fixed deposit in the name of sister and further twenty per cent of the compensation amount along with interest shall be kept in a fixed deposit in the name of brother of the deceased in any Nationalized Bank for a period of 5 years, and the balance 10% of the compensation amount along with proportionate interest shall be paid to the mother of the

deceased in cash on proper identification. The fixed deposit made in the name of sister and brother of the deceased shall be spent for their development. If there would be any need of money for the development of the family and welfare of the sister and brother, liberty is given to the mother to move this Court for early payment of the fixed deposit amount.

19. With the aforesaid observations and directions, the writ appeal is allowed.

Appeal allowed.

2012 (II) ILR - CUT- 600

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

W.P.(CRL.) NO. 39 OF 2004 (Dt.28.06.2012)

RAMESH DAS @ HADIBANDHU BISWAL & ORS. .....Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226.

Custodial death – Compensation – Accused is a juvenile – Learned C.J.M., Cuttack remanded him to the observation home at Berhampur – While travelling in the train being escorted by two Havildars the accused jumped from the running train and died at the spot – The deceased was in the custody of the police personnel and it was their duty to keep him in safe custody till they report to the Superintendent of the observation home, Berhampur – Only because they are negligent in their duty the deceased could escape and died – Held, it is a case of custodial death – The Havildars being the employees of the State of Orissa, the State is vicariously liable for the death of the deceased – Direction issued to O.P.1 to pay Rs.3 lakh to the petitioners as compensation. (Para 9)

Case laws Referred to:-

1.(1993)2 SCCs 746 : (Nilabati Behera(Smt.)@ Lalita Behera(through the Supreme Court Legal Aid Committee)-V-State of Orissa)
2.AIR 1997 SC 1203 : (People's Union for Civil Liberties -V-Union of India & Anr.)
3.2009(I)OLR 526 : (Ahalya Pradhan-V- State of Orissa)
4.2012(I) OLR 597 : (Banalata Dash-V- State of Orissa & Ors.)

For Petitioner - M/s. G.B.Kar, K.B.Kar, M.B.Kar, L.K.Mishra.
For Opp.Parties- Addl. Govt. Advocate.

S.K. MISHRA, J. Parents of the deceased Sukanta Das alias Budha Biswal have filed this writ application claiming compensation of Rs.5,00,000/- for the custodial death of their son.

2. Facts are not in dispute. One Abani Kanta Mohanty, son of Krushna Chandra Mohanty of Kalamandap Road, Dolamundei, P.S. Purighat, Dist. Cuttack presented a written report at Purighat Police Station to the effect that about 7 P.M. of that evening the deceased was caught red handed while taking away three pieces of aluminium bar after committing theft of the same. On the basis of such report, Purighat Police Station Case No.140 dated 21.06.2003 was registered for the offence under Section 380 of the I.P.C. As the deceased was found to be 14 years old, he was treated as a juvenile delinquent and was produced before the Chief Judicial Magistrate, Cuttack in connection with G.R.Case No.848 of 2003. The learned Chief Judicial Magistrate, Cuttack remanded the deceased to the observation home at Berhampur till 13.08.2003. On the same day later on, learned Chief Judicial Magistrate directed for compliance of Section 19 of the Juvenile Justice Act, though by the time, Juvenile Justice Act was repelled and in its place Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act' for brevity) was in force. It appears that there was non-compliance of Section 13 of the Act.

3. Thereafter, the deceased was escorted by Havildar D.D. Naik and C/1143 A.K.Kanungo to the Observation Home, Berhampur. They were traveling in 6003 Up Howrah-Channai Mail to Berhampur. It is admitted by the opposite parties that the deceased jumped from the running train on 24.06.2003 at about 5.30 A.M. near Dhauli Muhan passenger halt and died at the spot. In this connection, Khurda Road G.R.P.S. U.D. Case No.8 dated 24.06.2003 has been registered on the report of C/1143 Amiya Kumar Kanungo and Khurda Road G.R.P.S. Case No.59 dated 24.06.2003 under Section 224 I.P.C. on the repot of Havildar D.D.Naik have been registered and investigated in to.

4. Thus, it is clear from the pleadings of the parties that the deceased was in the custody of the police officers when his death took place. Thus, two important questions arise for determination in this case, firstly, whether the death of the deceased was a custodial death and whether the State should be directed to pay compensation to the petitioners because of the death of the deceased ?

5. It is duty of the police authorities to ensure safety and security of the person in their custody. Only because they were negligent, such an incident could take place. Though the authorities have termed the incident as a suicide, foul play cannot be ruled out. Therefore, this Court comes to the conclusion that it is a case of custodial death and the authorities are responsible for the same. The police personnel being the employees of the

State of Orissa, the State is vicariously liable for the death of the aforesaid deceased.

6. In ***Nilabati Behera (Smt.) alias Lalita Behera (through the Supreme Court Legal Aid Committee) v. State of Orissa,*** (1993) 2 SCCs 746, the Supreme Court examined a similar case and has come to the conclusion that enforcement of the constitutional right and the grant of redress embraces award of compensation as part of legal consequences of contravention. Award of compensation in a proceeding under Article 32 by the Supreme Court or by the High Court under Article 226 is remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available in a defence in private law in an action based on tort. A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights and such a claim based on enforcement of a fundamental right is distinct from and in addition to, the remedy in private law for damages for the tort resulting from contravention of the fundamental rights. Thus, holding the Supreme Court further clarified that such principle justified award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for contravention made by the State or its servant in the purported exercise of their power, and enforcement of fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226.

7. Similar view has been taken in People's Union for Civil Liberties v. Union of India and another, AIR 1997 SC 1203, wherein the ratio decided in Nilabati Behera's case (supra) was relied upon and it was further held that in assessment of the compensation, the emphasis has to be on the compensatory and not on punitive manner. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment of the offence, irrespective of compensation, must be left to the criminal Court in which offender prosecuted, which the State, in law, is duty bound to do. A similar view has been taken by the Division Bench of this Court in Ahalya Pradhan v. State of Orissa, 2009 (1) OLR 526, wherein the custodial death was leveled as a suicide, which was negatived by a fact finding commission, the Division Bench of this Court has come to the conclusion that the legal heirs of the deceased are entitled to receive compensation.

8. Similarly, in Banalata Dash v. State of Orissa and others, 2012 (1) OLR 597, this Court has come to the conclusion that it is the duty of the jail authorities to ensure safety and security of the inmates of the jail. Only when there have been negligence on their part, an incident relation to death of the deceased could take place and, therefore, a compensation of Rs.3,00,000/- has been awarded to the petitioner.

9. Keeping in view the aforesaid proposition of law, this Court comes to the conclusion that the deceased Sukanta Dash alias Budha Biswal was in custody of police personnel and it was their duty to keep him in safe custody till they report to the Superintendent of the Observation Home, Berhampur. Only because they were negligent in their duty, the deceased could escape as alleged and in the result, he died. This being the fact of the case, this Court comes to the conclusion that a compensation of Rs.3,00,000/- (Rupees three lakhs) to the petitioners shall be sufficient to subserve the interest of justice.

10. Accordingly, it is directed that the opposite party no.1 shall pay a sum of Rs.3,00,000/- (Rupees three lakhs) within 8 (eight) weeks to the petitioners, failing which the amount shall carry interest at the rate of 9% per annum from the date of filing of the writ petition. The writ petition is accordingly disposed of.

Writ petition allowed.

2012 (II) ILR - CUT- 604

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

W.P.(C) NO. 32150 OF 2011 (Dt.31.07.2012)

UMESH CHANDRA CHINERA ……...Petitioner

.Vrs.

CHAIRMAN & MANAGING DIRECTOR,
BHARAT PETROLEUM CORPN. & ORS. . ……Opp.Parties

TENDER – Advertisement for award of MS/HSD Retail outlet dealership of BPCL – Petitioner and O.P.4 applied – Petitioner fulfilled all requirements but O.P.3 selected O.P.4 – Petitioner challenged the selection on the ground of fraud.

This Court called for the original records for perusal – It is found that O.P.4 has produced a document which has been manipulated on the face of it – Any forgery cannot be accepted by the Court when there has been a manipulation to the official records – In this case official records have been tampered with – When an applicant gets an order/offer by playing fraud upon the competent authority such order cannot be sustained in the eye of law as fraud and justice never dwell together – Although only two applicants called for the interview and since application of O.P.4 is tainted with fraud his application has to be rejected and that leaves the petitioner alone as the applicant – Held, decision of O.P.3 to grant permission in favour of O.P.4 is quashed – O.P.3 is directed to issue appropriate orders to grant licence in favour of the petitioner.

(Para 8,9)

Case laws Referred to:-

1.(1996)5 SCC 550 : (Indian Bank-V- Satyam Fibres (India) Pvt. Ltd.)
2.(2003)8 SCC 319 : (Ram Chandra Singh-V- Savitri Devi & Ors.)

For Petitioner - Mr. Maheswar Satpathy
For Opp.Parties- M/s. Srinivas Pattnaik & T.P.Paul
(for Opp.Parties No.1 to 3)
M/s. D.P.Nanda, R.K.Kanungo,
Mrs. S.Das & B.P.Panda
(for Opp.Party No.4).

S.K.MISHRA, J. The petitioner in this writ application assails the selection of opposite party no.4 as a retail dealer for Petrol/Diesel of Bharat Petroleum Corporation Ltd. at Saatmile Chhak, Dist. Dhenkanal on the Cuttack-Sambalpur Highway.

2. Opposite party no.3 advertised in daily newspaper on 23.08.2011 for award of MS/HSD Retail outlet Dealership of BPCL at Saatmile Chhak, Dist. Dhenkanal in pursuance whereof, the petitioner and opposite party no.4 applied. After scrutiny of the applications, opposite party no.3 invited the applicant and opposite party no.4 for interview. The petitioner, who is an ex-Navy Officer having retired in the rank of Hon. Sub-Lieutenant, claims that he has fulfilled all the requirements as per the aforesaid advertisement. He further contends that he has requisite measure of land close to the Highway bearing plot no.90 of Hal Khata No.252 of Mouza-Baghaharia, Tahsil-Hindol, Dist. Dhenkanal.

3. Opposite party no.4 has submitted Record of Rights of mouza-Baghdharia of Hal Plot no.447 of Hal Khata No.260 having an area of Ac.1.020 decs. and Hal Plot No.459 of Hal Khata No.260 of an area of Ac.1.130 decimals. Further, opposite party no.4 has also shown the area under Plot no.439 corresponding to Hal Khata No.146 under the Kisam 'Abada Jogya Anabadi' and 'Parbat Dui' of an area of Ac.26,600 decs., wherein a public road is to be constructed without changing the Kisam of the land by due process of law. Hal Plot nos.447 and 459 under Hal Khata no.260 are not connected with any public road. The public road and such other lands of opposite party no.4 is intervened by the Government land under Hal Plot No.439 corresponding to Hal Khata no.146, wherein 33 KV/11 KV. electric line runs. Besides over Hal Plot No.447 corresponding to Khata No.260 of opposite party no.4, the said high voltage line is also running, wherein the petrol/diesel pump cannot co-exist under the high tension electric line.

4. The petitioner further pleads that the opposite party no.4 has obtained an order for construction of narrow public road deviating the norms and procedure for converting the Kissam of the Government land of Mountain-2 (Parbat-Dui) without observing the formalities of conversion or of due process of law; such as inviting objections from public, notification in the local newspapers etc. Hence, the opposite party no.4 has manipulated and forged the concerned documents in connivance with the Revenue authorities.

5. In the rejoinder affidavit, the petitioner further pleads that the opposite party no.4 has submitted forged permission granted by the Sub-Collector vide RMC No.1 of 2011 dated 02.07.2011, which was meant for HPCL and not for BPCL. In other words, it is pleaded by the petitioner that the permission granted by the Revenue Authorities for use of the Government land for the purpose of connecting public road with the site, wherein oppose party no.4 intends to construct his Petrol/Diesel pump, has been granted to the petitioner for running a petrol pump by the Hindustan Petroleum Co. Ltd. and not by Bharat Petroleum Co. Ltd. Hence, it is contended that opposite party no.4 has obtained the dealership from the BPCL by producing forged documents.

6. In order to assess the factual position as to how the opposite party no.4 has obtained an order of the Revenue authorities, the original records of R.M.C. No.1 of 2011 was called for and on being produced by the Standing Counsel, the same has been perused. It is apparent from the case records that originally the order was considered on 02.07.2011 granting permission to the opposite party to use the land for entrance purpose of HPCL Petrol Pump. However, from the order it is clear that "HPCL" has been over-written to read "BPCL". In other words, the letter 'H' has been over-written to read as letter 'B'. From the application filed by the petitioner, it is also clear that there has been a correction in the application form. Originally, the application has been filed for grant of permission to use a portion of the public land as entrance to the petrol pump for the purpose of operating a HPCL petrol pump, where again the letter 'H' has been manipulated to read as BPCL. The letter issued by the Sub-Collector, Hindol has also been manipulated to read BPCL instead of HPCL. Thus, it is apparent from the records that there has been manipulation of the records to change the permission granted to the petitioner to use the land for operation of a BPCL Petrol Pump instead of a retail outlet to the HPCL. Apparently, there has been a forgery of records and as a result of which a fraud has been committed and the fraud has been proved.

This shows that a false representation has been made intentionally. The question, whether the forgery is a fraud, came up for consideration in the case of **Indian Bank v. Satyam Fibres (India) Pvt. Ltd.,** (1996) 5 SCC 550. In the reported case, the Supreme Court quoted from the Webster's Comprehensive Dictionary, International Edn. and accepted the definition of forgery as "*The act of falsely making or materially altering, with intent to defraud; any writing which, if genuine, might be of legal efficacy or the foundation of a legal liability."* Thus, it has been held that fraud is an essential ingredient of forgery. In this case, it is apparent from the records

that there has been a manipulation of the official records, as a result of which the permission given to the opposite party for use of land for the purpose of operating a retail outlet of the HPCL has been changed to a permission granted for use of land for the purpose of a retail outlet of BPCL.

7. In **Ram Chandra Singh v. Savitri Devi and others,** (2003) 8 SCC 319, the Supreme Court has held that fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induce the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well-settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent representation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the injury from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void *ab initio*. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud. Fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*.

8. Applying the principle in the case in hand, it is seen that the opposite party no.4 has produced a document, which has been manipulated on the face of it and it has led BPCL to grant license in his favour, thereby causing injury to the petitioner. Any forgery cannot be accepted by the court, more so when there has been a manipulation to the official records. It is apparent in this case that official records have been tampered with. It is the settled proposition of law that when an applicant gets an order/offer by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of law. Therefore, the decision taken by the opposite party no.3 to award the retailership to the opposite party no.4 cannot be upheld in this case. It is further found that only two applicants i.e. the petitioner and the opposite party no.4 have been called for interview for the purpose of selection of granting retailership of the BPCL. Since the application of opposite party no.4 is tainted with fraud, his application has to be rejected outright, that leaves the petitioner alone as the applicant. In that view of the matter, the writ application should be allowed.

9. Thus, on the basis of the aforesaid discussion, the writ petition is allowed. The decision of the opposite party no.3 to grant permission in favour of the opposite party no.4 to run a retail outlet of MS/HSD is hereby quashed. Opposite party no.3 is directed to issue appropriate orders to grant the license in favour the petitioner within a period of two months from the date of communication of this order. No cost.

Writ petition allowed.

2012 (II) ILR - CUT- 609

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

W.P.(C) NO.14457 OF 2011 (Dt.25.06.2012)

PRAFULLA KUMARI DAS …. ….Petitioner

.Vrs.

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

LEASE – Husband of the petitioner applied for allotment of a Government Plot at Bhubaneswar – Plot was allotted in his favour on deposit of premium in the year 1968 through treasury challan – Authorities could not find out any ingenuinity in such deposit – Plea taken by the Opp.Parties that the cost of land has been increased sky high in the meantime will not help the authorities to reject the claim since premium which was prevailed at the time of allotment of the land has been deposited by the petitioner's husband – Moreover delay in approaching this Court cannot be a ground to reject the case of the petitioner when the said land is still lying vacant and it stated to have been in possession of the petitioner for the last half a century – Held, direction issued to the Opp.Parties to execute the lease deed in favour of the petitioner after completing the allotment process.

(Para 8,9)

For Petitioner - M/s. Ramakanta Mohanty, D.Mohanty, S.Mohanty, D.Varadwaj, S.Mohanty, N.Das, A.Mohanty, S.N.Biswal.

For Opp.Parties - Addl. Government Advocate (for O.Ps.1,2,4,5,6) M/s. A.K.Rath, R.K.Pattanaik, S.P.Das, (for O.P.3)

B.P.DAS, J. The petitioner is the widow of late Prasanna Kumar Das, who, after serving as Professor and Principal of different Government Colleges in the State of Orissa, retired as Addl. D.P.I. While in service, the husband of the petitioner had been allotted with a Government plot by the Capital Cooperative Housing Society Ltd-opposite party no.3. But before the allotment process could be completed and necessary lease deed could be executed, the husband of the petitioner died. Therefore, the present petitioner has filed this writ application with a prayer to direct the opposite parties to complete the process of allotment in pursuance of the allotment order issued by the Society under Annexure-2 and register the document of transfer of the land in her name within a stipulated time.

2. The brief facts as narrated in the writ application, tend to reveal that the State Government in the erstwhile Political and Services Department, now General Administration Department, set apart certain Government plots for allotment to the members of Capital Cooperative Housing Society Ltd. (hereinafter 'Society'). The husband of the petitioner being a bona fide member of the said Society since 15.10.1960 had applied to the Society for allotment of a piece of land. The Board of Directors of the Society decided to provisionally allot Plot No. 696 measuring approximately $1/10^{th}$ of an acre of the size 60' x 75' in Saheed Nagar, Bhubaneswar in favour of the husband of the petitioner vide the allotment letter dated 24.8.1965 in Annexure-2. On receipt of the aforesaid letter, the husband of the petitioner paid the premium of the land on 3.10.1966 vide Challan No. 1512 dated 19.9.1966 of the Bhubaneswar Sub-Treasury and submitted the Challan in original to the Deputy Estates Officer and Ex-Officio Under Secretary to Government, Political and Services Department, with a request to execute the lease deed and register the allotted plot in his name.

Since the Department did not take any step for registration of the aforesaid plot in favour of the husband of the petitioner and remained silent, he approached the Director of Estates personally and ventilated his grievance regarding non-execution of the lease deed in his favour, whereafter the Director of Estates asked the husband of the petitioner to furnish the certified copy of the treasury challan regarding deposit of the premium in respect of the plot allotted in his favour, as the concerned file was not treaceable in the Department. Thereafter the husband of the petitioner obtained the certified copy of the treasury challan from the Treasury Office, Khurda on 11.2.2000 and furnished the same to the Director of Estates, General Administration Department for taking necessary steps. Despite all sincere efforts made by the husband of the petitioner, when the General Administration Department did not take any step for execution of lease deed, he approached the then Chief Minister of Orissa and requested him to direct the Director of Estates, G.A. Department, to do the needful for execution of the lease deed in respect of Plot No.696 at Saheed Nagar in his favour. Though the husband of the petitioner was made to run from pillar to post, the same did not yield any result. Again the husband of the petitioner wrote a letter to the Chief Minister on 15.8.2005 to consider his grievance and indicated that he was at the fag end of his life. While the matter stood thus, the husband of the petitioner breathed his last. Thereafter, when the opposite parties did not take any step for execution of the lease deed, the present petitioner, being the widow of late Prasanna Kumar Das, approached the Society for supply of certain documents, considering which the Society issued a certificate vide Annexure-5 to the effect that her

husband was a member of the Society having membership No.1529 and he had been allotted with a Plot bearing No.696, Saheed Nagar measuring an area of 1/10th of an acre of size 60' x 75' vide letter dated 24.8.1965. In the said certificate the Chief Executive of the Society has also indicated that the late husband of the petitioner had deposited the treasury challan for an amount of Rs.1033.06 paise in favour of the P&S Department vide Challan No. 1512 as per his letter dated 3.10.1966.

The petitioner is now 80 years old and is in possession of the land in question since last half a century. After the death of her husband, she tried her best for registration of the said land in her name, but the G.A. Department turned a deaf ear to her request. So, she had approached the Chief Minister as well as the Chief Secretary in their grievance cells to ventilate her grievance, but to no effect.

Thereafter the petitioner resorted to the provisions of the Right to Information Act and sought for the following information.

1. All the note sheets, reports on the correspondences made by her late husband Prasanna Kumar Das regarding allotment and registration of the plot No.696 Saheed Nagar.

2. Action taken on the representation of late Prasanna Kumar Das dated 10.7.1974 to Dy. Director of Estate, Ex-Officio Under Secretary to the Government, P & S Department and letter dated 25.9.1979 to the Director of Estate and Ex-Officio Dy. Secretary to the Government, P & S Department and the representation to the Hon'ble Chief Minister dated 17.4.2000 along with the Amin's Report and notes of Dealing Asst. and all authorities above.

3. Action taken on the representation of the applicant dated 2.3.2009 to the Chief Secretary of Orissa and notes of Chief Secretary and others and Amin's Report.

The Public Information Officer, G.A. Department expressed his inability to furnish the information sought for by the petitioner on the ground that the relevant file dealing with allotment of Plot No.696, Saheed Nagar could not be readily traced out.

The case of the petitioner is that though the opposite parties have already registered lands in favour of certain persons, who like the husband of the petitioner had applied for lands and in whose favour allotment letters

were issued, non-consideration of the case of the petitioner for registration of the land allotted in his favour, is clearly discriminatory. According to her, her husband, who was a bona fide allottee of the land in question and had served the State being a renowned Scientist and Professor and many of his students have excelled in different fields, was put to unnecessary harassment, while he was in quest for a fair play and justice, which was expected from the Executive Authorities.

3. A counter affidavit has been filed by opposite parties 1 and 2, i.e. the State Government represented by the Secretary, General Administration Department and the Director of Estate and Ex-Officio-Deputy Secretary, P & S Department respectively, through the Additional Land Officer, General Administration Department, wherein the allotment of land and deposit of money by the husband of the petitioner has not been disputed, but it is only indicated that the genuineness of the Treasury Challan regarding deposit of premium for the land, is to be verified.

It is pertinent to mention here that the petitioner has filed the certified copy of the Treasury Challan showing deposit of the premium before the Director of Estates-O.P.2.

In the counter affidavit, the opposite parties have indicated that the land allotted to petitioner's husband had been encroached by some neighbors and as the relevant file was being not traceable, was to be reconstructed. Their further stand in the counter affidavit is that the petitioner has approached this Court after a long lapse of 46 years and no explanation has been given for such delay in approaching this Court and that the authenticity of the letter relied upon by the petitioner could not be verified as the file was not traceable. It is also indicated in the counter that as lands were then allotted through Capital Co-operative Societies and the allotment orders were issued from the erstwhile Political and Services Department and the said Department vide letter No. 7445 dated 24.8.1966 communicated to the Secretary, Capital Co-operative House Building Society, Bhubaneswar and to the allottees concerned including the husband of the petitioner vide Memo No.7447 dated 24.8.1966 indicating therein to deposit the land premium and execute lease deed in duplicate latest by 20.9.1966 and since the same has not been done by the husband of the petitioner, the petitioner has no right to claim such land. Further it is stated that since the price of the land at Bhubaneswar has increased sky-high, the possibility of deliberate destruction of relevant individual allotment file by vested interest cannot be ruled out. It is averred that the representation dated 17.5.2000 made by the

husband of the petitioner to the Chief Minister to direct the Director of Estates for execution of the lease deed, has been rejected.

The main objection raised on behalf of the opposite parties is that the lease deed has not been executed within the time and the price of the land has gone up in the meantime.

4. The letter dated 24.8.1966 issued by the P&S Department to O.P.3-Society, which is annexed as Annexure-B/1 to the counter affidavit, reveals that the land in question was allotted by O.P.3-Society in favour of the husband of the petitioner and the same has been approved by the State Government.

5. An affidavit has also been filed on behalf of opposite party No.3 through the Chief Executive in-Charge of the Capital Cooperative Housing Ltd. Paragraphs 2, 3 and 4 of the said affidavit being relevant are quoted herein below

> 2. That, the husband of the petitioner above named late Prasanna Kumar Das was a bona fide member of this Society since the year 1960 vide membership number 1529 as per the Share Registrar maintained by this Society.
>
> 3. That, late Prasanna Kumar Das, being a member of this Society, was allotted with a plot vide Plot No. 696, Saheed Nagar, Bhubaneswar vide the allotment letter contained under Annexure-2 to the writ petition.
>
> 4. That, in obedience to the direction issued by this Hon'ble Court on the last occasion, this deponent visited the spot and found that the Plot No. 696 at Saheed Nagar is lying vacant and no permanent construction over the said plot has yet been erected. There is a temporary shed put up by somebody as verified on 26.2.2012, but the name of the person putting the shed is not known to us."

