2011 (II) ILR- CUT- 370

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

W.A. NO.259 OF 2011 (Decided on 12.5.2011)

M/S. PARADEEP PHOSPHATES LTD. …….. Appellant.

.Vrs.

SANKAR DAS & ANR. ..…. Respondents.

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

Order of dismissal against workman – Management filed application U/s.33 (2) (b) for approval – Application rejected – Order of dismissal becomes inoperative – Workman-respondent is entitled to salary from the period of first order of dismissal till the date of Second order of dismissal, even though the Second order of dismissal is still required to be approved - Held, grant of wages and other consequential benefits by the learned Single Judge to the respondents-workman is legal & valid and the same shall be paid within a period of six weeks by the employer otherwise the amount shall carry interest at the rate of 12% from the date of first order of dismissal till the date of payment.

(Para 12)

Case laws Referred to:-

1.AIR 2002 SC 643 : (Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.-V-Sri Ram Gopal Sharma & Ors.)

2.AIR 1994 SC 1074 P-1092 : (Managing Director, ECIL-V- B. Karunakar etc.)

3.1978 SC 995 : (Punjab Beverages Pvt. Ltd., Chandigarh-V-Suresh Chand & Anr.)

For Appellant - M/s. N.K.Mishra & A.K.Ray.

For Respondents - M/s. Aurovindo Mohanty, A.Das, M.D.Mishra, K.K.Satpathy.

V.GOPALA GOWDA, C.J. This appeal is directed against the order dated 4.3.2011 passed by the learned Single Judge in W.P.(C) No. 22852 of 2010 quashing the order dated 18.9.2010 passed by the learned Labour Court, Bhubaneswar in I.D. Misc. Case No. 58 of 2008 and directing the appellant to pay the entire amount claimed u/s. 33C(2) of the I.D. Act.

2. Mr. Misra, learned counsel for the appellant has urged various legal grounds placing reliance upon the judgment of the Hon'ble Supreme Court which will be adverted to at the later portion of the judgment and prayed for

setting aside the impugned judgment of the learned Single Judge wherein he has erroneously quashed the order dated 18.9.2010 passed by the learned Labour Court, Bhubaneswar in I.D. Misc. Case No. 1 of 2006 u/s. 33C(2) of the Industrial Disputes Act, 1947 (hereinafter referred as 'the Act' in short).

3. On 18.9.2010 learned Labour Court, Bhubaneswar rejected I.D. Misc. Case No. 58 of 2008 filed by the respondent-workman (arising out of I.D. Misc. Case No. 1 of 2006) praying for computation of his arrears of dues in terms of money payable to him. The impugned order of the learned Single Judge is sought to be annulled on the following grounds :

4. The detailed facts are not required to be adverted in the judgment as the same are available in the orders of the Labour Court which have been referred to by the learned Single Judge in the impugned order.

5. Admittedly the applicant has not worked for the relevant period under the opposite party. Further more no documents had been filed in support of the claim of monetary benefits of salary and other consequential benefits in terms of money. According to the settled principle of law as reported in 1995(I) LLJ 395, the power of Labour Court is like that of an executing Court. It cannot determine the dispute or entitlement in the proceedings under section 33(C)(2) of the Act as it is an executing court on the basis of claim in the absence of prior adjudication in the dispute or recognition by employer.

6. Learned Single Judge has failed to take into consideration of the fact that the Labour Court is only to act as an Executing Court on the basis of the pre-adjudicated right or entitlement in favour of the claimant-applicant, it can pass order computing the monetary benefits claimed by respondent-claimant. Such entitlement may be based upon any settlement, award or interpretation of any disputed claim. It is also further contended by the learned counsel for the appellant that where the very basis of the claim or entitlement of the workman to a certain monetary and consequential benefits is disputed, there being no earlier adjudication or recognition of such claim by the employer, the dispute for such entitlement is not incidental to the benefit or claim and therefore, it is clearly outside the scope of Section 33-C(2) of the I.D. Act proceeding. This important aspect of the matter has not been considered by the learned Single Judge while passing the impugned order. Hence the order impugned, is not only erroneous but also suffers from error in law. Thereafter placing reliance on the provision under Section 33-C(2) of the Act, it is contended by learned counsel for the appellant that the two questions material for consideration of the aforesaid provision pertain to decision on the entitlement of the workman which, in other words,

mean maintainability of the claim and computation of the benefit in terms of money in case the claim is maintainable in law. Evidently, the oral and documentary evidence led by the respondent-workman and the arguments made before the Labour Court do not enable him to maintain his application under section 33-C(2) of the I.D. Act. Therefore, the direction of the learned Single Judge to the Management to pay the amount as claimed by the workman, in the application filed before the Labour Court is bad in law and is liable to be quashed.

7. Another ground of attack of the impugned order is that the claim application coupled with the evidence of A.W. 1 reveals that the workman in the court below has deposed that he had neither any document in support of his claim nor he had exhibited any document in support of his claim. Hence his application is not maintainable in law and further on the basis of the liberty given in the order of this Court dated 17.3.2009 in W.A. No. 97 of 2008, the workman was dismissed from the post. The workman has also admitted in his cross-examination that after his dismissal w.e.f. 21.8.2006, he has never worked under the appellant-Management. The Hon'ble Single Judge has lost sight of the findings of the Labour Court recorded on the contentious issue. Therefore, the questioning of the order of the Labour Court passed on the petition of the first respondent under section 33-C(2) of the Act, by the learned Single Judge, is bad in law. Another ground urged is that a total reading of the entire facts and the material on record, and appreciation of the same leads to the inescapable conclusion that the workman has no pre-adjudicated right or entitlement to claim the amount as laid in Form-T(3) application for which, the order of the learned Labour Court could not have been interfered with by the Hon'ble Single Judge in the Writ Petition filed by the workman. Therefore, it is urged that the impugned order is bad in law and liable to be set aside. Further it is contended that a composite reading of the order of the learned Presiding Officer of the learned Labour Court and the concerned papers before the court leaves no room of doubt that the order dated 18.9.2010 passed by the learned Labour Court in dismissing the Misc. Case of the respondent-workman is strictly in terms of the law settled on the facts and circumstances of the case and evidence on record and the same is without any error of fact or law.

8. The respondent-workman placed reliance upon the decision of the constitution Bench of Hon'ble Supreme Court in ***Jaipur Zila Sahakari Bhumi Vikas Bank Ltd. v. Sri Ram Gopal Sharma and others***, *AIR 2002 SC 643* keeping in view a deeming situation contending that the said decision was earlier placed before this Hon'ble Court in RVWPET No. 78 of 2009 decided on 11.9.2009, this Court dismissed the review sought for by the petitioner giving due credence to the peculiar facts and circumstances of

the case. Therefore, the impugned judgment of the learned Single Judge with least consideration of the decision already rendered by the Division Bench of this Court as well as the Hon'ble Supreme Court, and, therefore, it is fallacious, erroneous and unsustainable in the eye of law.