6. From the aforesaid affidavit, it is crystal clear that till date the land is lying vacant and has not been allotted to anybody. During the course of hearing, by order dated 29.3.2012, we directed the Special Secretary, G.A. Department to file an affidavit indicating the list of persons, who have been allotted with lands by the G.A. Department, in Saheed Nagar, Satya Nagar and Ashok Nagar in the last 10 years. Pursuant to such direction, the Special Secretary to Government, General Administration Department has filed an

affidavit indicating therein that 25 allottees including 12 institutions have been allotted with lands in the said three areas in the last 10 years.

7. Learned counsel for the petitioner referring to the list of allottees disclosed in the affidavit, submitted that the lands have either been allotted to bureaucrats, retired bureaucrats or persons belonging to influential classes.

8. Be that as it may, petitioner's husband who had served the State as a teacher had deposited the premium for the land allotted in his favour in the Treasury in the year 1966 and the certified copy of the treasury challan deposit of such premium had been submitted to the authorities and despite several adjournments granted, the authorities could not find out any ingenuinity in the treasury challan deposit. The plea taken by the opposite parties that the cost of land has been increased sky-high in the meantime will not in any manner help the authorities to reject the claim of the petitioner, because the rise in the cost of the land is not material as it is admitted by opposite party No.3- Society so also not disputed by the Government that the premium, which was prevailed at the time of allotment of the land has been deposited by the petitioner's husband. Hence, the representation, which has been rejected, should have been sympathetically considered by the authorities as it was difficult on the part of a teacher or his family to get a land at Bhubaneswar, which is now under the total control and hold of the Government officials as well as builders and rich persons and there is no place for a middle class family to get land in the vicinity of Bhubaneswar. If we would have gone deep into the matter and if the records of allotment of lands by the State Government in Bhubaneswar in the last 20 years would be re-opened, the same would lead to opening of a Pandora box and as stated by learned counsel for the petitioner, most of the allottees would be of higher income group of people. We are not inclined to do so, but at the same time, we are of the considered opinion that injustice should not be done to the petitioner, who is a 80 year old widow, and her husband who with a great hope to settle at Bhubaneswar applied for allotment of a land through opposite party no.3-Socieity and even if a land was allotted in his favour could not register the same in his name due to his transferable service. The delay in approaching this Court cannot be a ground to reject the case of the petitioner when the land is still lying vacant and is stated to have been in possession of the petitioner. So far as the encroachment is concerned, that is between the petitioner and the encroacher and the State Government has nothing to do with that.

9. For the foregoing reasons, we allow the writ application and direct the opposite parties to execute the lease deed in favour of the petitioner after completing the allotment process. The Special Secretary, G.A. Department is directed to register the land in question in the name of the petitioner. The entire exercise shall be completed within a period of three months from today. There will be no order as to cost.

Writ petition allowed.

2012 (II) ILR - CUT- 616

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

O.J.C. NO. 815 OF 1998 (Dt.28.06.2012)

BHARAT BIHARI MISHRA & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ORS. …… Opp.Parties

ORISSA ESTATES ABOLITION ACT, 1951 (ACT NO.1 OF 1951) – S.9.

Appeal – Only a final order on a claim raised U/s.8-A(1) is appellable U/s.9 (1) of the Act – The appellate power does not contemplate entertaining an appeal against any interim order like one either allowing or rejecting an application for restoration of a proceeding dismissed for default – Held, appeal U/s.9 of the O.E.A. Act against an order of the Collector rejecting an application for restoration of the proceeding is not maintainable. (Para 15)

Case laws Referred to:-

1.2000(2) SCALE 131 : (New India Assurance Co. Ltd.-V- R. Srinivasan)
2.AIR 1981 SC 606 : (Grindlays Bank Ltd.-V- The Central Government Industrial Tribunal & Ors.)
3.1996(86)E.L.T. 472(SC) : (J.K. Synthetics Ltd.-V- Collector of Central Excise)

For Petitioners - M/s. B.Routray, A.K. Baral, B. Singh, P.K.Das, D.K.Mohapatra, B.N. Satpathy & B.B.Routray.
For Opp.Parties - M/s. A.R.Dash, N.Lenka & N.Das (for O.P.No.4)
Dr. A.K.Rath (for Commissioner Endowments).

B.K.NAYAK, J. The petitioners in this writ application challenge the legality and propriety of the order dated 25.04.1998 (Annexure-8) passed by the learned Additional District Magistrate, Khurda in O.E.A. Appeal No.3 of 1993.

2. The facts of the case, as averred in the writ application are that the petitioners' late father Brajabehari Mishra and late mother Arnapurna Mishra jointly applied to opposite party no. 4-deity, Lord Lingaraj Mahaprabhu

through its Trust Board for permanent lease of the disputed land and paid the salami on 10.08.1954. Since the property in question was the Trust Estate of the deity, the Commissioner of Endowments accorded permission for permanent lease of the land under Section 19 of the Orissa Hindu Religious Endowments Act,1951 (in short 'OHRE Act'), as per order No.403/986 P (J) dated 16.08.1955 in O.A. Case No.106 of 1952-53. Since then the petitioners' parents were in possession of the land and paying rent to the temple authorities till vesting of the Trust estate of the deity in 1974 in the State Government under Section 3-A (1) of the Orissa Estates Abolition Act,1951 (in short 'O.E.A. Act').On vesting of the estate the parents of the petitioners, who were permanent tenants under the deity, became permanent tenants under the State Government under the provision of Section 8 (1) of the O.E.A. Act. It is further asserted that after the vesting opposite party no.4-deity filed a claim case under Sections 6 and 7 of the O.E.A. Act on 04.08.1975 for settlement of the disputed land in its favour alleging that the deity is in khas possession of the disputed land. The said claim application was registered as Nij Dhakhal Case No.378 (T) of 1974. It is stated that in the said proceeding, without proclamation of public notice inviting objection as required under first proviso to sub section (2) of Section 8-A of the O.E.A. Act from persons interested, the Tahasildar-O.E.A. Collector allowed the claim of opposite party no.4 by order dated 04.11.1980. Before passing of such order no notice had been given to the parents of the petitioners, who had absolutely no knowledge about such proceedings or the order of settlement passed therein till 20.12.1983. On coming to know about the passing of such order of settlement in favour of opposite party no.4, the parents of the petitioners filed O.E.A. Appeal No.1 of 1984 before the Additional District Magistrate, Bhubaneswar (opposite party no.2) challenging such settlement order. By order dated 23.2.1989 (Annexure-1), the Additional District Magistrate, allowed the appeal, set aside the settlement order passed by the Tahasildar and remitted the case back to the Tahasildar (opposite party no.3) directing that the original lessees shall file their objection within one month from the date of the order and the Tahasildar shall dispose of the claim case within six months. The A.D.M., did not go into the question whether the original lessees have become occupancy rayats under the State Government by operation of Section 8 (1) of the O.E.A. Act, which was raised by the appellants and left the same open to be considered by the O.E.A. Collector-Tahasildar. The lessees (parents of the petitioners) filed objection before the O.E.A. Collector on 26.06.1989. The case suffered some adjournments at the stage of hearing and was ultimately posted to 04.12.1989 on which date the Executive Officer of Trust Board, who was representing opposite party no.4, remained absent for which the claim was dismissed for default vide order

under Annexure-2. Thereafter on 02.01.1990, the Additional Executive Officer of opposite party no.4 filed a petition before the O.E.A. Collector for restoration of the claim case taking the plea that on 04.12.1989 to which date the claim case was fixed for hearing, he had come to the High Court for which he could not remain present before the O.E.A Collector. Ultimately, the restoration application was heard on 06.05.1990 and it was posted to 07.06.1994 for orders. Instead of passing final orders on 07.06.1990, the O.E.A. Collector on that day directed the Executive Officer of opposite party no.4 to file an affidavit mentioning the case number in connection with which he had come to the High Court and the matter was adjourned again to 26.6.1990 for passing final orders on the restoration application. The order dated 07.06.1990 has been annexed as Annexure-3. The Executive Officer did not file any affidavit on 26.06.1990 and the O.E.A. Collector having remained busy otherwise, the matter was adjourned to 20.07.1990 and again to 30.07.1990. Even by 30.07.1990 no affidavit was filed and even on that date the Executive Officer-opposite party no.4 did not choose to appear despite repeated calls and, therefore, the O.E.A. Collector passed order on that day vide Annexure-4 dismissing the restoration application for default and for non-compliance of earlier order dated 07.06.1990. Thereafter on 30.11.1991, the Executive Officer of opposite party no.4 filed another petition under Order 9 Rule 9 of read with Section 151, C.P.C. for restoration of the restoration petition filed earlier on 02.01.1990, which was dismissed for default by order under Annexure-4, along with a petition for condonation of delay on grounds inter alia that the Additional Executive Officer lost track of the case on 20.07.1990 as the O.E.A. Collector did not hold court on that day and that the further date of posting of the restoration application was not within the knowledge of the claimant. It is stated that on the date of filing of second restoration application, i.e., on 30.11.1991, the records being not available with the O.E.A. Collector, as the same had been transmitted to the Member, Board of Revenue in connection with another case, the O.E.A. Collector endorsed on the body of the restoration application that the matter would be taken up after receipt of the original records from the Board of Revenue. The restoration petition dated 30.11.1991 with the endorsement of the O.E.A. Collector has been filed as Annexure-5. Although nothing was decided by the O.E.A. Collector on the second restoration application, opposite party no.4 however on the very day filed an appeal before the Additional District Magistrate against the direction of the O.E.A. Collector endorsed on the body of the petition. The said appeal was registered as O.E.A. Appeal No.2 of 1991, which was ultimately disposed of by the A.D.M., on 06.07.1992 by order under Annexure-6 holding that since the matter was sub-judice before the O.E.A. Collector-cum-Tahasildar, the appeal was premature and it was inappropriate to interfere with the matter pending

before the O.E.A. Collector. Ultimately, the second restoration application was taken up for hearing by the O.E.A. Collector on 12.4.1993 and on the same date vide order under Annexure-7 it was dismissed mainly on the ground of non-compliance of the earlier order dated 07.6.1990 directing opposite party no.4 to file an affidavit. It was further held that the claimant (opposite party no.4) was deliberately negligent and delaying disposal of the case on flimsy grounds. It was held that there was no sufficient cause to allow the second restoration application. Challenging the order dated 12.4.1993 (Annexure-7), the claimant filed O.E.A. Appeal No.3 of 1993 before the Additional District Magistrate, Bhubaneswar purportedly under Section 9 (1) of the O.E.A.Act. Initially the petitioners filed this writ application challenging the maintainability of the second restoration application as well as the maintainability of O.E.A. Appeal No.3 of 1993. However, during the pendency of the writ application the said appeal was disposed of by the A.D.M. by his order dated 25.4.1998 (Annexure-8) by allowing the appeal and remanding the matter to O.E.A. Collector, Bhubaneswar for fresh adjudication with the following observations :

> "Heard both. Went through the case record, this case has a chequered career as the case has been agitated at the appellate forum, one revisional forum and before the Hon'ble High Court. This appeal has been filed on the ground that, the direction given by the appellate court to restore the case as is found from plaint has not been heard and disposed of as per the provision of law. The OEA Collector was advised to hear the parties and to dispose of the case after due opportunity to the parties. It is found that the case was posted to 6.11.89. The OEA Collector could not hear the case and posted to 4.12.89 for further hearing, as record reveals. They have not been heard nor their case has been properly enquired into.
>
> In the foregoing discussion and after hearing the parties and perusal of lower court case record, I am inclined to hold that the order of the OEA Collector dated 4.12.1989 is bad in the eye of law. Subsequent order is also vitiated the entire proceedings. Accordingly, the same are set aside. The matter is remitted back to the OEA Collector, Bhubaneswar for fresh adjudication after giving due opportunity to the parties interested and giving due regard to the orders of the Hon'ble Member, B.O.R., Hon'ble High Court and of this Court. The case be disposed of within six months in accordance with law. With the above observation the appeal is disposed of accordingly. In result the appeal is allowed. Return the L.C.R. Send extract of orders to OEA Collector-cum-Tahasildar, Bhubaneswar."

3. By virtue of amendment of the writ application, the appellate order under Anenxure-8 has been assailed by the petitioners. The main plank of argument of the petitioners is that since the petitioners' predecessors-in-interest were lessees in respect of the disputed land under opposite party no.4, the deity was not in khas possession on the date of vesting of the Trust estate including the disputed land and, therefore, the O.E.A. claim case filed by the deity was not at all maintainable and, further that Order 9, Rule 9, C.P.C. does not apply to a proceeding under the O.E.A. Act., and therefore, the second restoration application filed by the Executive Officer of the deity was not maintainable and further that the order passed by the O.E.A. Collector dismissing the second restoration application was not an appellable order under the provision of Section 9 (1) of the O.E.A Act., which was taken recourse to for filing the appeal and, therefore, the A.D.M. had no jurisdiction and power to entertain O.E.A. Appeal No.3 of 1993 and to pass the impugned order.

4. Opposite party no.4-deity has filed a counter affidavit through its Executive Officer contending inter alia that even though the Commissioner of Endowments passed order on 22.05.1955 permitting for transfer of the case land by way of lease in favour of Sri B.B. Mishra and Smt. Arnapurna Mishra, the parents of the petitioners, and the proposed lease was purportedly for construction of residential house, no lease deed having at all been executed by the deity, the parents of the petitioners did not become lessees or tenants under the deity. Thus, the lease sanction order of Commissioner of Endowments was never acted upon. The alleged receipt of salami by the deity in respect of the lease and the alleged grant of receipt dated 10.08.1954 has been disputed on the ground that no such receipt could have been granted since the order of the Commissioner of Endowments permitting the lease was much subsequent to the date of grant of receipt. It is also stated that the deity challenged the notification of vesting in OJC No.1075 of 1974 in which this Court passed order of status quo which continued till 1977, when the writ petition was ultimately withdrawn. It is also stated that the management of the deity has not submitted Ekpadia in favour of the parents of the petitioners since they were not tenants under the deity on the date of vesting. Lastly, it is contended that since the land in question was not leased out in favour of the parents of the petitioners, it was Nizdakhali land of the deity and shall be deemed to be settled in the name of the deity-intermediary as per the claim application made within the statutory period.

5. Within the ambit of the writ application, this Court is not called upon to decide the respective claims of the parties on merits. In other words, it is

not within the scope of the writ application to adjudicate whether the land in question was to be settled in favour of the deity (opposite party no.4) in terms of its original application under Section 8-A (1) of the O.E.A. Act or whether the parents of the present petitioners were already in possession of the case land as tenants on the date of vesting as per their objection filed before the O.E.A. Collector in opposition to the deity's claim for settlement. The limited question that arises for consideration is whether the second restoration application filed by opposite party no.4 on 30.11.1991 was maintainable and whether O.E.A. Appeal No.3 of 1993 filed against the order under Annexure-7 dismissing the said second restoration application was maintainable and whether the impugned order under Annexure-8 passed by the learned Additional District Magistrate in O.E.A. Appeal No.3 of 1993 is sustainable.

6. Section 8-A (1) provides for filing of claim application for settlement under Sections 6 and 7 of the O.E.A. Act. Under sub section (4) of Section 8-A any person disputing the claim for settlement under Sections 6 and 7 may file an objection before the O.E.A. Collector within three months from the date of public notice given under sub section (2) and the Collector shall prior to the determination regarding settlement under Sections 6 and 7 enquire into the matter in the prescribed manner. Under Section 42, the O.E.A. Collector for the purpose of enquiry under Section 8-A has power to summon and enforce attendance of witnesses and compel production of documents in the same manner as is provided in the case of Civil Court. For the purposes of Sections 193,196 and 228 of the Penal Code the proceeding before the Collector is deemed to be a judicial proceeding.

7. As per the provision of Rule 6 of Orissa Estates Abolition Rules, 1952 (in short the 'Rules') a claim application under Section 8-A (1) of the Act shall be filed in Form 'H' of the Schedule giving complete and accurate statement and description of the lands and that such application shall be verified in the manner prescribed for verification of a plaint under the Code of Civil Procedure. As per Rule 7-B the enquiry to be conducted on a claim application shall be of a summary nature after issuance of notice to the parties to appear before the O.E.A. Collector with their witnesses and documents in support of the respective claims. The Rules also provides for issuance of summons by the Collector for appearance of any witness or production of any document at the cost of the party, who desires such summons to be issued. There is also provision that the O.E. A. Collector may depute an Officer to make local enquiry, if he thinks fit, and the report of the Officer shall form part of the records.

8. All the above provisions of the Act and the Rules go to indicate that the proceeding under Section 8-A (1) is quasi judicial in nature. The procedure for conduct of the proceeding has been provided in the Act and the different Rules as noted above. There is no provision in the Act or the Rules making the provisions of the Code of Civil Procedure applicable for conduct of the proceeding under Section 8-A(1) except the one which mandates applicability of C.P.C. only with regard to verification of the claim application like a plaint.

9. Neither the Act nor the Rules makes any provision as to the remedy available to a claimant of the proceeding where the claim application is dismissed for default.

10. Dealing with the powers of the forum under the Consumer Protection Act,1986 to restore a proceeding dismissed for default, the Supreme Court of India in the case of ***New India Assurance Co. Ltd. V. R. Srinivasan; 2000 (2) SCALE 131*** held as follows :

> "**18.** We only intend to invoke the spirit of the principle behind the above dictum in support of our view that every court or judicial body or authority, which has a duty to decide a lis between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had instituted the proceedings. That is not the function of the court or, for that matter, of judicial or quasi-judicial body. In the absence of the complainant, therefore, the court will be well within its jurisdiction to dismiss the complaint for non-prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the non-appearance of the complainant."

11. While dealing with the power of Central Industrial Tribunal to set aside an ex parte award, the Supreme Court in the case of ***Grindlays Bank Ltd. V. The Central Government Industrial Tribunal and others;*** AIR 1981 SC 606 held as under :

> "**6.** We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so but it is a well-

known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

12. Similarly in the case of ***J.K. Synthetics Ltd v. Collector of Central Excise;*** 1996 (86) E.L.T.472 (S.C.) dealing with the powers of the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), the apex Court held that though Rule 21 of CEGAT (Procedure) Rules,1982 does not expressly state that an order on an appeal heard and disposed of ex parte can be set aside on sufficient cause for the absence of the respondent being shown does not mean that CEGAT has no power to do so. If, in a given case, it is established that the respondent was unable to appear before it for no fault of his own, the ends of justice would clearly require that the ex parte order against him should be set aside. Not to do so on the ground of lack of power would be manifest injustice.

13. In the light of the dicta of the apex Court laid down in the aforesaid decisions, it must be held that the O.E.A. Collector possesses such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties and for that matter, it has the power to dismiss for default a claim application for the absence of the claimant on the date of enquiry so also to restore such dismissed claim on being satisfied about existence of good and sufficient ground for non-appearance of the claimant on the date of dismissal, even though the O.E.A. Act or Rules do not specifically provide for such power to the Collector or that Order-9, Rule-9, C.P.C. does not apply. The contention of the petitioners that application for restoration of earlier application dismissed for default was not entertainable by the Collector, therefore, stands rejected.

14. Now the question is whether an appeal within the ambit of Section 9 of the O.E.A. Act against an order of the Collector rejecting an application for restoration of the proceeding is maintainable ? Sub section (1) of Section 9 which provides for appeal against an order passed under Section 8-A of the Act runs as under :

"9. **Appeal against Collector's order under Sections 5, 6 or 7 –** (1) An appeal against any order of the Collector under Sub-section (4) of Section 3-B, clauses (h),(i) and (k) of Section 5, sub-section (1) of Section 6 or 7, subsection (3) of Section 8 and sub-sections (3) and (4) of Section 8-A, if preferred within sixty days of such order shall lie to the Board of Revenue which shall dispose of the appeal according to the prescribed procedure.

Provided that if such order is passed by an Officer, other than the Collector of the district, appeal if preferred within sixty days of such order shall lie to the said Collector, who shall dispose of the appeal according to the same procedure as is prescribed for disposal of such appeals by the Board of Revenue.

Explanation- The Collector of the District' referred to in the proviso shall for the purpose of this sub-section includes [3] [xxx] the Additional District Magistrate of the District."

15. Right to appeal is a creature of statute. Unless a statute permits an appeal to be filed against an order, no appeal there against can be entertained. The tenor and ambit of Section 9 (1) of the Act shows that it is a final order on a claim raised under Section 8-A (1) against which an appeal can be preferred. The appellate power does not contemplate entertaining an appeal against any interim order or any other order, not being a final order in the proceeding, such as one either allowing or rejecting an application for restoration of a proceeding dismissed for default. In such view of the matter, we are of the opinion that O.E.A. Appeal No.3 of 1993 filed before the Additional District Magistrate under Section 9 (1) of the Act was not maintainable and, therefore, the appellate order under Annexure-8 passed in such appeal must be held to be non est in the eye of law. Besides, it is amply clear that the order under Annexure-8 is nothing but a bundle of confusions and without reference to the ground of rejection of the application for restoration filed by opposite party no.4.

In the circumstances, we quash the appellate order under Annexure- 8.

Before parting we make it clear that this Court has expressed no opinion with regard to the merits of the claim of opposite party no.4 and the objection filed before the Collector by the predecessors-in-interest of the present petitioners. The writ application is accordingly disposed of. No costs.

Writ petition disposed of

2012 (II) ILR - CUT- 625

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

W.P.(C) NO. 4582 OF 2004 (Dt.21.03.2012)

SUNIL KUMAR PATRA ……..Petitioner.

.Vrs.

ORISSA LEGISLATIVE ASSEMBLY & ORS. ……Opp.Parties.

SERVICE – Selection and appointment of O.P.4 & 5 as Data Entry Operators in Odisha Legislative Assembly is under challenge – Records show that O.P.5 never applied as SEBC Candidate but on the basis of a Caste Certificate produced by her subsequently she was appointed against the first post earmarked for SEBC category. The Cast Certificate was not found to be genuine – Held, appointment of O.P.5. as Data Entry operator is illegal and direction issued that the petitioner be appointed against the said post.

(Para 10,11)

For Petitioner - M/s. R.K.Rath, N.R.Rout & P.Rath.

For Opp.Party No.1 & 2 – M/s. Manoj Verma & L.N.Rayatsingh.

For Opp.Party No.4 - M/s. Mahadev Mishra, M.Mishra.
M/s. Aswini Kumar Mishra, J.Sengupta, D.K.Nanda, G.Sinha, A.Mishra & S.Misra.

For Opp.Party No.5 - M/s. S.R.Mohapatra, B.K.Raty, B.R.Mohanty A.K.Kar & M.K.Mohanty.

L.MOHAPATRA, J. The petitioner in this Writ Petition challenges the selection and appointment of opposite party nos.4 and 5 as Data Entry Operators in Odisha Legislative Assembly, Bhubaneswar.

2. The case of the petitioner is that in response to a requisition made by the Odisha Legislative Assembly, his name was sponsored by the Employment Exchange as S.E.B.C Candidate to face the interview for selection and appointment to the post of Data Entry Operator in Odisha Legislative Assembly. According to the petitioner out of nine vacancies two were meant for S.E.B.C Candidates and out of the said two, one was meant

for a candidate belongs to S.E.B.C (Woman). After the interviews were over a select list was not published and appointments were given to seven persons including opposite party nos.4 and 5 as Data Entry Operators. It was disclosed in the counter affidavit filed by Odisha Legislative Assembly in W.P.(C) No.27 of 2003 that the petitioner had been kept at Serial No.1 under S.E.B.C Category (Waiting List).

2.1 Challenging appointment of opposite party nos.4 and 5, it is stated by the petitioner in this Writ Petition that opposite party no.5-Kalyani Das neither belongs to S.E.B.C Category nor did she apply for appointment to the post as a S.E.B.C Candidate. Therefore, she could not have been appointed against the post meant for S.E.B.C Candidates. It is the case of the petitioner that the name of opposite party no.5 was not sponsored by the Employment Exchange either under General Category or under S.E.B.C Category or in any other category.

2.2 So far as opposite party no.4-Suvendu Kar is concerned, it is stated that he was appointed against a subsequent vacancy reserved for S.E.B.C (Woman). The appointment of opposite party no.4 has been made against a vacancy created in the year 2000 reserved for S.E.B.C (Woman). The case of the petitioner is that when S.E.B.C (Woman) Candidate is not available the vacancy is to be exchanged with S.E.B.C (Male) Candidate and instead of following the said procedure opposite party no.4, who belongs to General Category was appointed against the said post.