9. Further it is contended that the constitution Bench judgment of the Hon'ble Supreme Court in ***Managing Director, ECIL v. B. Karunakar etc. etc.***, *AIR 1994 SC 1074* at page 1092, it has been clearly held that the order of reinstatement with full back wages in all cases cannot be passed mechanically in favour of an employee and in appropriate cases, the order of payment of back wages can be passed if the order of dismissal is quashed on the ground of non-compliance with the principles of natural justice in not furnishing the enquiry report to the employee. In the instant case, no such order is passed by the learned Single Judge while considering the correctness of the order of rejection of the application under section 33(2)(b) of the Act and, therefore, it is contended by the learned counsel for the appellant that the impugned judgment of the learned Single Judge needs to be set aside. Further in support of his aforesaid contention, he has placed reliance on another decision of the Hon'ble Supreme Court in ***Union of India v. Y.S. Sandhu***, *AIR 2009 SC 161,* wherein it has referring to the decision of the constitution Bench in Managing Director, ECIL (supra), observation is made with regard to the reinstatement or payment of back wages. Therefore, the order of the learned Single Judge in not considering the aforesaid judgments and the decision of the constitutional Bench of the Hon'ble Supreme Court in the case *Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.* (supra) should not have been applied to set aside the order of the learned Labour Court and grant relief under section 33-C(2) of the Act in favour of the respondent is not only erroneous but also error in law. It is further contended that for the period between the earlier order of dismissal dated 21.8.2006 and the later order of dismissal dated 18.12.2009, the respondent-workman is not entitled to the monetary benefits. Since this factual aspect is not considered, the impugned order of the learned Single Judge is liable to be set aside by allowing this appeal.

10. Learned counsel for the respondent-workman in order to justify the order of the learned Single Judge placed strong reliance on the earlier order 21.8.2006 of the Industrial Tribunal passed under section 33(2)(b) of the Act rejecting the approval application of the appellant, not approving the order of dismissal passed against him. It is contended by the learned counsel for the respondent-workman that the same is not required to be interfered with and further contended that the ratio of the judgment of the apex Court in *Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.* (supra) would be applicable in the facts

and circumstances of the case. It is also further contended that the observation of the learned Labour Cout passed in Misc. Case No. 58 of 2006 with regard to the non-recognition of the workman by the employer, is unfounded because in view of the settled principle of law laid down in *Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.* (supra), the workman is treated to be deemed workman under the employer from the earlier order of dismissal is approved and, therefore, he is entitled for wages and other consequential benefits for the period from the date of dismissal to the date of subsequent order of dismissal. Furthermore, the observation of the learned Labour Court that after the order dated 17.3.2009 passed in W.A. No. 97 of 2009 permitting the Management to restart the enquiry, the order of the Labour Court passed in Misc. Case No. 1 of 2006 has lost its force, the said contention is also baseless and not supported by law as the Hon'ble Single Judge has rightly quashed the order of the Labour Court rejecting the application in I.D. Misc. Case No. 58 of 2008.

11. With reference to the aforesaid rival legal contentions urged on behalf of the parties the questions that need consideration are :

(i) Whether the law laid down by the constitution Bench of the apex Court in *Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.* (supra) having regard to the undisputed facts that approval to the earlier order of dismissal, was not granted vide order of the learned Labour Court dated 8.4.2008 and subsequent de novo enquiry was conducted and again another order of dismissal dated 18.12.2009 passed against the workman, therefore, the workman is entitled to salary or not ?

(ii) Whether the decision of the constitution Bench of the apex Court for granting relief in favour of the workman by the impugned order after quashing the order of the Labour Court is legal and valid ?

(iii) Whether there is substantial question of law involved in this appeal in view of the finding recorded by the learned Single Judge on the contentious issue based on aforesaid constitution Bench of the apex Court ? The aforesaid points are to be answered against the appellant for the following reasons :

12. It is an undisputed fact that on 21.8.2006 on the ground of certain misconduct the order of dismissal was passed by the appellant against the respondent. Since the respondent was one of the concerned workmen in the Industrial Dispute pending before the Industrial Tribunal in I.D. Case, the

appellant-Management filed an application under section 33(2)(b) of the I.D. Act before the Tribunal seeking approval of the order of dismissal after conducting an enquiry. The Tribunal rejected the said application vide order dated 8.4.2008 for the reason that the enquiry report was not supplied to the workman before passing the order of dismissal against the respondent-workman. The said order was confirmed by this Court in Writ Petition No. 6715 of 2008 disposed of on 9.5.2008. Against the said order Management preferred W.A. No. 97 of 2008 which was disposed of with a liberty to the appellant to restart the enquiry from the point it stood vitiated. On completion of enquiry conducted, again dismissal order dated 18.12.2009 was passed on the basis of the liberty given in the order dated 17.3.2009 passed in the above W.A. No. 97/2008. The appellant has sought for approval of its order by filing an application in Misc. Case No. 10/2009 before the Industrial Tribunal, Bhubaneswar under section 33(2)(b) of the Act which is still pending.

13. Having regard to the aforesaid facts, the question for our consideration is as to whether the direction given by the learned Single Judge to pay the amount as claimed by the workman under section 33(C)(2) of the I.D. Act in Misc. Case No. 58 of 2008 filed before the Labour Court, Bhubaneswar is sustainable in the eye of law. If subsequent dismissal order was passed by conducting de novo enquiry against the concerned workman, that action would be subject to approval of the Industrial Tribunal as he was one of the concerned workmen and the main dispute is still pending for adjudication before the Tribunal. The constitutional Bench decision of the Hon'ble Supreme Court in the case of *Jeypore Zilla Sahakari Bhumi Vikas Bank Limited* (supra) overruled its earlier decision in the case of ***Punjab Beverages Pvt. Ltd., Chandigarh v. Suresh Chand and another etc.,*** *1978 SC 995.* Paragraph-14 of the constitutional Bench decision of the Hon'ble Supreme Court in the case of *Jeypore Zilla Sahakari Bhumi Vikas Bank Limited* (supra) is quoted hereunder :

> "14. Where an application is made under Section 33(2)(b), Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimisation or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2) (b) dismissing or

> discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted."

11. A careful reading of the said decision, makes it clear that the order of dismissal was once not approved under section 33(2)(b) of the Act and the said order has been confirmed by this Court and the apex Court in the Special Leave to Appeal filed by the employer. Therefore, the law laid down in *Jeypore Zilla Sahakari Bhumi Vikas Bank Limited* (supra) is applicable to the fact situation and as a matter of right the workman is entitled to the salary and other consequential benefits as the order of dismissal was not

approved, which is an undisputed fact. Hence, the constitutional Bench decision in respect of the claim of the workman is applicable and, therefore, the application under section 33(C)(2) of the Act is maintainable. The Labour Court simply should have applied the law laid down in the said case and granted the relief to the workman. The fact situation of the decision of the apex Court in Managing Director, ECIL (supra) and another decision upon which reliance is also placed by the employer are not applicable both in facts and in law. It is an undisputed fact that the order of dismissal is still pending consideration in the Miscellaneous Application under section 33(2)(b) of the Act for approval. Therefore, the contention urged that he has applied leave, cannot be accepted and the same is contrary to the decision of the constitution Bench of the apex Court and further this aspect of the matter is not at all placed before the learned Single Judge. The said factual and legal contention is wholly untenable in law. Therefore, the contention urged in this regard need not be examined and considered by this Court in this appeal.

12. For the reason stated supra, we are of the view that applying the ratio in *Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.* (supra), a workman against whom the order of dismissal was passed and proceeding under section 33(2)(b) of the Act was undisputedly rejected and the same became final, the same is entitled for payment of salary and other consequential monetary benefits. Therefore, the respondent-workman is entitled to salary for the period from 21.8.2006 to 18.12.2009, the date of first order of dismissal till the date of second order of dismissal, even though the second order of dismissal, still is required to be approved by the Tribunal in the subsequent proceeding stated on the application of the appellant. Therefore, grant of wages and other consequential benefits by the learned Single Judge to the respondent-workman is legal and valid. The workman who will be entitled for the wages and other consequential benefits in the form of money as per the provision of law and the law laid down by the apex Court in the case referred to in *Jaipur Zila Sahakari Bhumi Vikas Bank Ltd.* (supra) laid down in case the non-grant of approval of order of dismissal, the workman is entitled for salary and consequential benefits from the date of dismissal till the date of disapproval. Therefore, the legal contentions urged on behalf of the appellant that the workman has no existing right either in the settlement or pre-adjudication of the dispute are wholly untenable in law. For the foregoing reasons, the appeal is liable to be dismissed. Accordingly the appeal is dismissed. Since we have affirmed the order of the learned Single Judge, salary for the period and other consequential benefits in the form of kind as claimed by the respondent, as granted by the learned Single Judge, shall be paid within a period of six weeks by the employer.

Otherwise that amount shall carry interest at 12% from the date of first order of dismissal till the date of payment of monetary benefits as directed in the impugned order.

Writ appeal dismissed.

2011 (II) ILR- CUT- 379

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

W.P. (C) NO.23407 OF 2010 (Decided on 18.3.2011)

SABITRI KANHAR & ORS. …….Petitioners.

.Vrs.

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

CONSTITUTION OF INDIA,1950- ART. 21

Murder in jail – Life convicts murdered by another life convict – Widows of the deceased are petitioners claiming compensation – Negligence of the jail authorities – State is vicariously liable for the negligence of its employees – Compensation granted to the next of kin of the deceased convicts. (para.14)

For Petitioners - Mr. Prabir Ku. Das
For Opp.Parties - Government Advocate

V. GOPALA GOWDA, C.J. The petitioner nos.1 and 2, the widows of late Sudarshan Kanhar and Late Duryodhan Kanhar respectively, are before this Court claiming compensation from the opp. parties by urging following facts and legal contentions.

2. The husband of petitioner no.1 Sudarsan Kanhar, her elder son (the husband of petitioner-2) Duryodhan Kanhar, her younger son Bhimasen Kanhar and a relative, Bhagaban Pradhan were convicted under Section 302/34, I.P.C. and sentenced to undergo imprisonment for life by the learned Addl. Sessions Judge, Boudh in S.T. No.25 of 2000 vide the judgment and order dated 15.02.2001 in connection with murder of one Kishore Chandra Behera on 05.09.1999 arising out of a land dispute.

3. It is the case of the petitioners that while undergoing the aforesaid sentence in Special Sub-Jail, Boudh Sudarsan Kanhar (Convict No.3734/A) and Duryodhan Kanhar (Convict No.3333/A) were stoned to death on the night of 21/22.09.2010 by another convict namely Antaryami Rana (Convict No.3513/A). It is alleged that on the said night at about 1.00 A.M. Antaryami Rana attacked Sudarsan Kanhar, Duryodhan Kanhar and Kamapala Khamari with a stone inside Ward No.4 who were severely and grievously injured. All the three critically injured convicts were immediately shifted to District Head Quarter Hospital, Boudh by the jail staff. Convict Duryodhan Kanhar was declared dead at District Head Quarter Hospital and convict Sudarsan Kanhar was also declared dead at 3.00 A.M. while he was

undergoing treatment and the other convict Kamapla Khamari was referred to VSS Medical College, Hospital, Burla on 22.09.2010.

4. On 22.09.2010, the Superintendent of Special Sub-Jail, Boudh lodged an F.I.R. with Boudh Police Station and a case was registered u/s 303/307/325, I.P.C. vide Boudh P.S. Case No.109 of 2010 corresponding to G.R. Case No.259 of 2010.

5. It is stated that the deceased Sudarsan Kanhar is survived by his wife (petitioner no.1) and his younger son Bhimasen Kanhar who is suffering sentence at Biju Patnaik Open Air Ashram, Jamujhari. The deceased Duryodhan Kanhar is survived by his wife (petitioner no.2) and his two minor sons, namely, Trilochaan and Chandan Kanhar.

6. It is the further case of the petitioners that in view of the brutal murder of Sudarsan Kanhar and Duryodhan Kanhar in the jail custody, the family of the petitioners suffered from severe trauma and intense mental agony. In the death of the two adult senior members, the family of the petitioners obviously suffered an irreparable loss. The safety, survival and future of the petitioners' family have been jeopardized on account of murder of two adult senior members of the family who were expected to be released in the near future which would have enabled them to take care of the family. It is stated that when they were alive and suffering sentence inside the jail, they had been supporting the family by sending the wages earned therein by them. In view of the brutal death in the jail custody, the payment of suitable compensation by the State has become an imperative need for ensuring the livelihood/maintenance of the family and for securing the upbringing/education of the minor children.

7. It is very relevant to be stated that on 22.09.2010 the Deputy Inspector General of Prisons, Berhampur range conducted an enquiry and submitted his report vide letter No.62 dated 24.09.2010. The relevant portion of the said report reads as under :

> "During my course of enquiry, I gathered information that the officers are not attending luck-up and un-lock-up of the wards for which the Guarding Staff are getting scope to neglect in their duty, not searching the wards before lock-up as a result this unfortunate incident took place inside the Special Sub-Jail, Boudh on 21.09.2010 night. The Jailor-cum-Superintendent Sri Arun Ku. Rath is squarely responsible for such security mismanagement of the jail."

8. It is further stated that the persons were brutally murdered while suffering sentence due to the utter failure on the part of the State and its employees in ensuring the safety and security of the deceased prisoners inside the jail. The aforesaid failure arising out of the negligence and latches of the jail authorities and staff in this regard resulted in violation of the right to life of the deceased convicts under Article 21 of the Constitution, therefore, the State is vicariously liable to pay compensation to the next of kin of the deceased person as the same is mandated by the law declared by the Hon'ble Supreme Court in a catena of decisions. Therefore, the petitioners having found no other alternative remedy they have filed this writ petition seeking for issuance of writ of mandamus directing the opp. party no.1 to pay a compensation of Rs.25.00 lakh to the petitioners for the murder of their husbands by another inmate in the Special Sub-Jail, Boudh, Ward No.4 while they were undergoing sentence.

9. Statement of counter has been filed on behalf of opp. parties 1 and 2 traversing the petitioners' averments, but the facts that the incident took place inside the jail custody and a criminal case has been registered against another convict who committed offence under Sections 303/307/325, I.P.C. on the complaint of Sri Arun Kumar Rath, Superintendent, Special Sub-Jail, Boudh are not in dispute. It is stated that a spot inquiry was conducted by the D.I.G. of Prisons, Berhampur Range, Berhampur on 22.09.2010. Basing upon the inquiry report dated 24.09.2010 of the D.I.G., Prisons, Berhampur the Jailor-cum-Superintendent, two Head Warders and one Warder have been placed under suspension and departmental action has already been initiated against them. It is also stated therein that after finalization of the Departmental Proceedings, the culpable negligence on the part of the Jail Officers/Staff will be determined.

10. It is further stated that the Orissa Human Rights Commission is also aware of the alleged ghastly incident and has registered OHRC Case No.1749/2010.