3. A counter affidavit has been filed by opposite party nos.1 and 2 stating therein that in order to fill up four vacant posts of Data Entry Operators, the Odisha Legislative Assembly Secretariate had requested the Employment Exchange to sponsor names of eligible candidates on 28.5.1998. In addition, applications were also invited from regular, ad hoc, seasonal employees of Legislative Assembly Secretariate for appointment against the said four vacancies through a notice dated 09.9.1998. A test as well as an interview was conducted on 12th and 13th of September, 1998 respectively. After evaluation of examination papers results were placed before the Selection Committee on 07.6.1999. The Committee recommended names of the following seven candidates as against seven vacancies in accordance with their merit, out of which four had been notified earlier and three were created later on. The recommended candidates are:-

1. Kumari Nilima Kangari (ST)

2. Sri Biswajit Tripathy (UR)

3. Smt. Kalyani Das (SEBC)

4. Smt. Madhumita Behera (SC)

5. Sri Rabinarayan Panda (UR)

6. Sri Manmohan Behera (SEBC)

7. Sri Praful Ch. Dyan Samantara (UR)

The above candidates were appointed on different dates. The Selection Committee had also prepared a waiting list of candidates for the post of Data Entry Operator and the names of four candidates are as follows:-

1. Sri Suvendu Kar (UR)

2. Smt. Satyabhama Mishra (UR)

3. Sri Sunil Kumar Patro (SEBC)

4. Sri Debendra Nath Behera (SC)

It is further stated in the counter affidavit that Kumari Nilima Kangari resigned from the post and two more posts were created. As against the above three posts, opposite party no.4-Suvendu Kar was appointed against Unreserved Category on probation for a period of two years w.e.f. 06.1.2000 and against Roster Point No.9 meant for S.E.B.C (Woman) the present petitioner was appointed on ad hoc basis but he did not join the post. It is also stated in the counter affidavit that opposite party no.5-Kalyani Das applied in response to the notice affixed in the Office Notice Board and produced a Caste Certificate on the basis of which she was selected as S.E.B.C Candidate and similarly opposite party no.4 had also applied in response to the said notice in the Notice Board and appeared in the test and interview. The further stand in the counter affidavit is that opposite party no.5-Kalyani Das was selected for appointment in the first vacancy of S.E.B.C. Category. Services of opposite party no.4 had been terminated on 29.11.2002 but on consideration of his representation the Hon'ble Speaker passed order for his reinstatement and accordingly he was given appointment.

4. A rejoinder has been filed by the petitioner enclosing several documents relating to appointment of the said two opposite parties obtained under the Right to Information Act.

5. Mr. Rath, learned Senior Counsel appearing for the petitioner challenges the selection and appointment of opposite party nos.4 and 5 on different grounds. It was contended by Mr. Rath, learned Senior Counsel that opposite party no.5 had never applied for appointment as a S.E.B.C Candidate and she had applied for appointment as an Unreserved Category candidate. Only after her selection, she produced a Caste Certificate on the basis of which she was given appointment against the first post meant for S.E.B.C Candidates. Mr. Rath, learned Senior Counsel further placed reliance on Annexure-14 to the rejoinder, which is the Caste Certificate produced by opposite party no.5 at the time of appointment. The Caste Certificate bears the date 06.10.1998. In Annexure-16 the Collector, Khurda has intimated the Joint Secretary, Odisha Legislative Assembly, Bhubaneswar that Misc. Case No.599 of 1998 had not been filed by opposite party no.5-Kalyani Das and the Certificate in the said Misc. Case had been issued in favour of one Niranjan Jethy, S/o Hrudananda Jethy. It was further intimated by the Collector that the name of Kalyani Das does not find place in the case register and therefore, the Caste Certificate produced by Kalyani Das is doubtful. After receipt of such intimation a Office Note was prepared and placed before the then Hon'ble Speaker and vide order dated 26.2.2004 the Hon'ble Speaker passed the following order:-

> "In view of the above, I do pardone her and order to regularize her service in her present post. And one S.E.B.C Candidate be appointed against a general category post to clear back-log."

On the basis of the said order, opposite party no.5 has been continuing in service.

5.1 So far as opposite party no.4-Suvendu Kar is concerned, it was submitted by Mr. Rath, learned Senior Counsel that the said opposite party had been illegally appointed violating the Reservation Rules and accordingly his services had been terminated on 29.11.2002. Thereafter on the basis of a representation made by him, the then Speaker directed his reinstatement against one of the posts of Data Entry Operator created on 31.1.2004 even though the Writ Petition filed by the said opposite party challenging the order of termination had been withdrawn.

6. Learned counsel appearing for Odisha Legislative Assembly referring to the counter affidavit filed submitted that opposite party no.5 had been appointed against the post meant for S.E.B.C Candidates as she had produced a Caste Certificate indicating that she belongs to S.E.B.C Category and therefore, there was no illegality in her appointment.

6.1 So far as appointment of opposite party no.4 is concerned it was contended by learned counsel appearing for Odisha Legislative Assembly that at the time of initial appointment a mistake had been committed by the authorities in giving him appointment, which was rectified by terminating his services and subsequently after a post was created he was reengaged on the basis of a representation filed by him.

7. Learned counsel appearing for opposite party no.5 referring to the counter affidavit filed submitted that she had been appointed as a S.E.B.C Candidate against the post meant for S.E.B.C Category and accordingly there is no illegality in her appointment against the said post.

8. After hearing learned counsel for the parties, we would like to deal with appointment of opposite party nos.4 and 5 individually. From the counter affidavit filed by opposite party no.5, it appears that she was working as a Data Entry Operator on D.L.R basis in Odisha Legislative Assembly from 30.5.1996. While continuing as such she learnt that some vacant posts of Data Entry Operators would be filled up and accordingly she applied for the post against General Category, which is evident from the Bio-Data given by her. The Bio-Data given by opposite party no.5 is annexed to the counter affidavit as Annexure-B/5. The Bio-Data appears to have been submitted on 10.9.1998 and her caste has been described as general. However, she further stated in the counter affidavit that she was called to appear in the written examination, which was held on 05.4.1998 and came out successful in the said examination. She was directed to appear in the viva-voce test vide notice dated 12.9.1998 and her serial number was four under Unreserved Category and she came out successful in the said viva-voce test. From Annexure-C/5 on which reliance has been placed by learned counsel appearing for opposite party no.5, it appears that it is an intimation given to opposite party no.5 to appear in the written test for the post of Junior Assistant and not Data Entry Operator. Therefore her averments in paragraph-4 of the counter affidavit that she appeared in the written test for the post of Data Entry Operator on 05.4.1998 is not only a false statement but also a misleading statement, as it is clear from Annexure-C/5 that the written test conducted on 05.4.1998 was for the post of Junior Assistant and not for the post of Data Entry Operator. Apart from the above Annexure-C/5 shows that opposite party no.5 had been assigned with Roll No.413 for selection to the post of Junior Assistant whereas her Roll Number for selection to the post of Data Entry Operator is 133. It is therefore, clear from the affidavit of opposite party no.5 that she has not only made a false statement in her counter affidavit but also has made an attempt to mislead the Court.

9. From the counter affidavit filed by Under Secretary of Odisha Legislative Assembly, Bhubaneswar it appears that on the basis of a Caste Certificate produced by opposite party no.5, she had been given appointment against the post meant for S.E.B.C Category Candidates. The Caste Certificate is annexed to the rejoinder filed by the petitioner as Annexure-14. The Caste Certificate bears a Case Number i.e. 599 of 1998. On the basis of a complaint an enquiry was conducted and a report was called for from the Collector, Khurda. In Annexure-16 to the rejoinder the Collector reported that in Misc. Case No.599 of 1998 the Caste Certificate had been issued in favour of one Niranjan Jethy, S/o Hrudananda Jethy and the name of opposite party no.5 does not find place in the case register. He further opined that the Caste Certificate of opposite party no.5 is doubtful. When this matter was brought to the notice of the Hon'ble Speaker, he passed the order which as quoted earlier pardoning the conduct of opposite party no.5 and directing regularization of her services. From these documents it is clear that opposite party no.5 had never applied as a S.E.B.C Candidate for appointment to the post of Data Entry Operator but subsequently on the basis of a Caste Certificate produced by her she was given appointment against the post meant for S.E.B.C Candidates. The said Caste Certificate was not found to be genuine and in spite of the same, the then Speaker pardoned her conduct and directed regularization of her services.

10. In our view when the stand taken by opposite party no.5-Kalyani Das is that she is not a S.E.B.C Category Candidate and had submitted her application as a General Category Candidate, she could not have been given appointment as a S.E.B.C Category Candidate against the first post meant for that category of candidates. Accordingly her appointment is illegal and liable to be set aside.

11. Once it is held that the appointment of opposite party no.5-Kalyani Das against the first post earmarked for S.E.B.C Category was illegal, the petitioner being the first S.E.B.C Candidate in the waiting list should be appointed against the said post w.e.f. the date opposite party no.5 joined the post. However, such appointment with retrospective effect shall only be for the purpose of seniority and no other purpose.

12. For the above reason, we do not feel necessary to go into the question as to whether appointment of opposite party no.4-Suvendu Kar is illegal or not. Admittedly he had been initially appointed against an unreserved post and subsequently his services were terminated. But on the

basis of a representation filed by him he was appointed by the then Hon'ble Speaker.

12.1 Accordingly we allow this Writ Petition to the extent stated above. The appointment of opposite party no.5-Kalyani Das as Data Entry Operator in the Odisha Legislative Assembly, Bhubaneswar is declared to be illegal and it is further directed that the petitioner be appointed against the said post with such service benefits as indicated earlier.

12.2 Before parting with the case we feel it necessary to observe, that we could proceed against opposite party no.5 for filing a false affidavit in this case in order to mislead but considering the fact that she is a lady, we do not direct for initiation of any proceeding against her for her lapses. This Writ Petition is disposed of.

Writ petition allowed.

2012 (II) ILR - CUT- 632

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

W.P.(C) NO. 9316 OF 2003 (Dt.03.04.2012)

NIRAKAR SAHOO .....Petitioner.

.Vrs.

NEELACHAL GRAMYA BANK & ANR. .....Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311.

Dismissal from service – Allegation that the petitioner while serving as Branch Manager, Neelachal Gramya Bank there was misappropriation – No finding that petitioner misappropriated any amount but only due to his negligence the fraud occurred – Punishment of dismissal on the ground of negligence is shockingly disproportionate – In the meantime 15 years have been passed so instead of remitting the matter back to the appellate authority a suitable punishment can be imposed by this Court – Held, impugned order of punishment is set aside and there shall be stoppage of three increments without cumulative effect – The petitioner is entitled to 30% of the salary for the period he has not worked.

(Para 7,8)

Case law Referred to:-

AIR 2010 SC 1105 : (Ms. G. Vallikumari-V- Andhra Education Society & Ors.)

For Petitioner - M/s. Sanjit Mohanty, S.P.Panda, S.P.Sarangi, S.Patnaik, M.Banerjee & S.Nanda.

For Opp.Parties - M/s. G.Rani Dora, G.A.R.Dora & J.K.Lenka.

L. MOHAPATRA, J. The petitioner in this writ application assails the order of the disciplinary authority dated 27.3.1997(in Annexure-7) dismissing him from service and also directing recovery of 50% of pecuniary loss caused to the Bank as a measure of punishment in pursuance of a disciplinary proceeding and the order of the appellate authority rejecting the appeal.

2. The petitioner, while serving as Branch Manager in Kunjam Branch of Neelachal Gramya Bank, was served with a charge sheet on 12.10.1995 on the allegation that while he was working as Manager of Babandha Branch, Rs.41,750/- had been deposited on different dates in different savings bank accounts and loan accounts, but the same had been misappropriated

without being accounted for in the Bank's cash. As a Branch Manager, the petitioner had authenticated the credit entries in the respective Savings Bank ledgers and loan ledgers without verification and in the process, allowed one Promod Kumar Sahoo, the then Clerk-cum-Cashier of the said branch to manipulate different G.L. heads in the General Ledger and General Ledger Balance and helped him to misappropriate the aforesaid amount. The petitioner filed his reply to the said charges denying the same, but the reply submitted by the petitioner was not accepted by the Bank and a disciplinary proceeding was initiated. One Shri Sribatsa Kumar Panda, an officer of the Bank, was appointed as inquiry officer. After completion of the inquiry, the Inquiry Officer submitted his report finding the petitioner guilty of all the charges and on the basis of the said inquiry report, punishment of dismissal from service was imposed by the disciplinary authority apart from directing recovery of 50% of the alleged misappropriated amount. The appeal filed by the petitioner was dismissed, as a result of which, the petitioner approached this Court in O.J.C.No.16584 of 1997 challenging the order of punishment imposed by the disciplinary authority as well as the appellate authority dismissing the appeal. This Court disposed of the said writ application on 9th January 2003 holding that there was contravention of sub-section(2) of Section 14 of the Regional Rural Bank's Act, 1976 and, accordingly, remitted the matter back to the appellate authority for consideration of the appeal afresh in accordance with law. Thereafter, the appellate authority again considered the appeal, dismissed the same and intimation thereof was given to the petitioner in Annexure-11 dated 23.6.2003. Again challenging the order of disciplinary authority as well as the order of the appellate authority passed after remand, this writ application has been filed.

3. Learned counsel appearing for the petitioner assailed both the orders basically on two grounds. The first ground taken by the learned counsel is that appeal of the petitioner was taken up in the 129th Meeting of the Board where the Chairman absented himself but no decision could be taken on the appeal. Again in the 130th Meeting of the Board, Chairman of the Bank participated to have the quorum and dismissed the appeal. Therefore, again there has been infraction of sub-section (2) of Section 14 of the aforesaid Act. The second ground of challenge is that in the inquiry proceeding, the petitioner has only been found guilty of negligence and the actual misappropriation has been done by Promod Kumar Sahu and, therefore, the order of punishment dismissing the petitioner from service and directing recovery of 50% of pecuniary loss caused to the Bank is disproportionate and should be interfered with.

Learned counsel appearing for the Bank submitted that after the matter was remitted back by this Court for reconsideration of the appeal, the same was considered in the 129th Meeting of the Board and the Board did not find any merit in the appeal and, accordingly, a decision was taken in the said meeting to dismiss the appeal. It was further contended by the learned counsel for the Bank that the matter never came up for taking a decision in the 130th Meeting of the Board as alleged by the petitioner.

4. So far as the second ground taken by the petitioner is concerned, learned counsel for the opposite party submitted that misappropriation of funds in a financial institution is not to be considered lightly and the petitioner was the Manager at the relevant time and he should have noticed the irregularities committed by his subordinates and taken action. Silence on the part of the petitioner resulted in misappropriation of funds by one of the sub-ordinates and, therefore, the petitioner cannot say that he was not responsible for the same. According to the learned counsel for the Bank, quantum of punishment imposed by the disciplinary authority is justified.

5. So far as the first ground taken by the learned counsel for the petitioner is concerned, we have perused the record of the appellate authority produced by the learned counsel appearing for the Bank. From the record, it appears that 129th Meeting of Board of Directors was held on 13th May 2003 and the appeal filed by the petitioner was taken up as item no.27th in the agenda. From the record, we find that the Board of Directors have taken into consideration each and every ground taken by the petitioner in the appeal and did not accept the same with reasons. The Board further observed that the petitioner admitted that fraud had been committed during his tenure as Branch Manager and stated that the said fraud had been committed by one Clerk-cum-Cashier of the said Branch. The question of quantum of punishment was also considered by the appellate authority, but it was of the view that the order of dismissal from service is justified. We are therefore unable to accept the contention of the learned counsel appearing for the petitioner that the Board of Directors did not act in terms of the direction of this Court in the earlier writ application. In the 129th Meeting itself in absence of the then Chairman eight other Directors present in the meeting considered the appeal of the petitioner, applied their minds to each ground taken by the petitioner and ultimately decided to dismiss the same. The contention of the learned counsel for the petitioner that the actual decision was taken in the 130th Meeting is not borne out from the record.

6. The second ground taken by the learned counsel for the petitioner relates to quantum of punishment. There is no dispute that the petitioner has

been found guilty of all the charges. The first imputation was that the amount deposited by the customers on various dates in different Saving Bank Accounts and Loan Accounts were misappropriated without being accounted for in the Bank's cash. The said imputation was proved but it was found that the petitioner as a Manager of the Bank failed to discharge his supervising duty. There is no finding that the petitioner actually misappropriated the said amount. Imputation no.2 was that even though the said amounts were not entered/reflected in the cash scrolls, credit entries in the respective Savings Bank ledgers and loan ledgers the same had been authenticated by the Manager. The inquiry officer found that crooked initials have been put against the credit entries so as to confuse the matter, whereas the petitioner had put his initial in the G.L., G.L.B. and balance books and, accordingly, the inquiry officer found the petitioner guilty of the said charge. The other imputations also relate to conduct of the petitioner in submitting Branch Manager's Certificate from Babandha Branch stating tally of all balances, and by his conduct permitting the said Promod Sahoo to misappropriate the funds. In the concluding paragraph, the inquiry officer specifically found that only due to the negligence of the petitioner, ineffectiveness to exercise control and supervision, casual approaches, such type of fraud has occurred. It is therefore clear from the findings of the inquiry officer that the petitioner was only found to be negligent in his work, but the actual misappropriation of funds had not been done by him.

7. Since the petitioner is not involved in misappropriation of the Bank's fund, we are of the view that only on the ground of negligence in duty, order of punishment of dismissal from service is not only disproportionate, but shockingly disproportionate considering the nature of charges leveled/proved against him. Since law does not permit this Court to substitute a punishment, ordinarily we would have remitted the matter back again to the appellate authority for reconsideration of the quantum of punishment. We find that the order of punishment was passed by the disciplinary authority in March, 1997 and in the meantime, fifteen years have passed. In the case of ***Ms.G.Vallikumari Vrs. Andhra Education Society and others*** reported in AIR 2010 Supreme Court 1105, under similar circumstances, the Hon'ble Supreme Court instead of remitting the matter back for reconsideration on the question of punishment, substituted a punishment. In the said reported case, the employee had been removed from service by way of punishment and her case was taken up by the Hon'ble Supreme Court thirteen years after the said order of removal from service was passed. Considering the same, the Hon'ble Supreme Court in paragraph-17 of the judgment held that ends of justice will be met by substituting the punishment of removal from service and imposed some other punishment.

8. In the present case also fifteen years have passed in the meantime and the petitioner is also due to reach the age of retirement. We are of the view that instead of remitting the mater back to the appellate authority, a suitable punishment can be imposed by this Court. Accordingly, we set aside the order of punishment of dismissal from service and direct stoppage of three increments without cumulative effect. It is further directed that for the period the petitioner has not worked, he would be entitled to 30% of the salary which he would have got. So far as second punishment is concerned, we set aside the same completely as there is no finding that the petitioner misappropriated the amount and, accordingly, no order of recovery can also be passed against him. The writ application is accordingly allowed.

Writ petition allowed.

2012 (II) ILR - CUT- 637

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

W.P.(C) NO. 28449 OF 2011 (Dt.12.04.2012)

NIRUPAMA MISHRA …….Petitioner

.Vrs.

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

EDUCATION – Appointment of Headmistress-in-charge - Criteria – Seniority of an Assistant Teacher in the Trained Graduate Post can only be reckoned from the date he/she acquires B.Ed. qualification and accordingly he/she be appointed in the post.

In the present case the petitioner joined the post in the year 1993 with B.Ed. qualification where as O.P4. acquired B.Ed. qualification in the year 1994 so the petitioner has to be treated as senior to O.P.4 and petitioner has been rightly placed as in-charge – Headmistress of the school – Held, order of the appellate authority permitting O.P.4 to work as Headmistress-in-charge is set aside and the petitioner being the senior most Trained Graduate Teacher has to continue as Headmistress-in-charge of Anchalika Girls' High School Saradapur in the district of Bhadrak. (Para 6,7)

For Petitioner - M/s K.K.Swain, P.N.Mohanty, P.K.Mohapatra
For Opp.Party No.4 - M/s.Sameer Kumar Das & S.K.Mishra.

L.MOHAPATRA, J. This Writ Petition has been filed challenging the order dated 10.10.2011 passed by the Joint Director, Regional Directorate of Education, Bhubaneswar in Appeal Case No.120 of 2009 preferred by opposite party no.4 challenging her termination from service and also praying for reinstatement.

2. Opposite Party no.4 was appointed on 06.8.1993 as an Assistant Teacher in Anchalika Girls' High School, Saradapur in the district of Bhadrak. She acquired B.Ed. training qualification in the year 1994. The Managing Committee of the said School by resolution dated 20.7.2001 promoted her to the post of Headmistress. In the said resolution the present petitioner was promoted to the post of Second Trained Graduate Teacher. The name of opposite party no.4 was stated to have been sent as In-charge

Headmistress of the said School in the Renewal Recognition Forms from the year 2002-03 to 2006-07. Her case was that she performed regular duty as In-charge Headmistress till 20.7.2007, on which date she was asked by the Secretary of the Managing Committee of the School to sign the Renewal Recognition Form of the year 2007-08 indicating her name against the Second Trained Graduate post instead of Sl. No.1 meant for the post of In-charge Headmistress. When she refused to sign the said form, she was not allowed by the Managing Committee of the School to perform her duty in the School, which amounts to termination and therefore, challenging such action of the Managing Committee appeal was filed before the Regional Directorate of Education, Bhubaneswar.

2.1 In the appeal report was called for from the Inspector of Schools and it was reported by the Inspector of Schools that the name of opposite party no.4 appears against Sl. No.1 as In-charge Headmistress in the Renewal Recognition Form from the year 2002-03 to 2006-07 of the School. It was also reported that opposite party no.4 submitted a representation before the Inspector of Schools on 28.8.2007 alleging therein that the Secretary of the School is compelling her to put signature in the Renewal Application Form for the year 2007-08 against the Second Trained Graduate Post and that she had been prevented from performing her duty. It was also reported that on 10.4.2005 the name of the petitioner was shown as In-charge Headmistress of the School at the time of constitution of Managing Committee of the School and the Director, Secondary Education, Odisha by order dated 18.8.2006 has approved the said resolution keeping the petitioner as In-charge Headmistress of the School.

2.2 The case of the Managing Committee before the appellate authority was that opposite party no.4 was absent from the School from 18.7.2006 to 18.7.2007. A General Body Meeting was held on 22.2.2006 wherein opposite party no.4 was present. She gave an undertaking before the General Body that she would be regular in the School and would attend to her duty sincerely. Even thereafter she remained absent and keeping in view the long absence of opposite party no.4 in the School and negligence in duty the Managing Committee resolved to cancel the decision taken earlier and placed the present petitioner against the post of Headmistress-in-Charge. It was also contended on behalf of the Managing Committee that opposite party no.4 has not signed the Attendance Register from 09.12.2004 and the present petitioner was asked by letter dated 02.4.2005 to take over charge of the School as opposite party no.4 was remaining absent. It was also brought to the notice of the appellate authority that opposite party no.4 having remained absent from the School worked as

Sikshya Sahayak under the Government of Odisha in Mirahasanpur Nodal U.P School and in view of such engagement and undertaken by opposite party no.4 the Managing Committee by resolution dated 23.3.2008 terminated her services after due notice.

3. The appellate authority on verification of the records came to a conclusion that reversion of opposite party no.4 from the post of Headmistress-in-Charge to the post of Second Trained Graduate Teacher without affording an opportunity of hearing was illegal. Even the order of termination was held to be illegal on the ground that due procedure of law had not been followed and opposite party no.4 had not been given an opportunity of hearing. Accordingly the appellate authority in the impugned order directed for reinstatement of opposite party no.4 as In-Charge Headmistress of the School and granted opportunity to the Managing Committee to take disciplinary action against her on specific charges after affording reasonable opportunity. At the same time it was also directed by the appellate authority that since opposite party no.4 has already rendered Government service as Sikshya Sahayak from 02.1.2008 till the date of order, her services from the date of such appointment till the date of re-absorption as In-charge Headmistress of the School shall not count towards regular services for future purposes.