11. In view of the aforesaid stand taken by the opp. parties, the facts that the alleged ghastly incident which had taken place inside the jail custody and two convicts who are the husbands of the petitioners died on account of the assault by another convict who was undergoing sentence along with the deceased for life are not in dispute. Therefore, the only question that falls for our consideration is as to what compensation the petitioners are entitled to in this petition.

12. The death of the two prisoners occurred on account of the attack by the co-convict No.3513/A Antaryani Rana is not in dispute. Further, it is not in dispute that against the said co-convict vide Boudh P.S. Case No.109 of 2010 has been registered for the offences punishable u/s 303/307/325, I.P.C. corresponding to G.R. Case No.259 of 2010. Further, the report of inquiry dated 24.09.2010 submitted by the D.I.G. of Prisons, Berhanpur Range, Berhanpur, states as follows:

> "I am to state that on receipt of the information from the Jailor-cum-Superintendent of Special Sub-Jail, Boudh on 21.09.2010 night at about 2.00 A.M. regarding death of two Life Convicts and one serious injury of another convict due to causing grievous hurt by a life convict inside the ward No.4, I proceeded to Boudh on 22.09.2010 morning to enquire into the matter. There, I came to know that life convict No.3513/A, Antaryami Rana, S/o. Ratha Rana of Village – Kirasira, P.S. Manmunda of District – Boudh attacked with a stone of size 1' length and 6 to 8" width weighing about two K.G. to 2.1/2 K.G. having sharpness around the surface to the life convict No.3333/A, Duryodhan Kanhar @ Milu aged about 40 years, S/o. Sudarsan Kanhar, Convict No.3734/A, Sudarsan Kanhar aged about 80 years S/o. Surya Kanhar of Village-Goradamunda, P.S. Harvangha of District-Boudh, and to life convict 3743/A, Kamapla Khamari aged about 60 years S/o. Iswar Khamari of Village – Godhaeswar, P.S. Birmaharajpur of District – Sonpur on 21.09.2010 night at about 1.00 A.M."

13. Further, as could be seen from the statement of counter filed on behalf of opp. parties 1 and 2, basing upon the inquiry report the Jailor-cum-Superintendent, two Head Warders and one Warder have already been placed under suspension and departmental action has already been initiated against them and after finalization of the Departmental Proceedings, the culpable negligence on the part of the Jail Officers/Staff will be determined.

14. Keeping the aforesaid facts in view, we are of the considered opinion that the petitioners are entitled to compensation for the negligence on the part of the Jail Superintendent and the Staff referred to supra for having killed the husband of the petitioners by co-convicts. Therefore, the compensation is required to be awarded in favour of the petitioners. Then what is the quantum of compensation to be awarded is the question required to be considered. For the above purpose, the guidelines of the M.V. Act are required to be applied to the case on hand. Under Section 163-A of the M.V. Act and the Schedule therein the minimum monthly income of the

deceased Sudarshan Kanhar in the absence of the income proved by the claimants the petitioners herein shall be taken at Rs.3,000/-. Apart from the above, guidelines, the life convicts will be continuing during the period of imprisonment, as the jail authorities are required to get the work done by the convicts depends their skill. The age of the deceased husband of petitioner no.1 is about 70 years. In such case, the multiplier of 5 is applicable. If out of the monthly income of Rs.3000/-, 1/3rd is deducted towards personal expenses, the monthly contribution towards family would come to Rs.2000/-. Calculated on the aforesaid basis the total dependency would come to Rs.1,20,000/-. If to the above sum an amount of Rs.5,000/- towards funeral expenses and obsequies ceremony is added the total amount of compensation would come to Rs.1,25,000/- (rupees one lakh twenty five thousand). In so far as the husband of the petitioner no.2 Duryodhan Kanhar is concerned, he was aged about 45 years at the time of death. His monthly income has also not been proved. Therefore, in the absence of any proof of his income, his monthly income is taken as Rs.3000/-. Having regard to his age, multiplier of 13 is applicable. On the aforesaid basis if 1/3rd out of the aforesaid amount is taken as personal expenses, then the dependency of the second petitioner would come to Rs.2000/- per month, i.e. Rs.24,000/- per year and applying the multiplier of 13, it would come to Rs.3,12,000/-. If to the above sum an amount of Rs.58.000/ towards funeral expenses and obsequies ceremony, loss of consortium, loss of love and affection and loss of estate is added, which are considered as conventional heads, the total amount of compensation would come to Rs.3,70,000/- (rupees three lakh seventy thousand). Hence, we award a sum of Rs.1,25,000/- (rupees one lakh twenty-five thousand) towards the death of the deceased Sudarsan Kanhar in favour of his wife (petitioner no.1) and minor son and Rs.3,70,000/- (rupees three lakh seventy thousand) towards the death of Duryodhan Kanhar in favour of his wife (petitioner no.2) and two minor sons. The aforesaid amounts shall carry interest at the rate of 6% per annum from the date of filing of the writ petition till the amounts are paid. Accordingly, the opp. parties are directed to pay the aforesaid amount to the claimant-petitioners within a period of four weeks from the date of date of this judgment.

The writ petition is allowed accordingly.

Writ petition allowed.

2011 (II) ILR- CUT- 384

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

W.P.(C) NO.1670 OF 2011 (Dt.11.04.2011)

BIRANCHI NARAYAN SAHU .....Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA ,1950 – ART-21

Rape & murder of a school girl by a teacher of the school during school hours - Conviction of the teacher by the learned Sessions Judge – Writ petition field by the father of the deceased claiming Rs.10 lakhs as Compensation.

"School is a temple of learning" – Prime duty of the state to appoint persons of high moral character as teachers in the schools – Duty of the state to protect the life of the children studying in school and ensure their education with dignity.

In this case murder of the deceased caused prospective loss of earring to the family- Held, state is liable for the wrong done by its teacher – Direction issued to the State of Orissa to pay a consolidated compensation of Rs. 4 lakhs to the parents of the deceased girl.

(Para 9 & 15)

Case laws Referred to:-

1.(2003)7 SCC 389 : (State of M.P.-V-Kedia Leather & Liquor Ltd. & Ors.)
2.AIR 1983 SC 1086 : (Rudul Sah-V-State of Bihar & Anr.)
3.AIR 1992 SC 2069 : (Kumari Smt.-V-State of Tamil Nadu & Ors.)
4.AIR 1962 SC 933 : (State of Rahasthan-V- Mst.Vidhyawati)
5.(2001) 8 SCC 197 : (Lata Wadhwa & Ors.-V-State of Bihar & Ors.)

For Petitioner - Mr. P.K.Das
For Opp.Parties - Standing Counsel
School & Mass Education Dept.

B.N. MAHAPATRA, J. The petitioner being the father of a female student, who was raped and murdered by a teacher in a Government School during school hours within the school premises, has filed this writ petition praying for issuance of a writ of mandamus or any other appropriate writ

directing opposite party No.1-State of Orissa, represented through the Commissioner-cum-Secretary, School and Mass Education Department, Government of Orissa, Bhubaneswar for payment of compensation of Rs.10,00,000/- (rupees ten lakh) to the petitioner.