4. Mr. K.K.Swain, learned counsel appearing for the petitioner assails the order of the appellate authority under Annexure-13 on the ground that the petitioner and opposite party no.4 joined as Teacher on the same day and at the time of joining the post of Teacher, the petitioner was a Trained Graduate whereas opposite party no.4 became Trained Graduate in the year 1994. Therefore the petitioner was senior to opposite party no.4 in the post of Trained Graduate Teacher and accordingly she should have been appointed as Headmistress-in-Charge. It was further contended by Mr. Swain, learned counsel for the petitioner that even though opposite party no.4 was kept in-charge of the post of Headmistress, she unauthorizedly remained absent for almost a year and refused to sign the Attendance Register from 09.12.2004. In view of such conduct of opposite party no.4, the petitioner was asked to take over as Headmistress-in-Charge by the Managing Committee of the School vide letter dated 02.4.2005 and since then she had been discharging the duties of Headmistress-in-Charge of the School. It was also contended by Mr. Swain, learned counsel for the petitioner that the senior most Trained Graduate Teacher is ordinarily to be kept in-charge of the post of Headmaster/Headmistress in absence of posting of a regular Headmaster. Therefore, remaining in-charge of the post of Headmistress is not a promotion from the post of Trained Graduate

Teacher and accordingly there was no question of reversion as held by the appellate authority. It was further contended by Mr. Swain learned counsel for the petitioner that opposite party no.4 had taken up a job in the State Government as Sikshaya Sahayak and this fact is not in dispute. Opposite party No.4 having taken up a job under the State Government without any intimation to the Managing Committee of the School, she had been rightly terminated from service. Even if an opportunity of hearing would have been given to opposite party no.4 no fruitful purpose would have been served in view of the admitted position that opposite party no.4 had undertaken a job in the State Government as Sikshaya Sahayak. On these grounds learned counsel for the petitioner prays for setting aside the impugned judgment.

5. Mr. Das, learned counsel appearing for opposite party no.4 objected to maintainability of the Writ Petition on the ground that the petitioner was not a party before the appellate authority and therefore, she has no right to challenge the order of the appellate authority in this Writ Petition. It was also contended by Mr. Das, learned counsel for opposite party no.4 that the legality of the order of termination is a matter between the Managing Committee of the School and opposite party no.4 and therefore, the petitioner has no role to play and cannot challenge the order of appellate authority setting aside the order of termination.

5.1 On merits it was contended by Mr. Das, learned counsel for opposite party no.4 that the petitioner was appointed as a Teacher later than that of opposite party no.4. Opposite party no.4 was appointed on 06.8.1993 whereas the petitioner was appointed on the basis of her application submitted on 07.2.1996 and therefore, she can under no stretch of imagination to be treated as senior to opposite party no.4. Though Mr. Das, learned counsel for opposite party no.4 does not dispute the fact that opposite party no.4 had been appointed as Sikshaya Sahayak under the State Government for a certain period but submits that the order of termination passed by the Managing Committee of the School without initiation of Disciplinary Proceeding or giving an opportunity of hearing to opposite party no.4 was rightly held to be illegal by the appellate authority.

6. The preliminary objection of Mr. Das, learned counsel appearing for opposite party no.4, relating to maintainability of the Writ Petition is required to be addressed first.

6.1 Mr. K.K.Swain, learned counsel appearing for the petitioner submitted that the petitioner has been working as Headmistress-in-Charge of the School and she is the Ex-officio Secretary and accordingly she

represented the Managing Committee before the appellate authority and no objection whatsoever was raised by opposite party no.4 during hearing of the appeal. This Writ Petition has been filed by the petitioner in the capacity of Secretary challenging the appellate order and therefore, the objection raised by learned counsel for opposite party no.4 has no substance.

6.2 Mr.Das, learned counsel for opposite party no.4 has not placed any material before this Court to show anybody else representing the Managing Committee of the School before the appellate authority. Therefore, since the Managing Committee was being represented before the appellate authority, it has to be the Secretary of the Managing Committee, who was present before the appellate authority on behalf of the Managing Committee. The petitioner being the Headmistress-in-Charge, she is the Ex-officio Secretary and accordingly, we find no substance in the submission of learned counsel for opposite party no.4 regarding maintainability of the Writ Petition merely because in the cause title the petitioner has not described herself as the Ex-officio Secretary of the said School.

6.3 So far as merits of the case is concerned undisputedly opposite party no.4 was appointed as Assistant Teacher in the said School on 06.8.1993 and by the time of her appointment she had not obtained the B.Ed training qualification. She acquired B.Ed training qualification only in the year 1994. From Annexure-1 of the Writ Petition, it appears that the Secretary of the School by letter dated 26.7.1993 had issued the appointment letter in favour of the petitioner as an Assistant Teacher asking her to join the post on or before 06.8.1993. This letter of appointment is alleged to be a forged one by Mr. Das, learned counsel for opposite party no.4 and reference is made to the so-called application submitted by the petitioner for appointment in the School on 07.2.1996 annexed to the affidavit filed by opposite party no.4 on 25.3.2012 as Annexure-K/4. From Annexure-K/4, it appears that one Nirupama Mishra had submitted the application on 07.2.1996 addressed to the Secretary of the School seeking for appointment as an Assistant Teacher. This letter is also disputed by Mr. Swain, learned counsel for the petitioner on the ground that neither the photograph appearing in the application is that of the petitioner nor the signature appearing thereof is that of the petitioner. Since there was no occasion to compare the photograph in absence of the photograph of the signatures appear to be completely different and therefore, Annexure-K/4 also cannot be relied upon. Since Annexure-1 is also disputed by opposite party no.4 it will be safe on the part of the Court to rely upon the Renewal Application Forms submitted by the School before the Board of Secondary Education for recognition from year to year. From Annexure-I/4 series

attached to the preliminary counter affidavit filed by opposite party no.4, it appears that the date of appointment and the date of joining in respect of the petitioner and opposite party no.4 have been mentioned as 18.7.1993 and 06.8.1993 respectively. It is also mentioned in the said application that opposite party no.4 obtained B.Ed qualification in the year 1994 whereas the petitioner had obtained B.Ed qualification in the year 1991. The series of Renewal Application Forms submitted before the Board repeats the same date of appointment and date of joining as well as the year of obtaining the B.Ed qualification. Therefore, from those records on which the Court can rely upon it is clear that both the petitioner and opposite party no.4 were appointed on 18.7.1993 and joined the post on 06.8.1993. Opposite party no.4 on the date of joining did not have the training qualification and obtained B.Ed only in the year 1994 whereas the petitioner having obtained B.Ed in the year 1991 had joined the post with a degree in training. All these renewal forms have been signed by opposite party no.4 as Headmistress-in-Charge. Seniority of an Assistant Teacher in the Trained Graduate Post can only be reckoned from the date he/she acquires the B.Ed qualification. Opposite party no.4 having acquired B.Ed qualification in the year 1994 and the petitioner having joined the post in the year 1993 with B.Ed qualification the petitioner has to be treated as senior to opposite party no.4. Therefore, under no stretch of imagination opposite party no.4 can be kept in-charge of the post of Headmistress of the School and the petitioner has been rightly placed as In-charge Headmistress of the School. To this extent the order of the appellate authority directing opposite party no.4 to be kept in-charge of the post of Headmistress is illegal and liable to be set aside.

6.4 So far as the order of termination is concerned undisputedly the said order has been passed by way of a resolution passed by the Managing Committee of the School solely on the ground that the said opposite party no.4 has undertaken a job under the State Government as Sikshaya Sahayak. Though Mr. Swain, learned counsel for the petitioner drew attention of the Court not only to the resolution passed by the Managing Committee but also the xerox copy of the receipts showing issuance of a letter through registered Post and submitted that notice to show cause was issued to opposite party no.4 in the said letter, the same is stoutly denied by opposite party no.4. Though the receipts annexed as Annexure-6 series show that some letter had been sent to opposite party no.4 it does not conclusively prove any notice to show cause had been issued to opposite party no.4 in the cover in respect of which the said receipt has been granted by the Postal authorities. Moreover the resolution by which the order of termination had been passed by the Managing Committee also does not show that any notice had been issued to opposite party no.4 to show cause.

Therefore, the appellate authority was justified in holding that no opportunity of hearing had been given to opposite party no.4 before terminating her services.

6.5 Mr. Swain, learned counsel for the petitioner submitted that no fruitful purpose would have been served by issuing notice to opposite party no.4 as admittedly she was working as Sikshya Sahayak. Law requires that before any adverse order is passed against an employee, a notice to show cause has to be issued. It is a different question as to whether opposite party no.4 would have admitted the charge or not. Had opposite party no.4 admitted the charge the question of further enquiry would not have arisen. If opposite party no.4 would not have admitted the charge it would have become necessary on the part of the Managing Committee of the School to conduct an enquiry.

7. We are therefore, of the view that the appellate authority was justified in setting aside the order of termination on the above ground. Since we have decided this case based on facts borne out from the record, we do not find necessity of referring to the judgments cited by both sides. Accordingly we allow this Writ Petition in part and also set aside the impugned order of the appellate authority in part. The direction of the appellate authority setting aside the order of termination of opposite party no.4 is confirmed whereas the direction permitting opposite party no.4 to work as Headmistress-in-Charge is set aside. Opposite party no.4 be taken back to service in terms of the order of the appellate authority but the petitioner being the senior most Trained Graduate Teacher has to continue as Headmistress-in-Charge of Anchalika Girls' High School, Saradapur in the district of Bhadrak. The Writ Petition is disposed of.

Writ petition allowed in part.

2012 (II) ILR - CUT- 644

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

JCRLA NO. 65 OF 2003 (Dt.12.04.2012)

DEBI CHARAN SUNANI . . .. … Appellant.

.Vrs.

STATE OF ORISSA …….Respondent.

A. CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S. 313.
Detection of blood stain on the weapon of offence i.e. knife – Weapon of offence was not put to the appellant during his examination U/s.313 Cr.P.C. – Held, recovery and seizure of knife can not be utilized as an incriminating circumstance against the appellant.

(Para 5)

B. CRIMINAL TRIAL – Murder Case – Last seen theory – P.W.1 stated to have seen the appellant with the deceased for the last time on 09.07.2001 – Dead body of the deceased was found on the following morning i.e. twenty four hours after P.W.1 stated to have last seen the deceased – Prosecution also failed to prove any other circumstance indicating complicity of the appellant with the offence – The deceased was last seen in the company of the accused may at best form a link in a chain which itself is not sufficient to establish the guilt of the accused – Held, the appellant is acquitted of the charge.

(Para 5,11)

Case laws Referred to:-

1.AIR 1979 SC 1566 : (Harijan Megha Jesha-V- State of Gujarat)
2.AIR 1984 SC 1622 : (Sharad Birdhichand Sarda-V-State of Maharashtra).
3.AIR 1991 SC 1674 : (Inderjit Singh & Anr.-V-State of Punjab).

For Appellant - M/s. Sanjeeb Chakrabarty,
Miss Tapaswini Sinha.
For Respondent – Mr. Sangram Das,
Addl. Standing Counsel.

B.K. PATEL, J. This appeal is directed against judgment and order dated 31.1.2003 passed by the learned Additional Sessions Judge, Nuapada in Sessions Case No.36/6 of 2002 convicting and sentencing the appellant to

undergo imprisonment for life under section 302 of the I.P.C. for commission of murder of deceased Jamuna Kharsel.

2. P.W.6 is deceased's father. Informant P.W.1 is P.W.6's brother. It is alleged that occurrence took place in the night of 9/10.7.2001. Prosecution case is that deceased, appellant and informant P.W.1's son were working at Raipur. Prior to the occurrence P.W.1 went to Raipur and stayed with his son for some days. On 8.7.2001 in the evening P.W.1 along with the deceased and the appellant boarded train in Raipur in order to come to his village. They reached Khariar bus stand on 9.7.2001 at about 8.00 A.M. Appellant asked P.W.1 to guard personal belongings of the deceased and left along with the deceased for Khariar town to purchase a torch light. Appellant and deceased having not returned till 10.00 A.M., P.W.1 returned to his house in a bus along with the personal belongings of the deceased and gave the same in his house. On 10.7.2001 at about 6.00 A.M. one of the co-villagers of P.W.1 came to his house and informed that dead body of the deceased was lying on the main road under a kendu tree near village Mandiarucha. P.W.1, P.W.2, P.W.3 and others went to the spot and saw the dead body of the deceased lying on the main road in a pool of blood. Suspecting the appellant to be the author of the crime, P.W.1 lodged First Information Report Ext.15 at Sinapali Police Station upon which Officer-In-Charge P.W.18 registered the case and took up investigation. In course of investigation, apart from taking other steps, P.W.18 seized weapon of offence, knife M.O.IV, from the house of appellant at his instance in presence of witnesses including P.Ws. 2,3,9 and 10. Upon examination under chemical examination report Ext.19 knife M.O. IV as well as wearing apparels of the deceased were found to be stained human blood of AB group. On completion of investigation, charge-sheet was submitted and the appellant faced trial for commission of offences under sections 302 and 379 of the I.P.C.

3. Appellant took the plea of denial.

4. In order to substantiate the charge, prosecution examined eighteen witnesses. Informant P.W.1 and P.W.14 were examined to depose regarding the circumstance that the deceased was last seen in the company of the appellant. P.Ws. 2,3,9 and 10 were examined to depose regarding circumstance of recovery and seizure of knife M.O.IV at the instance of the appellant. Of them, P.W.2 and P.W.10 were declared to be hostile witnesses. P.Ws. 4,11 and 12 were working at Raipur. P.W.4 deposed to have paid Rs.200/- to the deceased to give in his house whereas P.Ws. 11 and 12 deposed to have paid Rs.250/- and Rs.150/- respectively to the appellant to give the same to their family members. P.W.5 was an inquest

witness. P.W.6, deceased's father, and P.W.7 were post-occurrence witnesses. P.W.8 was a witness to seizure under seizure lists Exts.8,9 and 10. P.W.13 is a doctor who conducted post mortem examination over the dead body of the deceased. He also medically examined the appellant and found superficial cut injuries on right palm and index finger. P.Ws.15 and 16 were police constables who assisted in investigation. P.Ws. 17 and 18 were Investigating Officers. Prosecution also relied upon documents marked Exts. 1 to 19 and material objects M.Os.I to M.O.XII. No defence evidence was adduced.

Trial court held the prosecution to have proved the charge under section 302 of the I.P.C. against the appellant on the basis of circumstantial evidence. However, appellant was acquitted of the charge under section 379 of the I.P.C.

5. In assailing the impugned judgment it was submitted by the learned counsel for the appellant that in order to constitute a firm basis for conviction on circumstantial evidence, each of the links in the chain of circumstances must be established beyond reasonable doubt and such links must constitute a complete chain so as to unerringly point out that it was the accused who committed the offence. It was pointed out that in the present case prosecution relied upon two circumstances only, which are:

(1) deceased was last seen in the company of the appellant by P.W.1, and

(2) blood stained knife M.O.IV was recovered and seized at the instance of the appellant.

It was contended that neither of the two circumstances relied upon by the prosecution has been established beyond reasonable doubt. So far as circumstance that the appellant was last seen with the deceased is concerned, sole testimony of P.W.1 to have seen them for the last time at 8.00 A.M. on 9.7.2001 cannot be treated as incriminating against the appellant in view of the fact that dead body of the deceased was found on the following morning only. It was further argued that evidence of P.Ws. 2,3,9 and 10 with regard to circumstance of recovery of knife M.O.IV is inconsistent and not acceptable. That apart, circumstance of detection of blood stain on M.O. IV having not been put to the appellant in his examination under Section 313 of the Cr.P.C., recovery and seizure of the

knife cannot be utilized as an incriminating circumstance against the appellant.

6. Placing reliance on the evidence of P.Ws. 1,3 and 9 and the medical evidence, learned counsel for the State submitted that the prosecution has proved to the hilt the charge under section 302 I.P.C. against the appellant.

7. It is not at all disputed that death of the deceased was homicidal in nature. P.W.13 found as many as five ante-mortem incised wounds on the dead body of the deceased in course of post-mortem examination. He opined that cause of death of the deceased was syncope as a result of injuries to vital organs and haemorrhage. In response to query made by the Investigating Officer P.W.13 opined that injury on the deceased could be caused by seized knife M.O.IV.

8. Homicidal nature of death of the deceased by itself is not a circumstance which would implicate the appellant with the offence. Prosecution relied upon the following two circumstances in order to establish complicity of the appellant in commission of the offence:-

(1) deceased was last seen in the company of the appellant, and

(2) blood stained knife M.O.IV was recovered and seized consequent upon information received from the appellant while in custody.

P.Ws. 1 and 14 were examined in support of the first circumstance whereas P.Ws. 2,3,9 and 10 were examined in support of the second circumstance. Evidence of other witnesses does not in any manner incriminate the appellant.

9. P.W.14 testified that on 9.7.2000 at about 7 P.M. two persons purchased a coconut and two packets of Parle-G biscuits from his grocery shop. However, he did not identify the appellant to be either of those two persons. Therefore, evidence of P.W.14 is of no help to the prosecution. Informant P.W.1 stated in his evidence that on the date of occurrence he alongwith appellant and deceased came from Raipur by a train and got down at Kantabanji railway station, and therefrom they came to Khariar. At Khariar appellant Debi Charan asked him to watch over his belongings and the appellant and deceased went towards the market at about 8.00 A.M. to purchase a torch light for the deceased. Till 10 A.M. they did not return back

for which P.W.1 came towards his village by a service bus. He handed over the belongings and clothing of deceased to deceased's mother saying that she should keep the belongings as the deceased had gone with the appellant towards the market. Till late night the deceased did not come to their house and on the next day at about 7.00 A.M. one Banki Majhi of their village informed them that deceased was lying dead on the Mandiarucha road under a kendu tree. They noticed that there was bleeding from the body of the deceased. The deceased had been killed much prior to their seeing the dead body. They had strong doubt that the appellant must have killed the deceased because at the time when they left to purchase a torch from the market, the appellant had assured P.W.1 to see that the deceased reached their house safe. P.W.1 stated to have lodged First Information Report at the police station. Though prosecution sought to establish theft of money of the deceased by the appellant as the motive for commission of the offence, P.W.1 stated in his cross-examination that he did not know whether the deceased had any cash with him or not. Thus, P.W.1 is the only witness in support of the circumstance that the deceased was in the company of the appellant till 8.00 A.M. on the day proceeding the day on which the deceased's dead body was found. In view of long gap between the time when P.W.1 asserted to have seen the deceased for the last time in the company of the appellant and the time of detection of the dead body, the circumstance that the deceased was with the appellant when he was last seen by P.W.1 requires corroboration by other material in order to be the basis for any firm finding.

10. P.W.2 stated that in presence of him and others the appellant confessed his guilt and disclosed that he had concealed the knife by which he had killed under the roof of his house. However, he categorically stated that he had not gone to the place of discovery with the appellant and the police, but subsequently he saw the knife in the police station. In such circumstances, P.W.2 was declared hostile. P.W.10 stated that police stated before them that the seized knife was given by the appellant to the police and they saw the knife in the hand of the investigating officer. She also stated that she had not heard anything further spoken by the appellant at the place where the knife was shown by police. The appellant did not disclose anything else in their presence. In cross-examination also this witness stated that she had only seen a knife which was shown by the police. The investigating officer asked her to put signatures on different papers and without knowing the contents of the same she put her signatures. Therefore, evidence of hostile witness P.W.10 is also of no assistance to the prosecution. P.W.9 stated in his evidence that while in custody the appellant admitted to have killed a man by means of a knife and wanted to identify the

place where he had concealed the weapon of offence and pointed the place of his roof made of tiles. Then the investigating officer requested P.W.9 to get the knife from the roof of the accused and in obedience to their request, he brought the said knife and handed over the police. P.W.9 also testified that the appellant admitted to have brought out cash amounting to Rs.1,300/- from the pant pocket of the deceased and purchased clothing and chappals etc. In his cross-examination P.W.9 further stated that the appellant did not disclose the name of the deceased. The appellant also did not disclose regarding the place where the deceased was killed or regarding the circumstance under which he had killed a man. P.W.9 also stated in his cross-examination that the appellant did not disclose that he had purchased clothing and chappals etc. with the money he had stolen from the pocket of the deceased, but these things were stated to him by the police from whom they came to know about it. Police only stated before them that this was the version of the appellant. In view of such nature of evidence, P.W.9 does not appear to be a firm witness. P.W.3 stated that they noticed that the appellant had signs of injuries on the palm. The appellant while in custody confessed his guilt and stated to have concealed the weapon of offence namely the knife on the roof, and led the police to the place of discovery. He also accompanied the police to his house while the appellant pointed out the place where he had concealed the knife. P.W.9 on the instruction of the appellant brought out the knife and gave it to the police. The appellant also admitted that he had taken away the cash from the pocket of the deceased and repaid his debt and purchased saya, blouse etc. In his presence the knife M.O.IV and other articles were seized by the police. Thus, P.W.3 is the only witness who stated that the knife M.O.IV was recovered and seized consequent upon the information received from the appellant. His evidence is not consistent with the evidence of either P.W.9 or the two hostile witnesses P.Ws.2 and 10. That apart, in order to constitute an incriminating circumstance, prosecution is required to prove that the seized knife was an incriminating article. Though chemical examination report Ext.19 indicates that the knife M.O.IV as well as deceased's wearing apparels were found to be stained with human blood of AB group, no question was put to the appellant with regard to the circumstance of detection of human blood on the knife M.O.IV as indicated in the chemical examination report. Appellant's attention was also not drawn to the chemical examination report Ext.19. It is well settled that unless the circumstance appearing against an accused is put to him in his examination under Section 313 of the Cr.P.C., the same cannot be used against him. In this connection, decisions in **Harijan Megha Jesha –vrs.- State of Gujarat** : AIR 1979 SC 1566 and in **Sharad Birdhichand Sarda –vrs.- State of Maharashtra** : AIR 1984 SC 1622 are relied upon. Moreover, so far as the circumstance of detection of human

blood of AB group on the seized knife is concerned, not only P.W.2 stated to have seen the injuries on appellant's palm but also P.W.13 deposed that upon medical examination he found cut injuries on appellant's palm and fingers. Appellant's blood grouping having not been done, no inference can be done on the basis of the chemical examination report that blood stain detected on the seized knife was that of the deceased and not that of the appellant. Thus, Prosecution is not only found to have failed to adduce cogent evidence in support of the circumstance of recovery and seizure of knife M.O.IV but also the said circumstance cannot be utilized against the appellant.

11. Thus, circumstance of the deceased to have been last seen in the company of the appellant as deposed to by P.W.1 is the only circumstance which can be stated to have been brought on record by the prosecution. The dead body was discovered about twenty four hours after P.W.1 stated to have last seen the deceased. That apart, the prosecution having failed to prove any other circumstance indicating complicity of the appellant with the offence, sole circumstance that the deceased was last seen in the company of the accused may at best form a link in a chain. But the prosecution has not been able to establish any chain in the present case. In **Inderjit Singh and another –vrs.- State of Punjab** : AIR 1991 SC 1674 it bas been pointed out by the Supreme Court that in number of cases it has been held that the only circumstance that the deceased was last seen in the company of the accused by itself is not sufficient to establish the guilt of the accused.

12. In view of the above discussion, the appeal is allowed. The impugned judgment and order dated 31.1.2003 passed by learned Additional Sessions Judge, Nuapada in Sessions Case No.36/6 of 2002 convicting and sentencing the appellant to undergo imprisonment for life under section 302 of the I.P.C. are set aside. Appellant-Debi Charan Sunani is acquitted of the said charge. He be set at liberty forthwith unless his detention is required otherwise.

Appeal allowed.

2012 (II) ILR - CUT- 651

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

JCRA NO. 74 OF 2003 (Dt.17.04.2012)

DEBENDRA SIDU ……Appellant

.*Vrs.*

STATE OF ORISSA ……Respondent

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.25.

Confession of the appellant before police in presence of P.W.s. 7&8 – Evidence of P.Ws.7 and 8 shows that the appellant on his own volition appeared at the police station and produced the weapon of offence (M.O.I) which was stained with blood – Though confession of the appellant before the police in presence of the above witnesses is not admissible, his conduct of producing the axe out of his own volition on making appearance in the police station is a relevant piece of evidence to corroborate P.W.3 (the eye witness) especially in view of the fact that the chemical examination report is indicative of presence of blood of human origin on the axe (M.O.I) – Held, there is no infirmity in the impugned Judgment – Conviction and sentence confirmed

(Para 8,9)

For Appellant - Mr. Arunrendra Mohanty
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment of conviction and order of sentence dated 27.06.2003 passed by learned Sessions Judge, Mayurbhanj in Sessions Trial Case No.46 of 2000 convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. The occurrence happened at about 11.00 A.M. on 09.11.1999 in front of the house of the appellant. The prosecution case is to the effect that, the appellant was suspecting the deceased to have killed his (appellant's) daughter by practicing sorcery. At the relevant time the appellant was preparing to bury his deceased daughter in presence of Dubraj Sidu(P.W.3) and Harish Chandra Sidu(P.W.4). The appellant at that time dealt an axe blow to the deceased causing her instantaneous death. On the basis of the F.I.R. lodged by Laxmidhar Sidu (P.W.1), who happens to be the brother of the deceased, the case was registered and after completion of investigation, the appellant was charge -sheeted for offence under Section 302, I.P.C.