2. Petitioner's case in a nutshell is that on 30.09.2008 at about 11.30 A.M. the daughter of the petitioner, Shibani, a student of Class-VII in the Government Project U.P. School, Nimina was found dead in the toilet of the said school with bleeding injury on her vagina. Polsara P.S. Case No.98 dated 30.09.2008 was registered under Sections 302/376 IPC against the accused persons, who are the teachers of the said school, namely, Durga Prasad Sahu, Santha Charan Pattnaik and Biswanath Gouda on the basis of the written complaint of the petitioner. Autopsy was conducted on the body of the deceased-student-Shibani Sahu which indicated that she was raped and murdered. The learned Sessions Judge, Ganjam-Gajapati, Berhampur vide his judgment dated 27.07.2010 convicted Santha Charan Pattnaik under Sections 302 and 376 I.P.C. and sentenced him to undergo rigorous life imprisonment for the offence under Section 302 and seven years rigorous imprisonment for the offence under Section 376 I.P.C. and to pay a fine of Rs.10,000/- (rupees ten thousand) in default to suffer rigorous imprisonment for two years more with a direction that both the sentences shall run concurrently.

On behalf of the family of the deceased, this matter was brought to the notice of the Hon'ble Chief Minister and the Hon'ble Minister, School and Mass Education Department, the Chief Secretary, the Commissioner-cum-Secretary to School & Mass Education Department and the Secretary, Women and Child Development Department claiming *inter alia* to pay compensation of Rs.10.00 lakh. But, no action has been taken in this regard by the said authorities. The said matter was also brought to the notice of the Hon'ble Chief Justice, Orissa High Court and the Chair-person, National Commission for Protection of Child Rights. The Registry of the High Court of Orissa registered the relevant letter-petition as P.I.L. No.38/2008. The National Commission for Protection of Child Rights also treated it as a complaint. Since no relief was granted to the petitioner, he has approached this Court with a prayer to grant the above relief.

3. Mr. Prabir Kumar Das, learned counsel appearing on behalf of the petitioner submits that the death of 12 year old daughter of the petitioner due to the heinous crime of a teacher of the said school caused intense mental trauma and agony to the family of the petitioner. The death of the only daughter of the petitioner at such tender age is an irreparable loss to the petitioner's family. Had the daughter of the petitioner not died in such cruel and tragic circumstances, she would have completed her studies and after

growing up as an adult she would have supported the family and served the society as a responsible citizen. The rape and murder of the deceased girl is a shocking and outrageous incident because a female student is supposed to be taught and taken care of by the teacher in a school. The rape and murder of a young girl aged about 12 years by a teacher in a school during the school hour is a heinous crime. The said incident gives a picture of failure of the State to ensure safety and dignity of a female student in the Government School resulting in violation of her right to life under Article 21 of the Constitution. The girl was under the care and custody of the Department of School & Mass Education, Government of Orissa where she was attending her classes. Therefore, the above said Department of the State Government is vicariously liable to compensate the family of the deceased for violation of constitutional right to life of the deceased by an employee of the State.

4. Learned Standing Counsel appearing on behalf of School & Mass Education Department placing reliance upon the counter affidavit submits that pursuant to pronouncement of the judgment of the learned Sessions Judge dated 27.07.2010, the accused is in the jail custody. When an appropriate forum, i.e., a Criminal Court has sufficiently punished the accused with the cooperation of all the Government Officials from bottom to top, further claim of the petitioner for payment of compensation is without any merit and the same is liable to be rejected. The convict was appointed as a teacher under Level-V, whose immediate authority is the Block Development Officer, Polasara and the appointing authority is the District Inspector of Schools, Chhatrapur. In order to streamline the primary system of Education, Government is to issue directions and principles for maintaining discipline in the schools. It is the incumbent who has to ethically perform his/her duty for the best result of the students. If such type of heinous activity is committed by an incumbent, it is the duty of the higher Authority to initiate disciplinary proceedings as per law. In the instant case, the appointing authority has taken steps immediately and the accused teachers have been removed from the posts after following due procedure. The immediate authority, like the B.D.O., Polasara has paid an amount of Rs.10,000/- only to the family for the occurrence, out of the Red Cross fund as compensation. Moreover, the Government also directed to all the concerned officials to take serious action against the accused persons. Thus, no authority has neglected in the duty for awarding punishment on the accused. In such a situation, the petitioner's claim for compensation in this writ petition is baseless and unethical.

5. It is further contended that the petitioner's daughter was a day scholar student and she was not at all a boarder student in the hostel. Therefore, she was not under the care and custody of opposite parties. Moreover, the occurrence took place outside the classroom, i.e., somewhere near a latrine which is 100 ft distance from the class room. Hence, the State Government cannot be held responsible for such occurrence. Since a writ petition has been filed in the nature of Public Interest Litigation (PIL) No.38 of 2008 before this Court and there is also a case pending before the National Commission for Protection of Child Rights, New Delhi, for which the local administration as well as the Home Department officers have been co-operating the National Commission for adjudication of the case, this Court should not entertain the present writ petition. In case the petitioner is aggrieved by the order passed by the learned District and Sessions Judge, he should have approached this Court by way of filing a criminal appeal or criminal revision and not by filing a writ petition claiming compensation. If the petitioner has any grievance for the loss caused to the family on the unnatural death of his minor daughter, he should approach the appropriate court of law for compensation, but he has no *locus standi* to file the present writ petition seeking a direction for compensation. Concluding his argument learned Standing Counsel prays for dismissal of the writ petition.

6. On the rival contentions advanced by the parties, the questions that fall for consideration by this Court are as under:

(i) Whether in the facts and circumstances, the petitioner is entitled to any compensation for rape and murder of his minor daughter by a school teacher in the school premises during the school hours?
(ii) If the first question is in affirmative, then what should be the amount of compensation?
(iii) What order?

7. To deal with question No.(i), it is felt necessary to refer to Article 21 of the Constitution which speaks of protection of life and personal liberty. Article 21 is one of the fundamental rights guaranteed under Part-III of the Constitution which is reproduced below:

> "21. **Protection of life and personal liberty. —** No person shall be deprived of his life or personal liberty except according to procedure established by law".

Thus, one of the fundamental rights guaranteed to a person under the Constitution is protection of life which the State is bound to provide.

The apex Court in the case of **State of M.P. vs. Kedia Leather and Liquor Ltd. and others, (**2003) 7 SCC 389, held that environmental, ecological, air and water pollution amount to violation of the right to life assured by Article 21 of the Constitution of India. Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment.

Another fundamental right under Article 21-A is that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

In the instant case, the undisputed facts are that the petitioner's minor daughter, who then aged about 12 years old and studying in Class-VII, was raped and murdered by a teacher of the Government school during school hour and in the school premises.

8. In view of the aforesaid two fundamental rights as enshrined in Part-III of the Constitution, the stand of opposite party-State that the State is not responsible for the death of a girl student of 12 years, who was studying in Class-VII and was raped and murdered by the school teacher in school premises, is really unfortunate. For the same reason, the stand of the State that the writ petition filed by the petitioner claiming compensation is not entertainable by this Court is also not sustainable in law. The State is liable for tortious act committed by its employees in the course of their employment.

9. Needless to say "school is a temple of learning". It is the prime duty of the State to appoint persons of high moral character as teachers in the Schools. The State is also liable to protect the life of the children studying in schools and ensure their education with dignity. Since the heinous, barbaric and inhuman act has been committed by the teacher of a government School, it would be appropriate to hold that this case is governed by the legal maxim "respondeat superior" and thus the State is liable for wrong done by its teacher.