3. The prosecution examined twelve witnesses to prove the charge. P.W.1 is the informant and brother of the deceased. P.Ws.3 and 4 are the eye witnesses to the occurrence. P.W.2 is another brother of the deceased and he is also a post-occurrence witness like P.W.1. P.W.5 is the wife of P.W.2. P.W. 6 is the constable, who took the dead body for post-mortem examination. P.W.7 is a witness, who had accompanied P.W.1 to the Police Station at the time of lodging of the F.I.R. and saw the appellant appearing in the Police Station holding the weapon of offence (M.O.-I). P.Ws. 8 and 9 are witnesses to the seizure of weapon (M.O.-I) on production by the appellant on his voluntary appearance in the Police Station. P.W.10 is a post-occurrence witness. P.W.12 is the Medical Officer, who conducted autopsy on the dead body of the deceased. P.W.11 is the Investigating Officer.

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

5. Learned counsel for the appellant submits that P.W.3 having testified in his cross-examination that he had already left the spot by the time of occurrence, he cannot be believed as eye witness to the occurrence and conviction of the appellant on the basis of his testimony is not sustainable in the eye of law. Learned Additional Standing Counsel on the other hand supports the impugned judgment.

6. Perusal of the evidence on record shows that P.Ws.3 and 4 were examined as eye witnesses to the occurrence out of whom P.W.4 is the brother of the appellant. As P.W.4 turned hostile in course of his examination in court, he was cross-examined by the prosecution under Section 154 of the Evidence Act. After such fate of the evidence of P.W.4, the prosecution is left with the evidence of P.W.3, who remains to be the sole eye witness to the occurrence. P.W.3 in his evidence has testified that he was there in the house of the appellant to help him to cremate the dead body of his daughter. He has further testified that Harish Chandra Sidu(P.W.4) was also present with him and they were digging a pit in the graveyard for the purpose of burial of the dead body. He (P.W.3) has specifically testified that the appellant killed the deceased Suryamani with the help of (M.O.-I) in his presence; Suryamani died in front of the house of the appellant. There has been no cross-examination of P.W.3 to elicit any contradiction which may assume relevance under Section 145 of the Evidence Act. In his cross-examination P.W.3 has testified that he was present in the house of the appellant till 9.00 A.M. He has further testified that the burial place is situated in front of the house of the appellant. Taking clue from the aforesaid answer

of P.W.3 in his cross-examination it is submitted by learned counsel for the appellant that when P.W.3 ipse dixit has testified that the occurrence happened at about 12.00 (noon) A.M. in front of the house of the appellant, how could he happened to witness the occurrence, if he was there in the house of the appellant till 9.00 A.M.

7. We are constrained to say here that in a murder trial, time and space assume less relevance if there is a ring of truth in the evidence taken as a whole. The answer of P.W.3 in cross-examination regarding his presence till 9.00 A.M. relates to "in the house". The house of the appellant is not the spot which is situated according to P.W.3 in front of the house of the appellant. In his cross-examination he (P.W.3) has testified that he was there in the house of the appellant till 9.00 A.M., so the reference "in the house" may not be understood as spot and cannot be stretched to mean that P.W.3 had already left the spot by 9.00 A.M. It is the evidence of P.W.3 that Harish Chandra Sidu (P.W.4) was present with him and was helping him in digging a pit. When they were digging the pit at the spot for burial of the deceased daughter of the appellant, the occurrence had happened. In view of such fact, P.W.3 cannot be disbelieved on the basis of aforesaid facts as obtained in his cross-examination.

8. Harish Chandra Sidu (P.W.4) has turned hostile. Even if his evidence to the extent he has turned hostile is eschewed it is there in his evidence to shows that P.W.3 and he himself were there in the house of the appellant to dig the pit for burial of the deceased daughter of the appellant. Such a fact lends ample corroboration to the evidence of P.W.3 on the point of his presence at the spot. There are other evidence of post-occurrence witnesses like P.Ws.1, 2 and 5, who came to the spot on being informed by the minor daughter of the deceased about the occurrence and saw the dead body lying there at the spot. There is evidence of P.Ws.7 and 8 to show that the appellant on his own volition appeared at the Police Station and produced the weapon of offence (M.O.-I), which was stained with blood. Though confession of the appellant before the police in presence of the aforesaid witnesses is not admissible, his conduct of producing the axe out of his own volition on making appearance in the Police Station is a relevant piece of evidence to corroborate P.W.3 especially in view of the fact that the chemical examination report is indicative of presence of blood of human origin on the axe (M.O.-I).

9. Taking into consideration the entire evidence on record, we do not find force in the contentions raised by learned counsel for the appellant and

we do not find any infirmity in the impugned judgment. In the result, the appeal being devoid of any merit is dismissed.

Appeal dismissed.

2012 (II) ILR - CUT- 655

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

JCRA NO. 112 OF 2005 (Dt.16.04.2012)

DASMAT MARANDI @ NANDU …… Appellant

.Vrs.

STATE OF ORISSA ……Respondent

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

It is not the law that in every case of single blow or single injury where death is caused, the conviction should be one U/s.304 Part-I or Part-II of the I.P.C.

In the present case appellant prayed to modify his conviction U/s.302 I.P.C. to one U/s.304-Part-II I.P.C. – The injury is on the middle of the chest and abdomen of the deceased caused with violent thrust by a knife – The knife has passed through the entire body involving the vital organ like lever – Held, the injury caused by the appellant being sufficient in ordinary course to cause death and the appellant had intended to inflict such injuries the conviction of the appellant U/s.302 I.P.C. not unjustified in the absence of facts bringing the act of the appellant under any of the exceptions to section 300 I.P.C.

(Para 8)

For Appellant - Miss. B.L.Tripathy, Miss.B.Tripathy, Miss N.Tripathy.
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment and order of sentence dated 31.03.2005 passed by learned Additional Sessions Judge, Rairangpur in C.T. No.23 of 2004 (S.T. No.253 of 2004) convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life and to pay fine of Rs.2,000/- (two thousand), in default, to suffer R.I. for two months more.

2. The occurrence happened at about 2.30 A.M. in the mid-night of 22/23.06.2004 at village Bhalubasa under Rirangpur Town P.S. At that time, informant (P.W.1) and one Ladu Majhi (not examined) were present near the place, where playing of cards was going on. They saw the appellant entering

into the house of the deceased holding a sharp cutting weapon and after few minutes they saw both the deceased in bleeding condition and her son (P.W.3) chasing the appellant. The deceased fell down on the road after chasing the appellant a little distance. The informant (P.W.1) and others rushed to the spot. On their query, the deceased told them that the appellant assaulted her by means of a sharp cutting weapon causing injury in her chest region. They marked entry and exit wounds on the chest and back of the deceased. They immediately rushed the deceased to Rairangpur hospital, but soon after her arrival at the hospital, she died. The informant (P.W.1) being a relative of the deceased, lodged written report vide Ext.1 at Rirangpur Town P.S., on the basis of which investigation was taken up. On completion of the investigation, charge-sheet was filed implicating the appellant in offence punishable under Section 302, I.P.C.

3. Prosecution examined seven witnesses to prove the charge, out of whom P.Ws.1 and 3 are the eye-witnesses to the occurrence, P.Ws.2 and 6 are witnesses to the seizure and P.W.4 is a witness to the seizure of the weapon of offence (M.O.-II) at the instance of the appellant. P.W.5 is the Medical Officer, who conducted autopsy on the dead body of the deceased and P.W.7 is the Investigating Officer.

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

5. The Trial Court, on the basis of the evidence of P.Ws.1 and 3, seizure of the weapon of offence M.O.-II at the instance of the appellant, as testified by P.W.4, and the Medical Officer (P.W.5), convicted the appellant under Section 302, I.P.C.

6. Learned counsel for the appellant submits that there are various discrepancies and contradictions in the evidence of P.Ws.1 and 3, and P.W.3 being a child witness, he should not have been believed. Alternatively, it is submitted by learned counsel for the appellant that death of the deceased having been caused by a single blow of knife, the appellant should have been convicted under Section 304, Part-II, I.P.C. instead of Section 302, I.P.C. Learned Addl. Standing Counsel for the State on the other hand supports the impugned judgment and order of sentence.

7. P.W.3, who is none other than the son of the deceased, is the eye-witness to the occurrence. He has testified that at the time of occurrence he and his mother (deceased) were sleeping. A lantern was burning in the place where they were sleeping. He woke up hearing the cry of his mother

and saw the appellant pulling the knife from the belly of his mother. Then the appellant ran away, but his mother and he followed him to some distance. His mother however fell down on the ground and then he raised hulla and called the villagers. He has further testified that people gathered soon after his mother fell down on the ground. It is there in his evidence to show that P.W.1, P.W.1's wife, Ladu Chandan and others gathered at the spot before whom his mother disclosed that appellant Dasmat stabbed her by a knife and ran away. P.W.3 being aged about 11 years old, is a child witness. Learned Trial Court has certified that P.W.3, who is a student of Class-IV, is able to give rational answers to the questions. He was cross-examined at length. There is nothing in his cross-examination to show that he was tutored by anybody to depose in the fashion he has deposed. There is nothing also in his evidence to show that he has improved any fact or has tried to exaggerate any fact. There is nothing to disbelieve his evidence, as there is nothing to show that he could not have seen the appellant in the light of the lantern burning at the place where the occurrence happened. P.W.3 is corroborated by P.W.1, who is a witness to the oral dying declaration by the deceased, relevant under Section 32(1) of the Evidence Act. Even if P.W.1 is disbelieved on other aspects, his evidence on the point of oral dying declaration by the deceased before him and others implicating the appellant cannot be disbelieved. P.W.3 is further corroborated by the Medical Officer, P.W.5, who has found the following injuries on the dead body of the deceased :-

> "(i) Penetrating entry wound situated at anterior abdomen 3" x 2" below and medial to the level of left nipple, just below sub costal margin placed transversely of size about 1" x 1/3" x abdomen deep.
>
> (ii) Penetrating exit wound situated at mid part of back 2" right to midline of size about ½" x ¼" x abdomen deep.

Cause of death, as opined by P.W.5, is injury to the vital organ like liver, haemorrhage and shock.

In his cross-examination, P.W.5 has testified that the entry and exit wounds are caused by the same attempt and there was no other external injuries except the entry and exit wound. It is further testified by him that chance of survival in such type of injury, even if prompt medical treatment is given, is less. In view of such evidence on record and there being nothing to discredit the testimony of P.Ws.3 and 1, we do not find any infirmity in the conclusion arrived at by the learned Trial Court.

8. Coming to the alternative ground of the learned counsel for the appellant to modify the conviction to one under Section 304, Part-II, I.P.C. instead of 302, we find that the injury on the middle of the chest and abdomen of the deceased was caused with much force and with a violent thrust by a sharp cutting weapon. The knife has passed through the entire body of the deceased to exit on the backside involving vital organ like liver. The injury as it is and as opined by the Medical Officer (P.W.5), is sufficient in ordinary course of nature to cause death. If we further take into consideration the situs of the injuries, the force applied and the result of such force, there is no escape from the conclusion that the appellant had intended to cause the particular injuries. It is not the law that in every case of single blow or single injury, where death is caused, the conviction should be one under Section 304, Part-I or Part-II of the I.P.C. The offence being one under clause Thirdly of Section 300, I.P.C. in view of the fact that the injury caused by the appellant is sufficient in ordinary course to cause death and the appellant had intended to inflict the injuries, the conviction of the appellant under Section 302, I.P.C. is not unjustified in absence of facts bringing the act of the appellant under any of the exceptions to Section 300, I.P.C.

9. In view of the above, the appeal being devoid of merit is dismissed.

Appeal dismissed.

2012 (II) ILR - CUT- 659

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

JCRA NO. 61 OF 2002 (Dt. 19.01.2012)

BAICHANDRA MAJHI ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

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

Leading to discovery means discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was committed by the accused – What is admissible U/s. 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

In this case P.Ws.3 & 4 are witnesses to the leading to discovery – In Cross-examination P.W.4 admitted that in the police station he put his signature in the seizure list along with P.W.3 as told by the police and the contents of the documents where he signed had not been read over and explained to him – Held, P.W.4 having admitted that he put his signature in the seizure list in the police station along with P.W.3, the same has lost its sanctity – There being no other material to connect the present appellant with the crime it is not safe to convict the appellant –Appellant is acquitted of the charges.

(Para 9,10)

Case laws Relied on:-

1.2011 (5) Supreme 66 : (Mustkeem@ Sirajudeen-V-State of Rajasthan)
2.AIR 1047 Privy Council 67 : (Pulukuri Kotayya & Ors.-V-Emperor)
3.AIR 2011 SC 72 : (Varun Chaudhary-V- State of Rajasthan).

For Appellant - Miss. T.Sinha, Advocate
For Respondent - Mr. Karunakar Nayak, Addl. Standing Counsel.

PRADIP MOHANTY, J. This criminal appeal is directed against the judgment and order dated 30.06.2001 passed by the learned Additional

Sessions Judge, Titilagarh in Sessions Case No. 80 (B)/31 of 1999 convicting the appellant under Sections 302/201, IPC and sentencing him to undergo imprisonment for life for the offence under Section 302, IPC and rigorous imprisonment for one year for the offence under Section 201, IPC, which are to run concurrently.

2. The prosecution case in brief is that deceased Jatansingh Majhi, informant Khirasindhu Majhi, appellant Baichandra Majhi and two other acquitted accused persons are cousins. P.W.5 Dasmati Majhi is the wife of the deceased. On the night of 10.05.1999, the deceased as usual went to sleep in his hutment, which he had raised in his paddy land for guarding crops. On the next day morning as the deceased did not return, his wife

(P.W.5) and the informant Khirasindhu (P.W.2) went to the hutment, but to their surprise they did not find the cot and the deceased there. On 11.05.99, P.W.5, the wife of the deceased went to Bangomunda police station to lodge a missing report but police told her to search for him. On 13.05.1999 at about 5 P.M., P.W.5 and the informant (P.W.2) found a dead body tied with a cot lying inside the well of one Krupa Putel. With the help of a 'Bilai' they lifted the cot and found inside the well that the dead body tied with it was of the deceased. Then, P.W.2 went to Bangomunda police station and lodged F.I.R. (Ext.2), on receipt of which a case was registered and investigation taken up. During investigation A.S.I. Laxmidhar Patel visited the spot, brought out the dead body being tied with a cot from the well, conducted inquest over it and prepared inquest report. He seized the rope, cot and a big stone which was tied with the cot and sent the dead body for post-mortem examination. On 20.05.1999, the C.I., Bangomunda took charge of the investigation. He arrested the appellant along with two other accused persons. While in police custody the appellant disclosed his involvement in the incident with other two accused persons and gave recovery of a bamboo lathi used as weapon of offence. On completion of investigation police submitted charge-sheet against the appellant and two other acquitted accused persons under Sections 302/201/34 I.P.C.

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

4. The prosecution in order to prove its case examined as many as nine witnesses including the I.O. and the doctor and exhibited 12 documents. Defence examined none.

5. The learned Addl. Sessions Judge, who tried the case, acquitted two other accused persons but convicted and sentenced the present appellant,

as already stated hereinbefore, inter alia basing upon his statement under Section 27 of the Evidence Act and leading to recovery of the weapon of offence which was seized by the police under Ext.5.

6. Learned counsel for the appellant submits that there is no direct evidence against the appellant and the circumstances which have formed the basis of conviction do not complete the chain. The so called recovery of the weapon of offence on the disclosure of the appellant is not free from suspicion. Even if the so called leading to recovery theory is believed, it cannot form the basis of conviction in absence of any other corroborative evidence. Therefore, the impugned judgment of conviction and sentence is liable to be set aside. In support of his contention he relies on a decision in ***Mustkeem @ Sirajudeen Vrs. State of Rajasthan***, 2011 (5) Supreme 66.

7. Mr. Senapati, learned Additional Government Advocate vehemently contends that there is no infirmity and illegality committed by the learned Additional Sessions Judge, Titilagarh in convicting the appellant basing upon the circumstantial evidence. The appellant himself disclosed the fact of his involvement in the crime before P.Ws.3 and 4 and led the police to the place of concealment and gave recovery of the weapon of offence. There is no reason to discard the evidence of P.Ws.3 and 4. Therefore, the trial court is justified in holding the appellant guilty.

8. Perused the L.C.R. P.W.1 is a seizure witness. P.W.2 is cousin brother of the deceased and the informant. P.W.3 is a witness to the inquest and seizure of a lathi. He specifically stated that the present appellant confessed before him and the police that he along with Chaitan killed the deceased by means of a lathi and took the deceased with the help of accused Kirman to the well of Krupa Putel where by tying a stone threw the dead body with the cot. The appellant also confessed that he had concealed the lathi at Sunamudi land under a date-palm bush. He also led them to the place of concealment of lathi and gave recovery of it. In cross-examination, he stated that lathis like M.O.IV are commonly available in the locality. P.W.4 is another witness to the seizure and leading to discovery. He is also a witness to the inquest of the dead body. He specifically stated that the dead body was recovered on a Friday and thereafter the police brought the appellant in a jeep. The police called him and P.W.3 to accompany. In the village itself the appellant told them that he along with other accused persons killed the deceased by means of lathi. The appellant also disclosed that he had concealed the lathi at Sunemudi land under Khajuri bush and gave recovery. In cross-examination, he admitted that he signed the seizure list at Bangomunda P.S. and P.W.3 also signed in his presence. P.W.5 is the

wife of the deceased. She specifically stated that the appellant and other accused persons are cousins of her husband. Since last year's Falgun they had been threatening the deceased and herself by telling that they would kill the deceased and would make her widow. In the last year's Baisakha on a Monday the deceased went to sleep in the house constructed in their paddy land. On the next day, since they had raised Onion and Chana in that field, she along with P.W.2 went to that land in the morning and found neither the deceased nor the cot was there. Thereafter, they reported before the police about missing of the deceased. On Thursday afternoon P.W.2 came and told her that a Cot is found inside the well of Krupa Putel of village Gandharabandh. Then, they went near the well and by pulling the cot with the help of a Bilai found the deceased tied with the cot. Nothing has been elicited in cross-examination to disbelieve her evidence. P.W.6 is the doctor, who conducted autopsy over the dead body of the deceased. He opined that the injuries sustained by the deceased were ante mortem and grievous in nature. Death of the deceased was due to coma, as a result of injuries to the vital organs like brain, spleen and lungs. The I.O. produced the weapon of offence, i.e. bamboo lathi through C/380 with certain queries and he examined the weapon and met the query. He opined that the lathi in question can cause the injuries as he noticed in the dead body and reflected in the P.M. examination report. P.W.7 is the O.I.C. of Bangomunda P.S. He took charge of investigation from the A.S.I. and sent the weapon of offence which was kept in police malkhana for opinion of the doctor. He received the weapon examination report from the Medical Officer. After completion of investigation he submitted charge-sheet under Section 302/201/34 I.P.C. P.W.8 is the A.S.I. of Police who registered the case and in absence of O.I.C. took up investigation. During course of investigation he examined the informant and the scribe in the P.S. He held inquest over the dead body. P.W.9 is the C.I. of Police, who took charge of investigation from the A.S.I. of Police (P.W.8). He arrested the appellant and other accused persons. During examination the appellant disclosed his involvement in the incident with his associates. When he could know that there is likelihood of giving recovery of weapon of offence, he availed the witnesses-P.Ws.3 and 4 and in their presence recorded separately the statement of the appellant. Then the appellant gave recovery of the bamboo lathi kept underneath of the date-palm bush, which was seized in presence of P.Ws.3 and 4.

9. It is well settled in law that where the case rests squarely on circumstantial evidence the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. It is no doubt true that conviction can be based solely on circumstantial evidence but it

should be decided on the touchstone of law relating to circumstantial evidence. In the instant case, which squarely rests on circumstantial evidence, conviction has been made solely on the basis of the leading to recovery and disclosure made by the appellant under Section 27 of the Evidence Act. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution. The scope and ambit of Section 27 of the Evidence Act are illuminatingly stated in ***Pulukuri Kotayya & Ors. Vs. Emperor,*** AIR 1947 Privy Council 67. The same are reproduced hereunder:

> "…it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

It is also held by the apex court in ***Varun Chaudhary Vs. State of Rajasthan***, AIR 2011 SC 72 that if the recovery memos were prepared at the police station itself then the same would lose its sanctity.

10. With the above touchstone of law, this Court examined the evidence of P.Ws.3 and 4, who are witnesses to the leading to discovery and put their signatures in the seizure list (Ext.5). P.W.3 admitted that no signature was taken on the seized lathi and that lathis like M.O.IV are commonly available. In Cross-examination, P.W.4 admitted that in the police station he put his signature along with P.W.3. He had not read the contents of the documents as the police told him to put his signature and the contents of the documents where he signed had not been read over and explained to him. The above

evidence of P.Ws.3 asnd 4 makes the recovery of weapon of offence on the disclosure of the appellant doubt. The weapon of offence, i.e., lathi (M.O.IV) was sent for chemical examination but no blood was detected from it by the Chemical Examiner. There is no other material to connect the present appellant with the crime. Therefore, it is not safe to convict the present appellant.

11. In the result, the appeal is allowed by setting the judgment of conviction and sentence passed by the trial court in Sessions Case No.80 (B)/31 of 1999 and the appellant is acquitted of the charges.

Appeal allowed.

2012 (II) ILR - CUT- 665

M. M. DAS, J.

W.P.(C) NO. 10331 OF 2009 (Dt.11.04.2012)

NRUSINGHA NANDA MAHAPATRA ……..Petitioner

.Vrs.

GAUTAM DAS MAHAPATRA & ANR. ……..Opp.Parties.

CIVIL PROCEDURE CODE,1908 (ACT NO.5 OF1908)– ORDER 6, RULE1.

Pleadings – Defendant No.2 has not filed written statement and filed a memo admitting the case of the plaintiff – On the date of hearing of the suit he filed a petition to allow him to lead evidence – Trial Court allowed such prayer – Order challenged in this writ petition.

Evidence in a Civil Proceeding can only be led to prove the facts pleaded or to rebut the evidence led by the adversary in support of his pleadings – When such pleadings have been denied by him in his pleadings, question of leading evidence in absence of pleadings is not permissible – Held, the impugned order is quashed – Defendant No.2 can only be permitted to cross-examine the witness(s) examined on behalf of the plaintiff as well as defendant No.1 but such cross-examination shall be restricted only to find out the falsity in it or weakness of the case of the plaintiff or defendant No.1 – Under no circumstances, such cross-examination shall be permitted to travel beyond the above situation so as to convert itself virtually into a presentation of the defendant's case which has not been pleaded by Defendant No.2 as he has not filed any pleadings (written statement).

(Para 7,8)

Case laws Referred to:-

1.AIR 1989 SC 162 : (Modula India-V- Kamakshya Singh Deo).
2.2005(I) OLRE 104 : (Krushna Chandra Sahoo-V-Shyam Sundar Sahoo & Ors.)

For Petitioner - In person
For Opp.Parties - M/s. P.Mohanty

Heard the petitioner in person and the learned counsel for the Opp.Party No.1.

2. The writ petitioner has challenged the order dated 15.5.2009 passed in C.S. No.391 of 2005 by the learned Civil Judge (Sr. Division), Cuttack. The petitioner is the defendant No.1 in the suit.

3. During the course of hearing of the suit, a petition was filed by the defendant no.2 with a prayer to allow him to lead evidence in the suit. The learned Civil Judge considering the said application which was objected to by the present petitioner, who is defendant no.1 in the suit and on perusing the case record found that the defendant no.2 has filed a memo admitting the case of the plaintiff. However, the learned Civil Judge holding that it is a settled principle of law that even if a defendant failed to file written statement, he can participate in the proceeding and can lead evidence and cross examine the witness examined by the plaintiff, allowed the prayer made by the defendant no.2 to lead evidence.

(*emphasis supplied)*

4. It appears from the impugned order that the learned trial court has placed reliance on the decision in the case *of Modula India v. Kamakshya Singh Deo,* AIR 1989 SC 162. In the case of Modula India (supra), the Supreme Court was examining the right of a defendant to participate in the hearing of the proceeding when his defence has been struck off. In the facts of the said case, the Supreme Court held that even in a case where the defence against delivery of possession of a tenant is struck off under section 17 (3), the defendant tenant, subject to the exercise of an appropriate discretion by the Court on the facts of a particular case would generally be entitled (a) to cross-examine the plaintiff's witnesses; and (b) to address argument on the basis of the plaintiffs case. However, when the defendant is afforded the aforesaid right he would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances, should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually in to a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.