10. The apex Court in the case of ***Rudul Sah v. State of Bihar and another,*** AIR 1983 SC 1086, observed that in appropriate cases, the Court discharging constitutional duties can pass orders for payment of money in the nature of compensation consequent upon deprivation of a fundamental right to life and liberty of a person as State must repair the damage done by its officers to such person's right.

In ***Kumari Smt. vs. State of Tamil Nadu and others,*** AIR 1992 SC 2069, the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case six years' old child had fallen down in the uncovered sewerage tank. The High Court refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Apex Court directed the State to pay compensation.

The apex Court in the case of ***State of Rajasthan v. Mst. Vidhyawati,*** AIR 1962 SC 933, held as under:

> "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India……."

11. In view of the above, the petitioner, who is the father of the deceased girl, is entitled to compensation for the death of his child and the opposite party-State is liable to pay such compensation to the petitioner.

12. The question No.(ii) relates to the quantum of compensation to which the petitioner is entitled to get from the Government. In the present case, the deceased girl was the only daughter of the petitioner. The petitioner's family includes his wife and two younger sons. Had the girl not died, she would have completed her studies and would have supported her family which is very common in the present days. It is true that loss of child to the parents is irrecoverable and no amount of money could compensate the parents so also the other surviving members of the family. Now-a-days our society experiences that the daughters are more affectionate towards the parents and performing better service in different walks of life.

13. At this juncture, it will be profitable to refer to some of the judicial pronouncements of the apex Court as well as this Court. In the case of ***Lata***

Wadhwa and others vs. State of Bihar and others, *(2001) 8 SCC 197,* the apex Court at paragraph-11 of the judgment has held that:

> **"11.** So far as the award of compensation in case of children is concerned, Shri Justice Chandrachud has divided them into two groups, the first group between the age group of 5 to 10 years and the second group between the age group of 10 to 15 years. In case of children between the age group of 5 to 10 years, a uniform sum of Rs.50,000 has been held to be payable by way of compensation, to which the conventional figure of Rs 25,000 has been added and as such to the heirs of the 14 children, a consolidated sum of Rs.75,000 each, has been awarded. So far as the children in the age group of 10 to 15 years, there are 10 such children who died on the fateful day and having found their contribution to the family at Rs.12,000 per annum, 11 multiplier has been applied, particularly, depending upon the age of the father and then the conventional compensation of Rs.25,000 has been added to each case and consequently, the heirs of each of the deceased above 10 years of age, have been granted compensation to the tune of Rs.1,57,000 each. In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parents' claim and prospective loss will found a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of *Taff Vale Rly.* v. *Jenkins* and Lord Atkinson said thus:
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> '… all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact — there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can, I think, be drawn from circumstances other than and different from them.'
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> At the same time, it must be held that a mere speculative possibility of benefit is not sufficient. Question whether there exists a

reasonable expectation of pecuniary advantage is always a mixed question of fact and law. There are several decided cases on this point, providing the guidelines for determination of compensation in such cases but we do not think it necessary for us to advert, as the claimants had not adduced any materials on the reasonable expectation of pecuniary benefits, which the parents expected. In case of a bright and healthy boy, his performances in the school, it would be easier for the authority to arrive at the compensation amount, which may be different from another sickly, unhealthy, rickety child and bad student, but as has been stated earlier, not an iota of material was produced before Shri Justice Chandrachud to enable him to arrive at a just compensation in such cases and, therefore, he has determined the same on an approximation. Mr Nariman, appearing for TISCO on his own, submitted that the compensation determined for the children of all age groups could be doubled, as in his views also, the determination made is grossly inadequate. Loss of a child to the parents is irrecoupable, and no amount of money could compensate the parents. Having regard to the environment from which these children were brought, their parents being reasonably well-placed officials of Tata Iron and Steel Company, and on considering the submission of Mr Nariman, we would direct that the compensation amount for the children between the age group of 5 to 10 years should be three times. In other words, it should be Rs. 1.5 lakhs, to which the conventional figure of Rs.50,000 should be added and thus the total amount in each case would be Rs 2.00 lakhs. So far as the children between the age group of 10 to 15 years, they are all students of Class VI to Class X and are children of employees of TISCO. TISCO itself has a tradition that every employee can get one of his children employed in the Company. Having regard to these facts, in their case, the contribution of Rs.12,000 per annum appears to us to be on the lower side and in our considered opinion, the contribution should be Rs 24,000 and instead of 11 multiplier, the appropriate multiplier would be 15. Therefore, the compensation, so calculated on the aforesaid basis should be worked out to Rs.3.60 lakhs, to which an additional sum of Rs.50,000 has to be added, thus making the total amount payable at Rs.4.10 lakhs for each of the claimants of the aforesaid deceased children.

14. This Court in the cases of ***Guri Behera and others vs. Divisional Railway Manager, East Coast Railway, Khurda Road, Jatani and others*** in W.P.(C) Nos.3214 of 2010, 1455 of 2008 and 1456 of 2008 (disposed of

on 10.02.2011), while deciding the aforesaid writ petitions filed by the fathers of the deceased children, who died on account of railway accident awarded compensation of Rs.3,50,000/- to each one of the petitioners and Rs.5.00 lakh to the injured claimant with interest @ 7% per annum on the compensation amount from the date of claim made with the opposite parties till the date of realization.

15. Keeping in view the factual background of the case and the future prospects of the deceased-girl as well as her prospective loss of earning to the family, we are of the opinion that a consolidated compensation of Rs.4.00 lakhs (rupees four lakhs) should be paid to the parents of the deceased-girl, who became victim of such gruesome murder. We order accordingly. Opposite party No.1 is directed to make payment of the above amount of compensation to the parents of deceased Shibani within four weeks from the date of receipt of a certified copy of this judgment. The amount awarded shall be shared equally between the parents, and half of their share amount may be kept in fixed deposit in any of the Nationalized Bank, for a period of five years. If that amount is required to meet any urgent need of the family the same may be withdrawn by filing an application before this Court for grant of such permission.

16. In the result, the writ petition is allowed to the extent indicated above.

Writ petition allowed.

2011 (II) ILR- CUT- 393

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

W.P.(C) NO.19828 OF 2010 (Decided on 24.02.2011)

M/S. KRISHI ENTERPRISES .....Petitioner.

.Vrs.

COMMISSIONER OF COMMERCIAL TAXES, ORISSA & ORS. .....Opp.Parties.

(A) CENTRAL SALES TAX ACT, 1956 (ACT 74 NO OF 1956) – S.7 & 8 r/w Rule 12 of the Central Sales Tax (Registration & Turnover) Rules,1957.

Issuance of 'C' Forms – Registration U/s.7 (2) of the C.S.T. Act granted to the dealer – The goods being purchased from registered dealer of Jharkhand moved to Karnataka – Goods were not brought to the State of Orissa by the purchasing dealer – The dealer is entitled to purchase goods in course of inter-State trade being granted registration Certificate U/s.7 (2) of the C.S.T. Act – Such dealer could purchase goods from outside the State at concessional rate of tax by furnishing 'C' Forms.

(B) C.S.T. (REGISTRATION & TURN OVER) RULES, 1957 – RULE 12.