(*emphasis supplied*.)

5. This Court relying upon the aforesaid decision of the apex Court, in the case of *Krushna Chandra Sahoo v. Shyam Sundar Sahoo* and others, 2005 (I) OLR 104, reiterated the said position of law.

6. It, therefore, clearly transpires that the learned trial court under misconception and misreading the ratio of the aforesaid decision of the apex

Court has wrongly passed the impugned order by holding that the defendant can lead evidence.

7. It is trite law that evidence in a civil proceeding can only be led to prove the facts pleaded or to rebut the evidence led by the adversary in support of his pleadings. When such pleadings have been denied by him in his pleadings, question of leading evidence in absence of pleadings is, therefore, not permissible.

8. Hence, the impugned order being contrary to law, stands quashed with a direction that the defendant no.2 can only be permitted to cross-examine the witness (s) examined on behalf of the plaintiff as well as the defendant no.1. But such cross-examination shall be restricted only to find out the falsity in it or weakness of the case of the plaintiff or defendant no.1. Under no circumstances, such cross-examination shall be permitted to travel beyond the above situation so as to convert itself virtually into a presentation of the defendant's case which has not been pleaded by the defendant no.2 as he has not filed any pleadings (written statement).

9. The writ petition is accordingly disposed of. The interim order passed earlier stands vacated. All pending Misc. Cases also stand disposed of.

Since the suit is of the year 2005, the learned trial court shall expedite hearing of the suit and made an attempt to finally dispose of the same by the end of this year.

Writ petition disposed of.

2012 (II) ILR - CUT- 668

M. M. DAS, J.

F.A.O. NO. 169 OF 2012 (Dt.20.04.2012)

NATUREPRO BIOCARE INC & ANR. ……. Appellants.

.Vrs.

M/S. NATUROMA HERBAL PVT. LTD. & ORS. ……Respondents.

A. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39, RULE 1,2, 3 & 4.

Application Under Order 39, Rule 1 & 2 for ad-interim injunction – Prayer made to pass exparte order under Order 39 Rule 3 C.P.C. showing urgency that non-passing of such an order exparte would not only prejudice him but would cause irreparable injury to him – Exparte order passed by recording reasons – When such an exparte order passed the requirements under the proviso to Rule 3 of Order 39 C.P.C. are to be complied with which are mandatory in nature – Non-compliance of such requirements – Learned Court below vacated the exparte ad-interim order of injunction only on the ground of non-compliance of the provisions Under Order 39 Rule 3 C.P.C. – Held, for non-compliance of the proviso of Order 39, Rule 3 C.P.C. an exparte ad-interim injunction order cannot be vacated automatically – The said order can only be varied, discharged or confirmed in the final order to be passed in the application for interim injunction Under Order 39 Rule 1 & 2 as per the provision of Rule 4 of Order 39 C.P.C.

The learned Court below is not correct in straightway vacating the exparte ad-interim order of injunction passed by it earlier only on the ground of non-compliance of the provision of Order 39, Rule 3 C.P.C. – The impugned order is set aside. (Para 14,15 & 18)

B. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39 RULE 3 & 4. r/w Order 43 Rule 1(r) C.P.C.

Exparte Order of ad-interim injunction – Non-compliance of the requirements of Clause (a) & (b) of the proviso to Order 39, Rule 3 C.P.C. – Exparte Order vacated – Order challenged in appeal – Maintainability – The Court below having discharged the order of exparte ad-interim injunction has exercised power Under Rule 4 of

Order 39 C.P.C. which is appealable under Sub-rule (r) of Rule 1 of Order 43 C.P.C. – Held, the impugned order being an appealable order the FAO is maintainable. (Para 7,8)

Case law Relied on:-

(1993)3 SCC 161 : (Shiv Kumar Chadha etc.etc.-V-Municipal Corporation of Delhi & Ors.).

Case laws Referred to:-

1.65(1997)DLT 228 : (Interlink Services Pvt. Ltd.-V- S.P. Bangera)
2.AIR 1998 Delhi 126 : (S.B.L. Limited-V- Himalaya Drug Co.).

For Appellant - M/s. S.P.Singh, Sr. Advocate,
U.C.Patnaik, S.D.Mishra & S.Patnaik.
For Respondents - M/s. S.P.Mishra, Sr. Advocate,
B.Mohanty,S.K.Samantray,
S.K.Sahoo, S.Das.

M.M. DAS, J. The appellants as plaintiffs have instituted a civil suit being C.S. No. 1 of 2012 in the court of the learned District Judge, Bhubaneswar seeking for a decree declaring that plaintiffs are sole and/or exclusive user of the trade name/brand name/trade mark of "NATUREPRO" for its cosmetic products and for a decree for permanent injunction restraining the defendants – respondents from interfering, marketing, selling and advertising by using the trade name as aforesaid or any other name similar to it and for permanent injunction restraining the defendants-respondents from pursuing any application for grant of trade mark before the competent registering authority for the trade mark "NATUREPRO" and for appointment of receiver of the goods of the defendants which are manufactured and marketed in violation of the provisions of the trade mark of the plaintiffs under the provisions of the Trade Marks Act, 1999 (for short, 'the Act'). Along with the paint, the appellants as plaintiffs, filed an application under Order XXXIX, Rules I and 2 C.P.C. which was registered as I.A. No. 13 of 2012. A petition was filed by the plaintiffs under Order XXXIX, Rule – 3 C.P.C. praying to grant an ad interim ex parte injunction in the said interim application for restraining the defendants from manufacturing, marketing/distribution/selling/advertising any product using the trade mark of "NATUREPRO HERBAL" and/or "NATUREPRO" as well as from pursuing any application for grant of trade mark before the competent registering authority for registration of the trade mark "NATUREPRO HERBAL" and/or "NATUREPRO". The learned District Judge upon hearing the said interim application passed an ex parte order of ad interim injunction on 3.2.2012 by

elaborately discussing the facts of the case and the various litigations in which the parties are involved and entangled. In the said order, the learned District Judge came to the conclusion that prima facie there appears to be an act of passing off as alleged by the plaintiffs. He also concluded that the loss that would be caused by such act cannot be calculated in terms of money and may be irreparable. He found that the balance of convenience tilts in favour of the plaintiffs. Thus finding, the learned court gave the reason that the materials on record justify passing of an ex parte ad interim order of injunction till the defendants appear and make their submissions. The court directed that the defendants are restrained from interfering/marketing/distributing/selling or advertising their products by using the aforesaid trade name, i.e., "NATUREPRO" and "NATUREPRO HERBAL" till 16.3.2012. In the said order, the learned court directed the appellants-plaintiffs to comply the provisions of Order 39 Rule 3 C.P.C. By order dated 19.3.2012, the learned District Judge finding that there is non-compliance of Rule 3 of Order XXXIX C.P.C., which is mandatory and such non-compliance has serious consequences, rejected the contentions of the petitioners (appellants) before him and refused to extend the order of injunction granted ex parte earlier, for which the appellants filed an application before him. Thereafter, the learned District Judge directed as follows:-

: "The impugned order was passed on the petition filed under Order 39 Rule 3 C.P.C. The interim application filed under Order 39 Rule 1 and 2 C.P.C. is pending. The suit has been adjourned to 5.4.2012 for filing of written statement as mentioned in the order. Therefore, call on that date when the opposite parties shall file their objection, if any, and for further orders."

2. It, therefore, transpires from the records that on 16 16.3.2012, an application was filed on behalf of the appellants-plaintiffs to extend the ex parte order of injunction till final hearing of the interim application under Order XXXIX, Rules 1 and 2 C.P.C. The respondents, who were the opp. parties, also filed a petition with a prayer to vacate the ex parte ad interim order of injunction passed against them, on the ground that the appellants having not complied with the provisions of Order XXXIX, Rule 3 C.P.C within the time stipulated therein, the ex parte ad interim order of injunction is liable to be vacated.

3. At the out-set, Mr. S.P. Mishra, learned senior counsel appearing for the respondents raised the question of maintainability of the appeal. He contended that under Order 43, Rule 1 (r) C.P.C., an order under Rule 1,

Rule 2, Rule 2(A), Rule 4 or Rule 10 of Order XXXIX C.P.C. is appealable. This being not an order within the meaning of the said rules, the appeal cannot be maintained.

4. Mr. Singh, learned senior counsel appearing for the appellants, on the other hand, contended that the ex parte order of injunction having been varied/vacated by the impugned order dated 19.3.2012, the same would amount to an order under Rule 4 of Order XXXIX C.P.C. and, therefore, squarely comes under sub-rule (r) of Rule 1 of Order 43 C.P.C.

5. At this stage, it would be appropriate to extract the provisions of Order XXXIX, Rules 3 and 4 C.P.C. which are as follows:-

"39. (1)	xxx	xxx	xxx
2.	xXX	XXX	XXX
2A.	xxx	xxx	xxx

3. **Before granting injunction, Court to direct notice to opposite party.-** The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

(Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay and require the applicant

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;
(ii) a copy of the plaint; and
(iii) copies of documents on which the applicant relies, and,

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent).

3A. xxx xxx xxx

4. **Order for injunction may be discharge, varied or set aside.-** Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

(Provided that if in an application for temporary injunction or in any affidavit supporting such application a party has knowingly made a false or misleading statement in relation to material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party)".

6. Admittedly, by the impugned order, the ex parte ad interim order of injunction passed earlier on 3.2.2012, has been vacated.

7. A court during pendency of the suit can grant a temporary injunction if the conditions under Rule 1 of Order XXXIX C.P.C. are satisfied by the plaintiff. Under Rule 2 of Order XXXIX C.P.C., the court during pendency of the suit can restrain the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not and a plaintiff may at any stage of the suit, after its commencement, make an application to the court for a temporary injunction to restrain the defendant from committing breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The power under Rules 1 and 2 requires that the same can be exercised in all cases after directing notice of the application to be given to the opp. party, the exception being, as provided under Rule 3 C.P.C. quoted above. Hence, when a court exercises the power conferred on it to grant interim injunction under Rules 1 and 2 of Order XXXIX C.P.C. ex parte by applying the provisions of Rule 3, such an ex parte order of ad interim injunction is passed only by exercise of the

substantive power under Rules 1 and 2 as, Rule 3 does not independently empower the court to pass an order of injunction and it only lays down the procedure and the manner in which such order of injunction can be passed under Rules 1 and 2 C.P.C. ex parte, i.e., before issuance of notice to the opp. party.

Rule 4 of Order XXXIX C.P.C. gives power to the court to discharge, vary, set aside the order of injunction on an application made thereto by any party dissatisfied with such order.

8. It may be noted that by the impugned order, the court having discharged the order of ex parte ad interim injunction passed by it earlier, it has exercised power under Rule 4 of Order XXXIX C.P.C. which is appealable under sub-rule (r) of Rule 1 of Order 43 C.P.C. I, therefore, on considering the nature of the impugned order find that the said order, for the above reason, is an appealable order and the F.A.O. is maintainable.

9. Bereft of the question of maintainability, the only other point which was raised before me in this appeal is as to whether in the event of non-compliance of the provisions of Order XXXIX, Rule 3 C.P.C. proviso, should the court automatically vacate the ex parte ad interim injunction order passed earlier only on the ground of non-compliance of the said proviso without entering into the merits of the application under Order XXXIX Rules 1 and 2 C.P.C. as has been done by the learned District Judge in the impugned order. The provisions of the Code under Order XXXIX do not provide that non-compliance of the proviso to Rule 3 will entail vacation of the ad interim ex parte injunction order passed earlier by the court. The facts in the present case reveal that the ex parte ad interim injunction order was passed on 3.2.2012 and admittedly, the requirements of the proviso to Rule 3 were not complied by the appellants on the day when the order was passed or on the day following immediately. An explanation was given by the appellants that they were not aware of the ad interim ex parte injunction order, until they obtained the certified copy of the said order on 10.3.2012 and immediately thereafter, they complied with the proviso to Rule 3.

10. Mr. S.P. Mishra, learned senior counsel appearing for the respondents relying upon the judgment of the Delhi High Court in the case of ***M/s. Aswani Pan Products Pvt. Ltd. v. M/s. Krishna Traders***, passed in C.S. (O.S) No. 284/2012 on 2.3.2012 and another judgment of the said Court in the case of ***Interlink Services Pvt. Ltd. v. S.P. Bangera***, 65 (1997) DLT 228 as well as the judgment in the case of ***S.B.L. Limited v. Himalaya Drug Co.,*** AIR 1998 Delhi 126 submitted that the Delhi High Court in the

aforesaid decision has clearly laid down that in the event of non-compliance of the mandatory provisions of Order XXXIX, Rule 3 C.P.C., there is no option left with the court except to vacate the ex parte order of injunction.

11. In the case of Interlink Services (P) Ltd. (supra), the Delhi High Court was considering an interim application in its original side, filed in a suit, for a decree for permanent injunction restraining the defendant directly or indirectly from dealing with or entering into contract, agreement or understanding with any of the principals of the plaintiff including Sidel and Husky contrary to the agreement dated 28.7.1995 for a period of three years commencing from 1.8.1996 and for a preliminary decree for rendition of accounts in respect of any dealings which might have taken place between the defendant and the said principals of the plaintiff. An ex parte injunction was granted in the I.A. before appearance of the defendant in the said case. The defendant after appearing contested the claim of the plaintiff both in the suit as well as in the application for interim injunction contending that, both the suit and the interim application are liable to be dismissed and the ex parte injunction granted is also liable to be vacated. The Delhi High Court considering the merits of the case with regard to grant of interim injunction and analyzing the facts of the said case, came to the conclusion that for the reasons assigned in the judgment, the plaintiff is not entitled to an order of interim injunction. After holding thus, it considered the submissions made on behalf of the defendant that the plaintiff has not complied with the mandatory provisions of Order XXXIX, Rule 3 C.P.C. inasmuch as the affidavit in compliance of the same was not filed by the plaintiff. In that context, the Delhi High Court proceeded to interpret Order XXXIX, Rule 3 C.P.C. and held as follows:-

> "Order 39 Rule 3 Civil Procedure Code enjoins upon the applicant for injunction to deliver to the opposite party or to send to him by registered post immediately after the order granting ex parte injunction has been made, a copy of the application for injunction together with other relevant documents as mentioned therein on which applicant relies and file on the date on which such injunction is granted or on the date immediately following that date an affidavit that such copies as aforesaid were so delivered or sent. In Shiv Shankar Chadha vs. Municipal Corporation of Delhi, it was held that the compliance of this provision is mandatory. Following this judgment, this Court in M/s. Marble Udyog Ltd. v. M/s. P & O India Agency Pvt. Ltd., 1995 (3) AD Delhi 812 has held that for non-compliance of this provision, there was no option left with the Court except to vacate the ex parte order of injunction. For this reason also

the temporary injunction is liable to be vacated. However, the plaintiff has been found to be not entitled to temporary injunction on merits"

12. In M/s. Ashwani Pan Products Pvt. Ltd. (supa), the Delhi High Court also in its original side dealing with an interim application filed in a suit, relying upon the decision in the case of ***Shiv Kumar Chadha etc. etc. v. Municipal Corporation of Delhi and others***, (1993)3 SCC 161 and other decisions of the said High Court, while concluding that provisions of Order XXXIX, Rule 3 C.P.C. are mandatory, held that it is well settled law that in the event there is a non-compliance with the mandatory provisions contained in Order XXXIX, Rule 3 C.P.C. to supply to the opp. parties the copy of the application for temporary injunction together with other relevant documents relied upon by the applicant in support of the said application, immediately after the order granting ex parte interim injunction is passed, the said order is liable to be vacated as the said provision is mandatory in nature. In S.B.L. Limited (supra) , the Delhi High Court also was of the view that if the Court is satisfied of non-compliance by the applicant with the provisions contained in the proviso, then, on being so satisfied the Court which was persuaded to grant an ex parte ad interim injunction confiding in the applicant that having been shown indulgence by the Court, he would comply with the requirements of the proviso, it would simply vacate the ex parte order of injunction without expressing any opinion on the merits of the case leaving it open to the parties to have a hearing on the grant or otherwise of the order of injunction but bi-parte only. The applicant would be told that by his conduct (misconduct to be more appropriate) he has deprived the opponent of all opportunity of having an early or urgent hearing on merits and therefore, the ex parte order of injunction cannot be allowed to operate any more.

13. In Shiv Kumar Chadha (supra), the Supreme Court was dealing with the question of sealing and/or demolition of buildings at Delhi. The owners/occupiers/ builders filed an appeal before the Hon'ble Supreme Court against the order passed by the Delhi High Court directing the Municipal Corporation of Delhi to issue appropriate notices to the owners/occupiers/builders of the buildings where illegal constructions have been made. The High Court gave liberty to them to file fresh building plans with the Corporation in conformity with the existing bye-laws and directed that the building plans as filed are to be examined in accordance with law. The Corporation was directed that if it finds that the constructions are beyond the compoundable limits, then to seal the same and to demolish thereafter. The appellants were aggrieved by this part of the order. But they sought interference of the Hon'ble Supreme Court with the part of the order where the Delhi High Court said that no civil suit will be entertained by any

court in Delhi in respect of any action taken or proposed to be taken by the Corporations with regard to the sealing and/or demolition of any building or any part thereof and any person aggrieved by an order of sealing or demolition which is passed, shall, however, have the right of filing an appeal to the Appellate Tribunal under the Municipal Act. The other part of the order in respect of which the appellants preferred appeal was , where the Delhi High Court directed the Corporation to approach those courts which have already issued injunction "for variation and vacation of the injunction order in the light of" the said order. While considering the questions raised in the appeals with regard to maintainability of the suit filed against orders of demolition, taking note of the provisions of Section 343 (1) of the Corporation Act, the Supreme Court observed that in terms of the said provisions, the court should not ordinarily entertain a suit in connection with the proceedings initiated for demolition by the Commissioner and it should direct the persons aggrieved to pursue the remedy before the Appellate Tribunal and then before the Administrator in accordance with the provisions of the said Act. But the Court should entertain a suit questioning the validity of an order passed under section 343 of the Corporation Act only if the court is of the prima facie opinion that the order is a nullity in the eyes of law because of any "jurisdictional error" in exercise of the power of the Commissioner or that the order is out side the Corporation Act. With regard to grant of temporary injunction in such suits, the Supreme Court observed that the primary object of filing such suits challenging the validity of the order of demolition is to restrain such demolition with the intervention of the court. In such suit, the plaintiff is more interested in getting an order of interim injunction. In that context, it held that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. Thus observing, the Supreme Court held and directed as follows:

> "……The purpose of temporary injunction is, thus, to maintain the status quo. The Court grants such relief according to the legal principles – ex debite justitiae. Before any such order is passed the Court must be satisfied that a strong prima-facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him. Under the changed circumstance with so many cases pending in Courts, once an interim order of injunction is passed, in many cases,

such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extent its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.

Power to grant injunction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying that "where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay …….

It has come to our notice that in spite of the aforesaid statutory requirement, the Courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that Court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall

not affect any party, at the stage of the final adjudication. Apart form that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the Court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant. The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the Proviso aforesaid was introduced, Rule 3 said "the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party". The proviso was introduced to provide a condition, where Court proposes to grant an injunction without giving notice of the application to the opposite party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the Court "shall record the reasons" why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party who invokes the jurisdiction of the Court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the Court about the gravity of the situation and Court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the Court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance there of will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far reaching effect, as such a condition has been imposed that Court must record reasons before passing such order. If it is held that the compliance of the proviso aforesaid is optional and not obligatory, then the introduction

of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purpose. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well-known cases of Taylor v. Taylor (1875) 1 Ch. D. 426, Nazir Ahmed v. Emperor, AIR 1936 PC 253. This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramachandra Keshav Adke v. Govind Joti Chavare, AIR 1975 SC 915. As such, whenever a Court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side. It must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. But any such ex parte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying :- "Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion ……

An ex parte injunction should generally be until a certain day, usually the next motion day ……"

Accordingly we direct that the application for interim injunction should be considered and disposed of in the following manner :-

(i) The Court should first direct the plaintiff to serve a copy of the application with a copy of the plaint along with relevant documents on the counsel for the Corporation or any competent authority of the Corporation and the order should be passed only after hearing the parties.

(ii) If the circumstances of a case so warrant and where the Court is of the opinion, that the object of granting the injunction would be defeated by delay, the Court should record reasons for its opinion as required by proviso to Rule 3 of Order 39 of the Code, before passing an order for injunction. The Court must direct that such order shall operate only for a period of two weeks, during which

notice along with copy of the application, plaint and relevant documents should be served on the competent authority or the counsel for the Corporation. Affidavit of service of notice should be filed as provided by proviso to Rule 3 of Order 39 aforesaid. If the Corporation has entered appearance, any such ex parte order of injunction should be extended only after hearing the counsel for the Corporation.

(iii) While passing an ex parte order of injunction the Court shall direct the plaintiff to give an undertaking that he will not make any further construction upon the premises till the application for injunction is finally heard and disposed of.

In the result, the appeals are allowed to the extent indicated above. In the circumstances of these cases, there shall be no order as to costs.

Appeals allowed."

14. On an analysis of the aforesaid decisions cited at the Bar, this Court is of the clear view that now it is well settled in law that the provisions of Rule 3 of Order XXXIX C.P.C. are of mandatory in nature. However, as observed by the Delhi High Court in the aforesaid decisions that non-compliance of the said provision will entail automatic vacation of the ex parte order of ad interim injunction passed by the court is not what has been laid down in the decision of the Supreme Court in the case of Shiv Kumar Chadha (supra). This Court respectfully dis-agrees with the view of the Delhi High Court that on non-compliance of the proviso of the Order XXXIX, Rule 3 C.P.C. when an ex parte ad interim injunction order is passed, the court would be bound to vacate such order automatically.

15. As earlier observed, what Order XXXIX, Rule 3 C.P.C. provides is that the ad interim injunction order as sought for by the plaintiff, to be passed by exercising jurisdiction under Order XXXIX, Rules 1 and 2 C.P.C., can be passed ex parte if the plaintiff shows the urgency in the matter disclosing that non-passing of such an order ex parte would not only prejudice him but would cause irreparable injury to him. Only when such a case is shown, the order of ad interim injunction which is always discretionary can be passed by a court ex parte, provided, the court records the reasons for passing such an ex parte order. Only when such an ex parte order is passed, the requirements under the proviso to Rule 3 is to be complied with mandatorily.

16. The compliance of the requirements of the proviso is for the purpose of intimation of the ex parte order of injunction to the other party so that the said order can be given effect to and will become enforceable and binding on the other party, the moment the conditions in the proviso are observed and intimation of the order is received by the other party.

17. Thus, when such conditions are strictly observed after the court passes an ex parte ad interim order of injunction by giving reasons for passing such order under Order XXXIX, Rule 3 C.P.C. it would not be open for the other party to say that it had no knowledge of such order and continue to act contrary to the ex parte ad interim order of injunction. In other words, the mandatory provision of Order XXXIX, Rule 3 proviso if not complied with, the plaintiff subsequently cannot allege violation of the said order against the opp. party by filing an application under Order XXXIX Rule 2-A C.P.C. Further, as already observed by this Court, if the court has passed an ex parte order of ad interim injunction by exercising jurisdiction under Order XXXIX, Rules 1 and 2 C.P.C., on assigning reasons, such an ex parte order of injunction cannot be discharged, varied or set aside, unless opp. party files an application for the above purpose under Order XXXIX Rule 4 C.P.C. Hence, this Court is of the view that once an order of ad interim ex parte injunction is passed by assigning reasons as contemplated under Order XXXIX, Rule 3 C.P.C., such an order can only be varied, discharged or set aside when an application is filed by the opp. party for that purpose under Rule 4 of the said Order XXXIX. Non – compliance of the provisions of Order XXXIX, Rule 3 C.P.C. with regard to delivering or sending by registered post, a copy of the application for injunction, a copy of the affidavit filed in support of the application, a copy of the plaint and copies of document on which the plaintiff relies can only tantamount to the fact that such an ex parte order will not be binding on the opp. party. Therefore, the question of plaintiff's enjoying the fruits of such order will not arise even if the opp. party appears in the said proceeding and files his objection/application for vacating the order. Therefore, the ex parte ad interim order of injunction passed by the court in accordance with Rule 3 will be operative against the opp. party only when he appears in the proceeding and having knowledge of the said order files an objection or application to vary or vacate the same.

18. The Supreme Court in the case of Shiv Kumar Chadha (supra), thus, while holding that the provisions of Rule 3 of Order XXXIX C.P.C. are mandatory in nature, disposed of the appeals directing that the application for interim injunction should be considered and disposed of in the manner stated therein (as quoted above). Following the above ratio, in the instant case, this Court, therefore, feels it appropriate that the learned court below

is not correct in straightway vacating the ex parte ad interim order of injunction passed by it earlier only on the ground of non-compliance of the provisions of Order XXXIX Rule 3 C.P.C. Hence, the said order is set aside and it is directed that the appellants-plaintiffs, who though state to have already sent the required documents as per the proviso to Order XXXIX Rule 3 C.P.C. by registered post to the opp. parties, shall provide copies of the interim application supported by affidavit and the documents on which they rely along with copy of the plaint to the defendants and the learned court below shall call upon the defendants to file its objection, if any, thereto and take up the application for interim injunction for final disposal, since the opp. parties – defendants have already entered appearance in the suit. Till such copies of the application, plaint and documents are supplied to the opp. parties – respondents, it cannot be presumed that they are bound by the ex parte ad interim order of injunction from the date when it was passed till the date, when copies of the documents as per the proviso to Rule 3 are supplied to them or to their learned counsel. However, the said ex parte ad interim order of injunction passed by the court earlier, can only be varied, discharged or confirmed in the final order to be passed by the learned trial court in the application for interim injunction under Order XXXIX, Rules 1 and 2 C.P.C. as per the provisions of Rule 4 of the said Order XXXIX.

19. The FAO is accordingly disposed of.

Appeal disposed of.

2012 (II) ILR - CUT- 683

M. M. DAS, J.

CRLMC. NO.461 OF 2009 (Dt.08.05.2012)

DEBI PRASAD MOHANTY ……Petitioner

.Vrs.

STATE OF ORISSA … …Opp.Party

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

Offence alleged U/ss. 399, 402, 307 I.P.C. and Sections 25 & 27 of the Arms Act – None of the seizure lists discloses that the seizures were made from the spot – Neither the informant nor the witnesses stated anything that the accused persons were discussing among themselves from which it can be suspected that they were preparing to commit dacoity – No material in the case diary to implicate the petitioner and other accused persons with the alleged offences – In the above circumstances the case is likely to be ended in acquittal – Held, since this Court does not find any prima-facie case made out against the petitioner and other accused persons the FIR being registered as Chandaka P.S. Case No.5 of 2009 corresponding to G.R. Case No.154 of 2009 pending before the learned SDJM, Bhubaneswar is quashed.

(Para 5)

For Petitioner - M/s. D.P.Dhal, S.K.Tripathy, A.K.Mishra & S.Mishra.

For Opp.Party - Addl. Govt. Advocate.

M. M. DAS, J. This application under Section 482 Cr. P.C. has been filed by the petitioner to quash the F.I.R. dated 18.1.2009 registered as Chandaka P.S. Case No.5 of 2009 corresponding to G.R. Case No.154 of 2009 pending before the learned S,D,J.M., Bhubaneswar.

2. An FI.R. was lodged by the A.S.I. of Police, Nandankanan Out Post, namely, Shri Kailash Chandra Bhoi, on 18.1.2009 in the Chandaka P.S., inter alia, stating that on the said date at about 5.00 P.M., he received reliable information that a group of persons numbering about 5 have assembled at the backside of Botanical Garden office inside the Botanical Garden of Nandankanan in a bush, armed with deadly weapons, preparing to commit dacoity in the nearby villages. They have come to the said place in two motor-cycles. On receiving such information, the informant-A.S.I. entered the said fact in the station diary of Nandankanan Out Post vide

Station Diary Entry No.346 dated 18.1.2009 and immediately left the Out Post along with two constables named in the F.I.R. to the spot, to verify the matter. On his arrival at the Botanical Garden Gate, he called the Nandankanan staff members, also named in the F.I.R., to accompany him. On arriving at the place, he heard from a little distance, the voice of some persons in the nearby bush at the backside of the Botanical Garden Office. They carefully advanced towards the spot and surrounded the area and found five persons who were sitting together and talking amongst themselves and over mobile phones about their plan to commit Dacoity at the nearby villages. He along with the police staff and the persons accompanying them captured those five persons and at that time, he detected that one of them was carrying a pistol loaded with ammunition in his pant pocket. So, the informant-A.S.I., immediately tried to disarm him, to which he resisted and during the tussle with him, he fired one shot and tried to escape from the clutches of the informant. Further, he along with others managed to overpower and disarm the said person. On his personal search, one mobile phone bearing no.9437043215 of Nokia make was also recovered from his possession. On the query of the informant, the said person disclosed his name and address as Amarender Singh, son of late Kameswar Singh of Madhupatana. At the same time, another person also attempted to run away who was also captured by them. In the process, he sustained injuries on his face. On asking, he disclosed his name as Kashinath Sahoo and the remaining three persons also disclosed their names to be Devi Prasad Mohanty, Suresh Chandra Panda and Ramnarayan Singh. Two more mobile phones were also recovered from them the numbers of which have been mentioned in the F.I.R. Two motor-cycles, the registration numbers of which have been mentioned in the F.I.R. were also seized by him. Another ammunition case having “KF 7.65” engraved on it along with fired pellet from the spot were recovered with two bamboo sticks measuring about 4 feet each. The said F.I.R. was registered for alleged commission of offence under Sections 399/402/307 I.P.C. read with Section 25/27 of the Arms Act.

3. Mr. Dhal, learned counsel appearing for the petitioner, who is one of the accused named in the F.I.R. being Devi Prasad Mohanty, submitted that on a bare reading of the F.I.R. it would be seen that the petitioner except on being asked disclosing his name as Devi Prasad Mohanty, there is no other iota of materials to implicate him with the alleged offence. He further submitted that no incriminating materials have been seized from the petitioner. The petitioner is stated to be a Government servant working as Senior Assistant in the Health and Family Welfare Department, Orissa,

Bhubaneswar and also working as Advisor of Madhupatna Puja Committee, Cuttack and other accused persons are all respected persons of the said locality of Madhupatna. All the accused persons, as per the contention of Mr. Dhal are Income Tax assesses and the petitioner is also a Trade Union activist. He is also working as President of Orissa State Non-Gazetted Officers Co-ordination Committee, Bhubaneswar.

4. Learned counsel for the State, on the contrary, submitted that the F.I.R. itself discloses that the alleged offences have been committed by the petitioner and therefore, the plea of the petitioner that no case is made out against him cannot be accepted,

5. In order to appreciate the case of the respective parties, I called for the case diary, which was produced before me. On perusal of the same, it appears that the informant as well as accompanied constables had corroborated the F.I.R. story. The articles seized, such as, motor-cycles and the mobile phones have been given in Zima to the respective persons from whom those were seized. The pistol was also returned to the accused Amarendra Singh along with the license, in Zima. Though it is stated that the incident took place on 18.1.2009 and the informant who is an A.I.S. seized the articles from the spot, but the seizure lists have been prepared on 7.3.2009 and 21.6.2009 and the articles have also been given in Zima on the date when the seizure lists have been prepared. On the face of the seizure lists, it appears that the place of seizure is stated to be Chandaka P.S. and the fact of seizure is stated to be on being produced by the respective accused persons to whom the seized articles have been given in Zima. None of the seizure lists discloses that the seizures were made from the spot. None of the witnesses including the informant have stated anything to show that the accused persons were discussing among themselves from which it can be suspected that they were preparing to commit dacoity. From the entire case diary, this Court does not find any iota of material to implicate the petitioner and the other accused persons with the alleged offences for which the F.I.R. has been registered. It is well settled in law that if the material does not disclose any offence to have been committed and the case would inevitably end in acquittal, by exercise of power under Section 482 Cr.P.C., the F.I.R. can be quashed. As already stated above, since this Court does not find any prima facie case to have been made out against the petitioner and the other accused persons, the F.I.R. in its entirety registered as Chandaka P.S. Case No.5 of 2009 corresponding to G.R. Case No.154 of 2009 pending before the learned S.D.J.M., Bhubaneswar stands quashed.

The CRLMC is accordingly allowed.

Application allowed.

2012 (II) ILR - CUT- 686

INDRAJIT MAHANTY, J.

CRLMC. NO. 597 OF 2008 (Dt.04.07.2012)

PRADEEP KUMAR PRADHAN ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.239.

Application for discharge – When and how to consider – On a reading of Sections 238, 239 and 240 Cr.P.C. together it becomes clear that the mandatory requirement for the Court is to first consider compliance of the provision U/s.238 Cr.P.C. and if an application for discharge is filed, the same has to be considered and only after such consideration and hearing the trial Court shall proceed to form an opinion whether or not there is sufficient ground for presuming that the accused has committed the offence.

Here the case was posted to 18.04.2007 for framing of charge – On that day accused filed petition for discharge – Learned Magistrate framed charge on 18.04.2007 but kept pending the application for discharge which was rejected by order Dt.23.07.2007 – Both the orders are under challenge – Held, the impugned orders Dt.18.04.2007 and 23.07.2007 are quashed and the matter remitted back to the learned SDJM, Bonai to here the petition U/s.239 Cr. P.C. on merit.

(Para 6,8)

For Petitioner - M/s. A.R.Dash, R.N.Behera, M.C.Swain, S.K.Nanda & B. Mohapatra.
For Opp.Parties- Addl. Govt. Advocate (O.P.No.1)
M/s. P.C.Chhinchani (O.P.No.2)

I. MAHANTY, J. This petition under Section 482, Cr.P.C. has been filed by one Pradeep Kumar Pradhan seeking to challenge the order of framing charge dated 18.04.2007 and the order dated 23.7.2007 passed by the learned S.D.J.M., Bonai in G.R.Case No. 168 of 2005 rejecting the petition filed under Section 239, Cr.P.C. seeking discharge.

2. Mr.A.R.Dash, learned counsel for the petitioner asserts that on the date when the charge was framed, i.e. on 18.4.2007, a petition under

Section 239, Cr.P.C. has been filed seeking discharge by the accused-petitioner (copy of which is appended to this petition as Annexure-2). He further asserts that even though such petition was filed and kept pending for consideration, the same was not heard and disposed of on 18.4.2007,(i.e. on the date of framing of charge) but instead the learned S.D.J.M. took up the petition for consideration on 23.7.2007 and in the said order, it is observed as follows :

> " …… But on the same day while framing charge after hearing of the both sides, this Court has held that there is sufficient materials in the record to believe that there is a prima facie case against the accused U/s.498(A), IPC and 4 D.P. Act. Hence, the petition dt.18.4.2007 filed by the accused be treated as rejected. X x x x x ."

In other words, it is asserted that the learned S.D.J.M. has not determined the petition filed by the petitioner on its own merits and since he had ignored to pass any order on the petition filed by the accused for discharge on 18.4.2007, by a later order, i.e. on 23.7.2007 came to hold that since charge has already been framed by him after hearing learned counsel for the parties on 18.4.2007, the petition for discharge itself would be "**treated as rejected**'.

3. Mr.P.C.Chhinchani, learned counsel appearing for opposite party no.2 strenuously urged that since charge was framed on 18.4.2007 after hearing learned counsel for both the sides, the requirement of Section 239, Cr.P.C. has been satisfied and he could have no grievance thereto.

4. Mr.Dash, learned counsel appearing for the accused-petitioner, on the other hand, submits that as would be evident from Sections 238, 239 and 240, Cr.P.C. once the accused files a petition for discharge, it is incumbent upon the trial court to consider the same and only after rejection of the same, the Court could proceed to frame charge under Section 240, Cr.P.C.

5. Having heard learned counsel for the parties as well as learned Addl. Government Advocate on behalf of the State and on perusing the provisions of Sections 238, 239 & 240, Cr.P.C. it is clear therefrom that when an accused appears or is brought before the Court in pursuance of commitment of the case under Section 209, Cr.P.C., the prosecutor shall open its case by describing the charge brought against the accused and state what evidence he proposes to prove the guilt of the accused under Section 240, Cr.P.C. Thereafter, the Court is required to examine the case

record and the documents submitted therewith, hear the submission of the accused as well as the prosecution and if the Judge considers that there is no sufficient ground to proceed against the accused, he shall discharge the accused and record his reasons for so doing. Section 240, Cr.P.C. clearly stipulates that only after such consideration and hearing as aforesaid, if the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, he shall proceed thereafter in accordance with law.

6. On a reading of the aforesaid three provisions of the Code of Criminal Procedure together, it is abundantly clear therefrom that, the mandatory requirement for the court is to first consider compliance of the provisions of Section 238, Cr.P.C. and if the application for discharge is filed, the same has to be considered and only after such consideration and hearing of the petition, the trial court shall proceed to form an opinion whether or not there is sufficient ground for presuming that the accused has committed the offence.

7. As per the aforesaid provisions of law and the discussions made above, it clearly appears that the impugned order dated 23.7.2007 has been passed basing on a presumption, which is not available under law. The accused-petitioner admittedly filed the petition for discharge on 18.4.2007 and the said petition was neither considered nor heard, but instead on 18.4.2007 charges were framed, off course after hearing the respective parties. But the said petition under Section 239, Cr.P.C. remained pending for consideration. Thereafter only on 23.7.2007, the petition filed on 18.4.2007 seeking for discharge came to be "**treated as rejected**" without entertaining the issue raised by the accused-petitioner.

8. In view of the foregoing discussions, I am of the considered view that interest of justice would be best served if both the orders dated 18.4.2007 and 23.7.2007 passed in G.R.Case No. 168 of 2005 are quashed and the matter is remitted back to the learned S.D.J.M., Bonai to hear the petition filed by the petitioner under Section 239, Cr.P.C. on its own merits and ordered accordingly.

9. The CRLMC is allowed with a direction to the learned S.D.J.M., Bonai to consider the petition filed by the petitioner under Section 239, Cr.P.C.(copy of which has been annexed as Annexure-2) and thereafter to proceed in accordance with law. While considering the said petition, the trial court shall not be influenced by any observation made in this order. Since the matter is pending for a substantial period, the trial court shall do well to

expeditiously deal with the same. The interim orders passed earlier stand vacated.

Application allowed.

2012 (II) ILR - CUT- 690

INDRAJIT MAHANTY, J.

CRLMC. NO. 2180 OF 2009 (Dt.18.04.2012)

VARUN PASSARY & ANR. ……..Petitioners

.Vrs.

M/S. MAITHAN ISPAT LTD. .....Opp.Party

NEGOTIABLE INSTRUMENTS ACT, 1881 (ACT NO.26 OF 1981) – S. 138.

Petitioner-accused seeks direction for sending the bounced cheques to a handwriting expert for examination of the writings – Learned Magistrate rejected the prayer which was affirmed in revision – Hence this application – Held, ends of justice would be best served if an opportunity is granted to the accused to examine an expert at his own cost – Direction issued to the trial Court to grant him an opportunity to examine the disputed documents, submit a report and examine himself as a witness in the case preferably on the same day.

(Para 5)

Case law Relied on :-

(2009) 44 OCR (SC) 195 : (G. Someshwar Rao-V- Samineni Nageshwar Rao & Anr.)

Case laws Referred to:-

1.(2007)2 SCC 258 : (Kalyani Baskar (MRs.)-V- M.S. Sampoornam(MRs.).
2.(2008)5 SCC 633 : (T.Nagappa-V- Y.R. Muralidhar).

For Petitioner - M/s. S.Ratho, M.K.Das & Mahendra Kumar Das.
For Opp.Party - M/s. R.Sahu-2, B.P.Mohapatra & S.Pradhan.

I. MAHANTY, J. This application under Section-482 Cr.P.C. has been filed by the petitioner-Varun Passary and another, Director of M/s. Mani Vyapar (P) Ltd., Kolkatta, inter alia, seeking to challenge the judgment dated 02.05.2009 in Criminal Revision No.25 of 2008, whereby, the lower revisional court i.e. Additional Sessions Judge, Rourkela came to dismiss the revision and affirm the earlier order passed by the learned J.M.F.C., Rourkela in I.C.C. Case No.23 of 2007, who by order dated 23.10.2008 rejected a petition filed by the petitioner seeking for direction for sending the bounced cheques to a handwriting expert for examination of the writings.

2. Ms. S. Ratho, learned counsel appearing for the petitioners sought to contend that the respondent-petitioner No.1 had issued cheques as 'security' for receipt of advance from the complainant for supply of iron ore. Learned counsel for the petitioners asserted that the complainant had advanced a sum of Rs.75,00,000/-, whereas, the total amount payable for supply of 3600 M.Ts. of iron ores was Rs.99,69,300/-. It is contended that, since the balance amount was not paid by the complainant-purchaser, no supply of iron ore was effected. It is further averred that the complainant had advanced a sum of Rs.75,00,000/- to the respondent-petitioners against security of five blank cheques amounting to Rs.75,00,000/-.

Learned counsel for the petitioners further submitted that while petitioner No.1 admits his signature on the body of the cheque, it is asserted that apart from the signature, all other writings on the cheques have been made by the complainant for which purpose, the application with a prayer for sending the said cheques for examination by handwriting expert had been filed.

Learned counsel for the petitioner asserted that the cheques which had been given to the opposite party-complainant was by way of security and had never been issued for the due discharge of any liability. In this connection reliance was placed on various judgments of the Hon'ble Supreme Court which are as follows: (i) ***Kalyani Baskar (MRs.) v. M.S. Sampoornam (MRs.),*** (2007) 2 Supreme Court Cases 258, (ii) ***T.Nagappa v. Y.R. Muralidhar, (2008) 5*** Supreme Court Cases 633.

3. Mr. R. Sahu-2, learned counsel for the opposite party, on the other hand, contended that the claim made by the petitioners that the cheques had been issued by them as 'security', is a clear 'after thought' and not a fact borne out on record. He submitted that while the complainant had, in fact, advanced a sum of Rs.75,00,000/- to the respondent-petitioner for supply of iron ore, in terms of their letter dated 8.9.2006, the accused, having failed to effect delivery of the iron ore even though advanced had been paid, offered to return the said advance amount of Rs.75,00,000/-, to the complainant and accordingly, the respondent-petitioner issued five cheques, each for the amount of Rs.15,00,000/- towards discharge of his liability. These cheques were sought to be encashed and dishonoured which are the subject matter of the present proceeding under the N.I. Act.

Mr. Sahoo, learned counsel for the opposite party further stated that the plea of the petitioner claiming the cheques as 'security cheque' is clearly an 'after thought' and has been raised merely to delay the proceeding and to

frustrate the provision of law. In this respect reliance was placed by him on a judgment of the Hon'ble Supreme Court in the case of G. ***Someshwar Rao v. Samineni Nageshwar Rao & Anr., (2009) 4***4 OCR (SC) 195.

4. Having heard the learned counsel for respective parties as noted hereinabove, since the facts of the present case are not in dispute, it needs to be reiterated herein that the petitioner's application before the learned trial court praying for sending of the cheques for an expert opinion, in spite of the fact that, the petitioner No.1 had categorically admitted his signature on the body of the cheque. In this respect, reliance placed by the petitioner on a judgment of the Hon'ble Supreme Court in the case of ***T.Nagappa v. Y.R. Muralidhar*** (Supra) is wholly misplaced. In the said case prayer had been made by the accused therein seeking to refer the cheque in question for examination by the Director of Forensic Science Laboratory "for determining the age of his signature" contending that the respondent had obtained the signed cheque from him in the year, 1999 as security for a hand loan of Rs.50,000/- which the accused claimed to have paid back to the complainant and that the complainant instead of returning the said cheque had misused the same many years later by entering a huge amount in the cheque, which the accused did not owe to the appellant. In the background of such fact, the Hon'ble Supreme Court came to hold that it was necessary to ascertain the age of the signature of the accused on the front page of the cheque as well as on the reverse. In other words, the Hon'ble Supreme Court in the said case referred the cheque for determination of the "age of signature" where the accused denies any liability would be justifiable.

The facts of the present case are clearly distinct. There is no suggestion even made by the accused in the present case similar to the allegation made in the aforementioned case. The facts of the present case being completely distinct, the said judgment would have no applicability to the facts that have arisen for consideration in the present case.

Further reliance was placed by the petitioners' counsel on a judgment of the Supreme Court in the case ***of Kalyani Baskar (MRs.) Vrs. M.S. Sampoornam (MRs.)*** (supra) which is also in my considered view misplaced. In the said judgment the accused therein had sought for sending the disputed cheque for the opinion of the handwriting expert, "to ascertain the genuineness of the signature" on it. On such a prayer being rejected challenge had been made before the Hon'ble Apex Court. The Hon'ble Apex Court concluded that a "fair trial" would include fair and proper opportunity to

be allowed to an accused by law to prove his innocence or otherwise the denial of such right would amount to a denial of the right to a fair trial. In the present case, the signature of accused is not in doubt nor has been questioned. Therefore, the facts situation that arose in the said judgment is distinct to the facts situation of the present case and in my considered view, the said judgment has no applicability to this case.

5. On the other hand, reliance was placed by the learned counsel appearing for the complainant (opposite party) on a judgment of Hon'ble Supreme Court in the case of ***G. Someshwar Rao v. Samineni Nageshwar Rao & Anr.*** (supra). In the said judgment, the Bench headed by Hon'ble Justice S.B. Sinha (as His Lordship the then was) concluded that, the ends of justice would be best sub-served if an opportunity was granted to the accused to examine an expert at his own cost. In the case at hand, I find the aforesaid judgment to have full applicability to the present case and dispose of the petition with a direction to the trial court to allow an opportunity to the accused-petitioner to examine an expert at his own cost and if he requisitions the services of an expert, the learned judge would grant him an opportunity to examine the disputed documents, submit a report and examine himself as a witness in the case preferably on the same date. Such a step as directed hereinabove must be taken by the petitioner herein within four weeks from the date of judgment.

6. With the aforesaid observations and directions, this CRLMC stands disposed of.

Application allowed.

2012 (II) ILR - CUT- 694

S. PANDA, J.

CRL. REV. NO.42 OF 2012 (Dt.01.08.2012)

RABINDRA MOHANTY … …Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 -(ACT NO.2 OF 1974) – S.200.

Complaint Petition – Amendment – No provision in Cr.P.C. to file amendment application – Amendment sought to correct the application where mistake was inadvertently Crept in- Amendment is common in nature and no prejudice would be caused to the accused and it is necessary for the just decision of the Case – Held, the Court in exercise of its ancillary and incidental powers can allow amendment even though there is no specific provision in the Code.

Case laws Referred to:-

1.AIR 2008 SC 3086 : (Subodh S.Salaskar-V- Jayprakash M. Shah & Anr.)
2.1990(I)OLR-402 : (Srimati Sabita Sahoo-V- Captain Khirod Kumar Sahoo)
3.1992(II) OLR-549 : (Smt. Aruna Kar-V- Dr. Sarat Dash @ Nachhi)

For Petitioner - M/s. L.M.Das, S.R.Das, P.R.Sahoo

For Opp.Parties- M/s. Samir Ku. Mishra,J.Pradhan,P.Prusty, D.K.Pradhan ,G.S.Sahaubidhin.

The petitioner, in the revision challenges the order dated 1.10.2011 passed by learned S.D.J.M. Balasore in ICC Case No.504 of 2009 allowing the application to amend the complaint petition.

The petitioner is the accused in a proceeding under Section 138 of the Negotiable Instrument Act. The complainant filed the aforesaid ICC case on the allegation that due to previous business relationship, the complainant purchased prawn feed on credit basis. In the said business transaction the accused was liable to pay heavy amount to the complainant. Accordingly, he issued an Account payee cheque on 22.4.2009 of the Central Bank of India, Bhubaneswar Branch to the tune of Rs.5,00,000/- in favour of M/s. Seva Sea Food to meet and discharge the liability. Since the said cheque was returned

by the banker with remarks “insufficient of funds” the complainant after following due procedure of law, filed the complaint case. The court below took cognizance of the offence under Section 138 of the N.I.Act on 23.9.2009 and notice was issued to the accused. While the matter stood thus, the complainant filed an application on 10.8.2011 to correct certain statement inadvertently not reflected in the complaint petition and he styled the said application as a petition for amendment and he wanted to insert in the complaint petition that the Proprietor of M/s. Seva Sea Food being a handicapped woman authorized the complainant to file complaint petition. However, the learned Advocate engaged earlier on behalf of the complainant had not reflected the said fact and wanted to furnish the address of the complainant Seva Sea Food situated at Vill/Post Nayapada (Haldipada) P.S. Basta, Dist.Balasore represented by its Manager. On the above explanation he has filed the application and prayed to allow him to carry out the said correction in the complaint petition. In the said petition, the present petitioner filed objection to amend the application on the ground that there is no provision under law to file an amendment application during trial and if the amendment is allowed, the nature and character of the complaint petition will be changed and the same would cause injustice to the accused.