Refusal to issue 'C' Forms – If officer at the time of granting 'C' Forms has knowledge of use of 'C' form and on enquiry into the nature of transaction he comes to a finding on the basis of materials available before him that the claim of inter-State purchase by the dealer is not correct, it cannot be said that the authority lacks jurisdiction in refusing to issue 'C' Forms.

Case law Referred to:-

.(2007) 7 VST 214 : (State of Orissa & Anr.-V-K.B.Saha & Sons Industries Pvt.Ltd. & Ors.)

For Petitioner - M/s. D.Pati, S.K.Mishra, S.N.Sharma S.Agarwal.

For Opp.Parties- Mr. R.P.Kar Standing Counsel (Revenue)

B.N. MAHAPATRA, J. In this writ petition the petitioner challenges the legality and propriety of the order dated 5.8.2010 (Annexure-1) passed by

opposite party no.2-Additional Commissioner, Sales Tax, North Zone, Cuttack (for short, 'Revisional Authority') by which the order of opposite party no.3 –Sales Tax Officer, Rourkela-II Circle (for short, 'S.T.O.') dated 28.05.2010 denying issuance of Form 'C' has been upheld.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner is a proprietorship firm carrying on business in Iron and Steel goods. It is registered under the Orissa Value Added Tax Act, 2004 (for short, VAT Act') and Central Sales Tax Act, 1956 (for short, 'C.S.T. Act'). On 15.3.2010 the petitioner made an application to opposite party no.3 for issuance of 5 folios of 'C' Forms. On being asked by opposite party no.3, the petitioner submitted the details of purchase made by it for which it required statutory declaration Form 'C'. However, opposite party No.3 was not satisfied with the explanation furnished by the petitioner and on 28.05.2010 he rejected the petitioner's application for issuance of declaration form 'C'. The petitioner being aggrieved by the said order dated 28.5.2010 passed by opposite party no.3 approached this Court in W.P.(C) No. 10,618 of 2010 for necessary redressal and the said writ petition was disposed of on 22.7.2010 with a direction to the petitioner to avail the remedy before the revisional authority provided u/s. 79 of the V.A.T. Act read with Rule 22 of the C.S.T. (Orissa) Rules. In pursuance of the aforesaid direction, the petitioner filed revision petition before opposite party no.2 challenging the order passed by opposite party no. 3. Opposite party no. 2 vide the impugned order dismissed the revision petition and confirmed the order passed by opposite party no.3 holding that the petitioner is not entitled to 'C' forms for the reasons stated in the said order. Hence, the present writ petition.

3. Mr. D. Pati, learned counsel appearing on behalf of the petitioner vehemently argued that being a registered dealer under the C.S.T. Act, the petitioner is entitled to be issued with the declaration form 'C' which is the mandate of Section 8 of the C.S.T. Act read with Rule 12(1) & 12(6) of the C.S.T. (R&T) Rules and Rule 6 of CST(Orissa) Rules. The registration certificate granted under OVAT Act and CST Act specifies the goods to be dealt with by the petitioner. The petitioner received order from MSP Ltd., Hospet Karnataka dated 12.10.2009 for supply of medium grade iron ore fines of a particular specification. The said purchaser is a registered dealer under the provisions of C.S.T. Act in the State of Karnataka. The material was required for the purpose of export. The purchase order specifies the rate. It is indicated in the said order that seller is to raise final invoice along with certificate issued by SGS India Pvt. Ltd. Relating to quality. The

petitioner in order to fulfil the obligation stated above contacted and visited the mines of Saha Brothers, Jharkhanda and placed purchase order with Saha Brothers, Jharkhanda for supply of the same goods. At the instruction of the petitioner M/s. Saha Brothers booked the goods through railway in favour of M.S.P.L. Ltd. In pursuance of sale of goods there was transportation of those goods from the State of Jharkhand to another State. Subsequent to supply of materials, M/s. Saha Brothers raised bills in favour of the petitioner charging concessional rate of central sales tax in terms of the provisions of the CST Act on the condition that the petitioner shall submit declaration form 'C' to it. The petitioner had made the purchase of the goods from outside the State and supplied the goods on inter state basis. Even though the goods purchased by the petitioner have not moved to Orissa, the transactions made by it was effected by way of transfer of document of the titles to the goods during their movement from one state to another. In support of his contention the petitioner relied upon the decision of the Supreme Court in the case of Tata Iron and Steel Co. v. B.R. Sarkar and others, 11 STC 655 and Oil India Limited V. The Superintendent of Taxes and others, 35 STC 445.

It is further submitted that under the instruction of the petitioner the goods moved out of the State of Jharkhanda through Railway and are delivered at the prescribed Port on account of MSPL. The sales between M/s. Saha Brothers and the petitioner are inter-state sale. The sale between the petitioner and the MSPL are also interstate sale. A plain reading of Rule 12(6) of the CST (R & T) Rules will go to establish that the petitioner is entitled to be issued with Form 'C'. The goods purchased and sold by the petitioner are not different from the iron ore which were transported through Railway. Rule 6 of C.S.T. (O) Rules prescribes the procedure to be adopted for obtaining declaration in Form 'C' which the petitioner complied with. Proviso to Rule 6 of the CST(O) Rules provides issuance of 'C' Form to a registered dealer may be refused who has failed to comply with the order demanding security or additional security. The 2nd proviso stipulates that second or subsequent supply of declaration Form 'C' shall not be made to any dealer unless he furnishes to the Sales Tax Officer a true copy of the accounts certified by him under his signature of the Form last supplied to him. These are the requirements for the purpose of issuance of 'C' Form. Section 10 and Section 10A of the CST Act provide safeguard for any misuse of 'C' form. By virtue of being a dealer under Section 7(2) of the CST Act it is statutory right of the petitioner to be supplied with the declaration form 'C'. Denial of 'C' form to the petitioner amounts to infringement of fundamental right guaranteed under Article 19(1)(g) of the Constitution of India.

The petitioner had also supplied goods to different customers which are required for the purpose of export. Sales made by the petitioner to the exporters are penultimate sales and the petitioner is entitled to tax exemption since those sales are export sales. The purchasing dealer is required to submit form H to the petitioner. The other statutory required documents are also submitted by the buying dealer to the petitioner for and in connection with purchases made by it for export purposes. The sales effected by the petitioner are export sales and such sales fall under the scope of Section 5(3) of the CST Act.

The petitioner disclosed the transaction under the return reflecting as sales falling under Section 5(3) of the CST Act. The tax liability under Section 6 accrued against the petitioner but dispensed since it fell within the scope of Section 5(3) of the CST Act. The petitioner has to meet the statutory requirement like submission of statutory declaration forms and other evidentiary documents for availing tax exemption provided under Section 5(3) of the CST Act. The petitioner has submitted the return for the tax period from 01.03.2010 to 31.03.2010 disclosing the sales made by it for export and claimed exemption on account of the tax. Due to non-receipt of certificate 'H' from M/s. MSPL Ltd., the petitioner revised its return during the month of October, 2010 and had paid Rs.10.00 lakhs as tax. Concluding his argument, Mr.Pati submitted that opp. parties should be directed to supply form 'C' to the petitioner forthwith.