The court below after hearing learned counsel for the parties and taking into consideration the limited nature of prayer made by the complainant and relying on the decision reported in 1988 CRLJ 1112, 2000 Cr.L.J.1579 (Mad.) allowed the application as the parties had not adduced any evidence by that time and the correction sought for by the complainant is common in nature and no prejudice would be caused to the accused and that correction is necessary for just decision of the case. He has also allowed the said application imposing cost of Rs.200/- to the accused.

Learned counsel appearing for the petitioner submitted that there is no provision in the Cr.P.C. to amend a complaint petition. Therefore, the impugned order is liable to be interfered with. In support of his contention he has relied on a decision in the case of **Subodh S.Salaskar** v. **Jayprakash M.Shah & Anr.,** AIR 2008 SC 3086.

On the other hand, learned counsel for the opp.party submitted that since application for amendment of the complaint petition is formal in nature and the complainant has filed the application to further elucidate the fact already stated in the complaint petition, the court below rightly allowed the same and as cost has been awarded, the accused would be no way prejudiced .He further submitted that the court below has the power to allow such correction in absence of any provision prescribed in the Cr.P.C. in

exercise of the ancillary power. In support of his contention he has cited a decision in the cases of **Srimati Sabita Sahoo v.Captain Khirod Kumar Sahoo,** 1990 (I) OLR-402, **Smt.Aruna Kar v. Dr.Sarat Dash @ Nachhi,** 1992 (II) OLR-549.

Considering the rival submission of the parties and on perusal of the application filed by the complainant for correction of the complaint petition, though it appears that the nomenclature of the application is a petition for amendment, it was rather an application for correction of the complaint petition and the correction is formal in nature, as stated above, the court has to look into the spirit of the application but not to the nomenclature of the application.

In the case of Subodh S. Salaskar (supra), the apex Court considered whether the provision appended to Section 142 of the N.I.Act inserted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 is retrospective in operation held that the provisions of the Act being special in nature, in terms thereof the jurisdiction of the Court to take cognizance of an offence under Section 138 of the N.I.Act was limited to the period of thirty days. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 in 2002. It confers a jurisdiction upon the Court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Criminal Procedure Code. The provisions of the said Acts are not applicable. If the proviso appended to Clause (b) of Section 142 contained a substantive provision and not a procedural one, it could not be given a retrospective effect .Accordingly, the apex Court held as such.

In view of the aforesaid legal position it was further held that the accused alleged to have issued post dated cheques dated 6.12.1996 and 28.9.2000) which were presented at a much later date i.e.10.1.2001 and the same was dishonored on the ground that account was not operative). A legal notice dated 17.1.2001 was sent by speed post asking the appellant to pay the amount, failing which legal action would be taken against him. Accordingly, complaint petition was filed on 20.4.2001 under Section 138 of the N.I.Act and said complaint petition was sought to be amended in adding Section 420 of the I.P.C. in the complaint petition and that application was allowed on 14.8.2001.A revision was filed before the Addl. Sessions Judge which was dismissed. A Criminal Writ petition was also filed before the High

Court and the same was dismissed on the ground that as a result of amendment of clause (b) of Section 142 of the Act delay has been caused in filing the complaint petition and the Magistrate has power to condone the delay. On the above factual background the apex Court held in the said decision that the court had no jurisdiction to allow the amendment of the complaint petition at a latter stage. Therefore, the High Court was not correct in taking the aforementioned view in the facts and circumstances of the case.

The apex Court has pronounced the said decision in the facts and circumstances of the said case, holding that the court below has no jurisdiction to allow the amendment application.

In the cases of Smt.Sabita Sahoo and Aruna Kar (supra) Division Bench of this Court while interpreting the statutory provision held that express grant of statutory powers carries with it by necessary implication, the authority to use all reasonable means to make such grant effective and further held that in absence of any power for dismissal of an application for prosecution, the Court in exercise of its implied power can direct dismissal for non-prosecution. It is firmly established rule that an express grant of statutory power carries with it by necessary implication, the authority to use all reasonable means to make such grant effective. (Sutherland's Statutory Construction 3rd Edition, Articles. 5401 and 5402. On Comat's Civil Law(Cushing's Edition)Vol.1 at page 88 it has been stated that. "It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it. It was further held that the court in exercise of its ancillary and incidental powers can direct restoration even though there is no specific provision in the Code.

Applying the above principle, since the Court has the ancillary and incidental powers to correct an application where mistake was inadvertently crept in and it has allowed the application for such correction by passing the impugned order, this Court is not inclined to interfere with the same. Accordingly, the CRLREV is dismissed. No cost.

Revision dismissed.

2012 (II) ILR - CUT- 698

B. K. PATEL, J.

MA NO. 994 OF 2001 (Dt.27.06.2012)

HATA SWAIN (DEAD) HIS LEGAL HEIR
RAMESH CH. SWAIN & ORS. ……. Appellants

.Vrs.

STATE OF ORISSA ……...Respondent

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

Remand – Remand should be done by the appellate Court for specific purposes and under specific circumstances and it cannot be made for the purpose of enabling a party to get a fresh opportunity for the omission committed in conducting the trial – There cannot be an arbitrary Order of remand without justifying conditions Under Rule 23, 23-A and 25 of Order 41 C.P.C.

In this case parties having exercised their rights to adduce evidence by availing all opportunities of being heard and there being no infirmity in the judgment and decree of the trial Court, the impugned judgment directing remand of the suit to be conducted by the defendant in a particular manner is not sustainable in law – Held, there is no basis for open remand of the suit for fresh trial – Impugned judgment passed by the learned District Judge is set aside.

(Para 12 to 16)

Case laws Referred to:-

1.1986(II) OLR 654 : (Nishi Swain & Ors. -V- Bikala Charan Swain.
2.1987(Ii) OLR 157 : (Harmohan Mishra & Anr. -V- Anapurna Dibya & Ors.)
3.AIR 2003 Karnataka 320 : (Balappa Naikappa Naik -V- Neelappa Khemappa Kashappagol)
4.AIR 2002 SC 771 : (P.Purushottam Reddy & Anr.-V- M/s. Pratap Steels Ltd.)

For Appellants - Mr. R.K.Mohanty, Sr. Advocate
M/s. S.J.Pradhan, P.K.Patnaik, C.R.Swain, B.Sahoo.
For Respondents - Addl.Govt.Advocate.

B.K. PATEL, J. This appeal by the plaintiffs in O.S. No.203 of 1989 (I) of the court of learned Munsif (now Civil Judge (Junior Division), Bhubaneswar under Order 43, Rule 1(u) of the Code of Civil Procedure (for short 'the C.P.C.') arises out of order dated 12.10.2001 passed by learned District Judge, Khurda at Bhubaneswar in Title Appeal No.4/17 of 2001/1992 remanding the suit under Order 41, Rule 23-A of the C.P.C. for fresh trial in terms of directions made in the impugned judgment.

2. The concluding part of the impugned order reads as follows:

> "13. From the discussions made and reasons stated in the foregoing paragraphs I hold that in the interest of justice the entire suit should be tried again affording the defendant an opportunity to amend the written statement of defence by pleading initiation of the land acquisition process under Exts.B/1 and B and other relevant notifications and documents and to confront the contents of Ext.A/2 to the P.W.1 (plaintiff no.13) on recall under Order 18, Rule 17 C.P.C., and allow the plaintiffs to lead rebuttal evidence. Since this is an open remand, both parties be given opportunity to adduce fresh evidence.
>
> 14. In the result, the appeal is allowed on contest without cost. The impugned judgment and decree are set aside and the suit is remitted back for retrial under Order 41, Rule 23-A C.P.C., as per the observations made in paragraph 13 supra. The learned Civil Judge (Junior Division), Bhubaneswar will make endeavour to dispose of the suit by the end of December, 2001. Parties are directed to appear before the trial court on 7.11.2001."

3. O.S. No.203 of 1989 (I) was instituted by plaintiffs against the sole defendant State of Orissa for declaration that they are owners in possession of the suit lands and for correction of the record of rights in their favour claiming absolute title over the suit lands as occupancy raiyats. The suit lands are recorded under different plots under khata no.38 of mouza Bomikhal in the ROR published in the year 1962. However, in the current settlement of the year 1987-88 the suit lands were fragmented to different plots under khata no.109 of mouza Bhaingar, but draft record of rights was prepared in favour of General Administration Department of Government of Orissa.

4. Defendant filed written statement disputing plaintiffs' claim over the suit lands. It was asserted by the State that the suit lands were acquired for public purpose in Land Acquisition Proceeding No.9 of 1962-63 on payment

of compensation to the plaintiffs. It was further pleaded that though the entire suit lands were acquired in Land Acquisition Proceeding No.9 of 1962-63, an area of AC.0.69 decimals of land out of suit plot no.18 and an area of AC.0.06 decimals of land out of suit plot no.12 were again acquired by mistake in the year 1973 in Land Acquisition Proceeding No.25 of 1973 for which plaintiffs were again paid compensation. It was also pleaded that in the current record of rights the State Government in the General Administration Department have been correctly recorded as owner in respect of the suit lands.

5. Considering the rival pleadings the trial court settled the following issues:

"(i) Is the suit maintainable?

(ii) Is there any cause of action for the suit?

(iii) Whether the entire suit properties have been acquired by the Government of Orissa in L.A. Case No.9 of 1962 or only some portion have been acquired in L.A. Case No.25 of 1973?

(iv) Whether the plaintiffs are the rightful owners of the suit property, having right, title, interest and possession over it? And

(v) If the plaintiffs are entitled to the reliefs prayed in the suit?"

6. In order to substantiate their case, plaintiffs examined plaintiff no.13 as P.W.1 and placed reliance on the documents marked Exts.1 to 5. One witness D.W.1, the Revenue Inspector of General Administration Department, was examined and documentary evidence marked Exts.A and B series were relied upon by the defendant.

7. On an appraisal of evidence on record learned trial court answered the vital issue nos.(iii) and (iv) in favour of the plaintiffs holding that suit properties had not been acquired by the Government of Orissa in Land Acquisition Proceeding No.9 of 1962-63 and that plaintiffs have established their claim over the suit lands. Accordingly, the suit was decreed declaring that the plaintiffs are the owners in possession of the suit lands and directing correction of record of rights published in the year 1987-88.

8. On appeal by the State the impugned order remand of the suit for retrial with directions as extracted at paragraph-2 above was passed.

9. In assailing the impugned judgment it was contended by the learned counsel for the appellants that the impugned order of remand is not sustainable in law. There was no grievance by the State either before the trial court or before the lower appellate court with regard to insufficiency of evidence or inadequacy of pleadings. At no point of time so far any application has been made by the State for adducing additional evidence or for amendment of written statement. Both the parties were given adequate opportunities to adduce evidence which they availed in support of their respective claims on the basis of which judgment and decree were passed by the trial court. In the impugned order of remand the learned District Judge has found no fault with the judgment and decree of the trial court holding that plaintiffs have established their claim over the suit lands whereas the State Government has failed to establish that the suit lands were acquired by the State Government in Land Acquisition Proceeding No.9 of 1962-63. Therefore, none of the provisions including the provision under Order 41, Rule 23-A of the C.P.C. could have been invoked to remand the suit for retrial advising the State Government to amend the written statement by pleading initiation of land acquisition process under Notifications under Exts.B and B/1, or to conduct the trial in a particular manner by recalling P.W.1 and confronting him with the contents of Ext.A/2. It was argued that State Government having failed to establish acquisition of suit lands as pleaded by adducing necessary evidence, there was no scope for remanding the matter. Order of remand cannot be made for the purpose of enabling a party to get a fresh opportunity for omission committed in conducting the trial especially in the absence of any prayer for amendment of pleadings or for adducing additional evidence. In this connection, learned counsel for the appellants placed reliance on the decisions of this Court in **Nishi Swain and others –vrs.- Bikala Charan Swain** : 1986 (II) OLR 654 and in **Harmohan Mishra & another –vrs.- Anapurna Dibya & others** : 1987 (II) OLR 157 as well as of Karnataka High Court in **Balappa Naikappa Naik –vrs.- Neelappa Khemappa Kashappagol** : AIR 2003 Karnataka 320.

10. In reply, it was contended by the learned counsel for the State appearing for the respondent that the learned District Judge having found certain discrepancies in the pleadings in the written statement and evidence adduced on behalf of the State due to improper conduct of the trial, has rightly resorted to provisions under Order 41, Rule 23-A of the C.P.C. to remand the suit for retrial.

11. There is no dispute regarding antecedent title of the plaintiffs over the suit lands. Plaintiffs have established their claim over the suit lands by producing documentary evidence Ext.1, certified copy of khatian of 1913

settlement; Ext.2 series, rent receipts, and Ext.3, notice issued in Land Acquisition Proceeding No. 25 of 1973 by Land Acquisition Authority for acquisition of some portions of suit plots not included in the suit properties. Oral evidence with regard to possession over the suit lands was also adduced. The entire case of the State depended on the acceptance of the stand of acquisition of the suit lands in Land Acquisition Proceeding No.9 of 1962-63. Record in Land Acquisition Proceeding No.9 of 1962-63 was not produced in court. Instead Ext.A, record in Land Acquisition Proceeding No.9 of 1961-62, was produced. That apart, State also relied upon Ext.B, Land Acquisition Notification dated 20.4.1960 in which the lands proposed to be acquired have not been described by assigning plot numbers. Instead in the Notification relating to proposed acquisition, four pieces of lands measuring 46.644 acres have been described by mentioning different plot numbers which bounded such lands. Therefore, Ext.B is also of no help in correlating the suit properties with the lands proposed to be acquired under the Notifications Exts. B and B/1.

12. In such circumstances, there is no infirmity in the observations of the trial court that though the defendant categorically averred in the written statement that suit lands were acquired in the year 1962 in Land Acquisition Proceeding No. 9 of 1962-63, instead of producing the record in the said case, defendant produced and proved Exts. A/1 and A/2 which relate to Land Acquisition Proceeding No. 9 of 1961-62. Defendant also did not plead anything regarding Ext.A/2 which is stated to be application dated 3.4.1962 filed by some of the plaintiffs. Moreover, the lower appellate court has not found any infirmity with the findings and conclusion of the trial court. Learned counsel for the appellants in course of hearing before this Court also has not shown any infirmity in the judgment and decree of the trial court in order to assail it on the ground that in view of nature of evidence adduced by the parties any other view leading to a different conclusion could have been taken by the trial court. Therefore, it is evident that there was no basis for open remand of the suit for fresh trial or retrial.

13. Specific provisions have been made in the C.P.C. empowering remand of a suit by appellate court for specific purposes under specific circumstances. There cannot be an arbitrary order of remand without satisfying conditions under Rules 23, 23-A or 25 of Order 41 of the C.P.C. High principle of public policy is to bring finality of an adjudication at the earliest. In **Nishi Swain and others –vrs.- Bikala Charan Swain** (supra), it has been held:

> "3. xx xx xx xx xx As the law stands now, power of remand is vested in the appellate Court under Rule 23, 23-A and 25 of Order 41, CPC.

> Rule 23 is not applicable to this case since the suit has not been disposed of on a preliminary issue. The consideration would have been different if remand would have been under Rule 25 which requires that the appeal shall be kept pending and an issue newly framed is to be sent back to the trial Court for returning the finding. This is, however, a case of open remand under Order 41, Rule 23-A, CPC. In a decision reported in AIR 1986 Ori. 207 (**Rushi and another v. Madan Behera and another**), I have expressed:
>
> "……The appellate Court is required first to make the endeavour to answer the disputed findings and where in spite of such findings it would not be in a position to come to a conclusion either way, it would remand the suit for fresh trial."
>
> I may make it clear that Order 41, Rule 23-A, CPC, should be sparingly used since the public policy is that a litigation is to be concluded finally as early as possible. Xx xx xx xx xx"

14. In view of nature of evidence adduced by the parties in the present case there is no scope to hold that the findings and conclusion of the trial court are not based on materials on record. Even when a party fails to discharge the burden of proof, an order of remand cannot be passed in order to enable him to get a fresh opportunity for that omission. **In P.Purushottam Reddy and another –v- M/s Pratap Steels Ltd**.: AIR 2002 Supreme Court 771 it has been categorically held by the Supreme Court:

> "An appellate Court should be circumspect in ordering a remand when the case is not covered either by R.23 or R.23A or R.25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided.

15. This Court also, in **Harmohan Mishra & another –vrs.- Anapurna Dibya & others** *(supra)*, has pointed out:

> "21.xx xx xx xx It is not the duty of a Court to necessarily record a conclusive finding and insist that the best evidence should be brought on record by the parties for that purpose. The anxiety of the Court does not extend to that extent. If the evidence would not establish the right of the plaintiff or of the defendant, as the case may, then the claim having not been proved would not be decreed and there the matter would end.

> When a party with full knowledge fails to discharge the burden of proof, an order of remand is not proper to enable him to get a fresh opportunity for that omission."

16. In view of the above, the nature of the directions given by the lower appellate court and remanding the whole matter for a retrial do not find support from any of the provisions conferring jurisdiction on an appellate court to pass an order of remand. The parties having exercised their rights to adduce evidence by availing all opportunities of being heard the impugned order directing remand of the suit to be conducted by the defendant in a particular manner is not sustainable in law.

17. In the result, the appeal is allowed and the impugned judgment dated 12.10.2001 passed by learned District Judge, Khurda at Bhubaneswar in Title Appeal No. 4/17 of 2001/1992 is set aside. Judgment passed by the trial court is confirmed. Parties shall bear their own cost.

Appeal allowed.

2012 (II) ILR - CUT- 705

B. K. MISRA, J.

W.P.(C) NO. 3399 OF 2012 (Dt.17.04.2012)

M/S. ORES ENTERPRISERS (P) LTD. …….Petitioner.

.Vrs.

ORISSA MINING CORPORATION LTD. ……Opp.Party.

CIVIL PROCEDURE CODE,1908-(Act No.5 of 1908) Order 9 Rule 13 r/w Order 43 Rule 1(d).

Suit decreed exparte – Application filed under Order 9 Rule 13 C.P.C. to set aside the exparte decree – Application dismissed for default – To restore the said application another application U/s.151 C.P.C. filed which was disallowed on merit – Order impugned in this writ petition.

Exparte decree passed in view of the negligence and carelessness of the writ petitioner – Normally a writ Court should not come to the aid of one who is indolent and careless in pursuing the litigation – An order dismissing an application under Order 9, Rule 13 C.P.C. is appealable under Order 43, Rule 1 (d) C.P.C. – Held, writ petition is disposed of with a liberty to the petitioner to file an appeal.

(Para 6)

Case laws Referred to:-

1.1985(II) OLR.155 : (Ramanath Misra-V-Ganeswar Misra & Ors.)
2.2008(I) OLR.783 : (Pravasini Behera-V- Sankar Das & Seven Ors.)

For Petitioner - Mr. Prahalad Kar, G.Kar, A.Mohanty, P.Ku.Mallick.
For Opp.Party - M/s. M.R.Mohanty, A.K.Panigrahi, L.K.Behera, P.Sethy. (for caveator)

B.K.MISRA, J. The petitioner being aggrieved with the impugned order passed by the learned Civil Judge (Sr.Divn.), Rourkela in C.M.A. No. 53 of 2010 (Annexure-5) has approached this Court under Articles 226 and 227 of the Constitution of India.

2. The material facts of the case are that the opposite party of this writ petition as plaintiff had instituted Civil Suit No. 221 of 2005 in the court of

learned Civil Judge (Sr.Divn.), Rourkela for recovery of Rs.63,35,151/- with pendentelite and future interest @ 12% per annum and the present petitioner was the defendant in the said suit. The said suit was decreed ex parte on 18.11.2008. To set aside the ex parte decree so passed, the petitioner-defendant filed a petition under Order, 9 Rule, 13 of the Civil Procedure Code (C.P.C.) which was registered as C.M.A. No. 99 of 2008 and the same was dismissed on 22.3.2010 for default of the petitioner. To restore C.M.A. No. 99 of 2008, another C.M.A. which was registered as 53 of 2010 was presented on 16.4.2010 under Section 151 of the C.P.C., but the same was also disallowed on merit by the court by the impugned order at Annexure-5.

3. Learned counsel appearing for the petitioner contended that by dismissal of the prayer in C.M.A. No. 53 of 2010 serious prejudice has been caused to the petitioner as the court adopted a too harsh attitude and did not consider liberally in allowing the Misc. Case and in setting aside the ex parte decree. It is alleged that the findings of the learned trial court that the petitioner was not so ill which prevented him from appearing before the court when the matter was taken up for hearing are perverse in view of the Medical Certificate produced by the petitioner and by examining the doctor in support of the illness. The learned counsel for the petitioner placed reliance on a decision of this Court as reported in **1985(II) OLR-155, Ramanath Misra V. Ganeswar Misra and others**.

4. Learned counsel appearing for the opposite party on the other hand by placing reliance on a Division Bench decision of this Court as reported in **2008(I) OLR-783, Pravasini Behera V. Sankar Das and seven others** raised serious objections about the maintainability of the writ petition and further contended that since the facts of **Pravasini Behera's case (supra)** is identical to the facts of the given case, the ratio decided in **Pravasini Behera's case(supra)** is binding on this Court since the aforesaid decision stands in full force. The facts of the Pravasini Behera's case (supra) is that she filed Title Suit No. 609 of 1998 against Sankar Das and others but since the defendants did not appear despite service of notice on them and also when they did not take any steps they were set ex parte on 20.8.1999. The said suit was decreed ex parte on 17.8.2001. Thereafter Misc. Case was filed for setting aside the ex parte decree under Order, 9 Rule 13 of the Civil Procedure Code the same was dismissed on 14.7.2003. Thereafter, after considerable delay another Misc. Case was filed to restore the first Misc. Case, that was also dismissed for default. For setting aside the dismissal order dated 6.12.2005 and also to restore Misc. Case No. 588 of 2002, that prayer was also dismissed by the learned Civil Judge (Sr.Divn.),

Bhubaneswar. Against the said order of the learned Civil Judge (Sr.Divn.), writ petition being W.P.(C) No. 15159 of 2006 was filed on 3.11.2006 and that was allowed by the learned Single Judge by setting aside the order dated 25.10.2006 passed by learned Civil Judge (Sr.Divn.), Bhubaneswar and direction was given for restoration of Interim Application No. 71 of 2005 on payment of cost. Challenging the said order of the learned Single Judge, Writ Appeal No. 73 of 2007 was preferred by Pravasini Behera and while deciding the said Writ Appeal and by taking into consideration the guidelines in **Surya Dev Rai's case (supra)**, their Lordships observed as follows:-

> " On this aspect, the Supreme Court has given clear indication and guidelines in Surya Dev Rai's case (supra). Before considering those guidelines it may be kept in mind that an ex parte decree has been passed. Such a decree is always appealable under the CPC. It is clear from the conduct of the writ petition that such an ex parte decree has been passed in view of his sheer carelessness and negligence. Normally a writ Court should not come to the aid of one who is indolent and careless in pursuing the litigation. Apart from that, the orders of the Civil Court would show that there has been repeated dismissals of the application under Order 9, Rule 13, CPC. An order dismissing an application under Order, 9, Rule 13 CPC ex parte can be appealed against under Order 43, Rule 1, Clause (d). The said remedy is sought to be bypassed by creating the subterfuge of an interim application for approaching the Writ Court. Under these circumstances filing of application under Articles 226/227 of the Constitution is impermissible in view of the clear guidelines given in paragraph 38 at page 3056 of the report in Surya Dev Rai's case. In this connection, sub-paras 3, 4, 5, 6 and 7 of para 38 are very pertinent."

5. It is the settled law that the High Court may intervene only when the error is such that if it is not corrected at the very moment it would become incapable for correction at a later stage and would result in travesty of justice. In this case there is no material on record to show that the order of the learned Civil Judge (Sr.Divn.), Rourkela is without jurisdiction or that it suffers from any patent error of law and there has been gross failure of justice. It is also the well settled position of law that the supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction namely, when the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise its jurisdiction which it does have or the jurisdiction though available has been exercised in a manner which is not permissible by law.

6. By applying the ratio in Pravasini Behera's case (supra) when the impugned order in refusing to set aside the ex parte order is an appealable one the present petitioner can very well file an appeal under Order 43, Rule 1 Clause (d) of the C.P.C. and thus Writ Court cannot come to the aid of the petitioner who was careless in pursuing the litigation.

7. In the circumstances for the reasons stated above, the writ petition stands disposed of with a liberty to the petitioner to approach the appropriate authority by presenting an appeal and in that event the learned appealate court would be free to dispose of the same on its own merit. Nothing in this judgment shall be construed as an expression of opinion on the merits of the order passed by the learned Civil Judge (Sr.Divn.), Rourkela and the remedy of the writ petitioner against the impugned order of the learned Civil Judge (Sr.Divn.), Rourkela is no way impaired by this judgment.

Writ petition disposed of.