4. Per contra, Mr.R.P.Kar, learned Standing counsel for Revenue submits that the petitioner has not approached this Court with clean hands. He has made certain false averments in the writ petition. In paragraph 4 of the writ petition it is stated that the petitioner was a registered dealer under Section 7(1) of the CST Act. In fact, the petitioner is a registered dealer under Section 7(2) of the CST Act and not under Section 7(1) of the CST Act which is evident from the certificate of registration (Annexure-2 series). On this solitary ground his petition is liable to be dismissed. The petitioner having been registered under Section 7(2) of the CST Act it is not entitled to effect inter-state sale as claimed by it in paragraph 9 of the writ petition. Placing reliance under Section 3(b) of the CST Act, it is submitted that a sale or purchase of goods shall be deemed to take place in course of inter-State trade or commerce if the sale or purchase is effected by transfer of documents of the title to the goods during their movement from one State to another. Relying on the documents annexed under Annexure-4 it is argued that MSPL Limited is both the consignor and the consignee. Therefore, it cannot be said that there was inter-State transaction between the petitioner and Saha Brothers and between the petitioner and MSPL Limited. Mr. Kar, further submitted that a purchase or sale in order to be inter-State

sale/purchase, the goods in question must move from one State to another. The goods in question stated to have been purchased from M/s. Saha Brothers, Jharkhand have not moved to Orissa. Therefore, the same cannot be an inter-State transaction between the petitioner and seller in Jharkhand. Referring to Annexure-3, it was argued that the claim of the petitioner that his sale to MSPL is exempted under Section 5(3) of the CST Act is also not legally tenable.

5. On the rival contentions, the questions that fall for consideration by this Court are—

(i) Whether the petitioner by virtue of being a registered dealer under Section 7 of the CST Act is entitled to be supplied with declaration form 'C' as provided under Section 8 of the C.S.T. Act read with Rule 12(1) and Rule 12(6) of CST (R&T) Rules and Rule 6 of the C.S.T. (O) Rules ?
(ii) In the facts and circumstances whether the opp. party department authorities are justified in refusing 'C' form to the petitioner ?

6. The first question relates to the petitioner's entitlement to be supplied with form 'C' being a dealer registered under Section 7(2) of the CST Act. Sub-section (2) of Section 7 enables those dealers who though not liable to pay tax under the C.S.T. Act but are liable to pay tax under the Sales Tax Laws of the appropriate State or where there is no such law in force in the appropriate State or any part thereof who have place of business in that State or any part thereof, to apply for registration under this sub-section. Thus, a dealer who is not himself a seller in inter-state trade but he is only a purchaser of goods from outside the State if he gets himself registered under Section 7(2) can obtain goods with concessional rate of tax under Section 8(1)(b) if those goods are specified in its certificate of registration.

Section 8(4) of the CST Act provides that the declaration form is to be submitted in the prescribed form obtained from the prescribed authority when a dealer claims concessional rate of tax on his sale under Section 8(1) of the said Act. Rule 12(1) of the CST (R & T) Rules, 1957 provides that the declaration shall be in Form 'C'. Under Rule 12(6) of the said Rules form 'C' shall be obtained by the purchasing dealer in the State in which goods covered by such form are delivered. In the explanation under Rule 12(6), it is further laid down that when the dealer is not registered in the State in which goods were delivered then Form 'C' may be obtained by him in the State in which the dealer is registered under Section 7 of the CST Act.

Rule 6 of the CST(O) Rules provides that the registered dealer, who wishes to purchase goods from any such dealer on payment of tax at the rate applicable under the CST Act on sales of goods by one registered dealer to another for the purpose specified under the certificate of registration shall obtain on application declaration forms for furnishing them to the selling dealer.

In view of above statutory provisions, it is the statutory right of a dealer registered under Section 7(2) of the CST Act to be supplied with declaration form 'C' to avail concessional rate of tax against the purchase of goods from outside the State.

7. The second question is with regard to legality and validity of the order passed by opposite party Nos.2 and 3 refusing to issue 'C' forms to the petitioner. The petitioner's case is that opposite party Nos.2 and 3 are not justified in refusing to issue 'C' forms to the petitioner on the ground that the transaction between the petitioner and M/s. Saha Brothers, Jharkhand are not inter-state in nature. According to the petitioner, by virtue of being a dealer registered under Section 7(2) of the C.S.T. Act, it is entitled to be supplied with declaration form 'C' which is a statutory right under law. Opposite parties are not empowered to examine the nature of utilization of 'C' forms at the time of issuing Form 'C'. The C.S.T. Act provides adequate safeguard by way of enacting Section 10 and Section 10A, which provides for imprisonment or fine or imposition of penalty, for misuse of declaration forms. In support of his contentions, Mr. Pati, relies upon the decision of the apex Court in the case of **State of Orissa and another vs. K.B. Saha and Sons Industries Pvt. Ltd. and others**, (2007) 7 VST 214.

Mr. Kar, learned counsel for the Revenue submits that the correctness of the decision of the apex Court in **K.B. Saha** (supra) has been referred to Larger Bench of the apex Court in the case of **M/s. Malayagiri Sandalwood Oil Distillery vs. SP. Commissioner and Commissioner of Commercial Taxes & others** (Civil Appeal No.2421 of 2006, disposed of on 07.08.2007)

Be that as it may, if at the time of issuance of 'C' declaration form, the Issuing Officer has knowledge about use of 'C' forms by the dealer and on enquiry into the nature of transaction he comes to a finding on the basis of materials available before him that the claim of Inter-state purchase by the dealer is not correct, it cannot be said that the S.T.O. lacks jurisdiction in refusing to issue 'C' declaration forms.

Therefore, if at the time of issuance of form 'C' it comes to the knowledge of the Issuing Officer that the declaration form if issued shall be

misutilized, then he is not expected to issue declaration form 'C' and allow those to be misutilized and till that time he will remain as mute spectator awaiting initiation of criminal/penal action under Section 10 or Section 10A of the C.S.T. Act.

8. In the instant case, the petitioner claims that it has purchased goods from one M/s. Saha Brothers, on the condition of 'C' declaration forms and while goods were in transit, it sold the goods by transfer of documents as provided under Section 3(b) of the C.S.T. Act to one M/s. M.S.P.L. Ltd., Karnataka. The further claim of the petitioner is that it's second sale to M/s. M.S.P.L. Ltd., is in course of export and exempt from payment of tax since the said transaction falls within the ambit of Section 5(3) of the C.S.T. Act against Form-H. Thus, there are two sales; one by M/s. Saha Brothers, Jharkhand to the petitioner and the other is from the petitioner to the exporter, M/s. MSPL Ltd. According to the Department, both two sales are independent of each other in the sense that there is no movement of goods to State of Orissa in pursuance of contract if any between M/s. Saha Brothers, Jharkhand and the petitioner. Further case of the Revenue is that the goods sold by M/s. Saha Brothers, Jharkhand were mixed dump of iron and goods transported in Railways were iron ore and the goods sold by the petitioner to M/s. MSPL Ltd. were iron ore fines and do not qualify for exemption as provided under Section 5(3) of the C.S.T.Act as both the goods are not same goods. The Revisional Authority in his order referring to various provisions of the C.S.T. Act and the judicial pronouncements, held that the sale between M/s. Saha Brothers and the petitioner was not an Inter-state sale as there is neither transfer of document by the dealer to MSPL Ltd. nor there is movement of goods in pursuance of the sale if any between M/s. Saha Brothers and the petitioner. The sale in question was from outside State to outside State. The petitioner is the first seller in the State of Jharkhand after purchasing the goods in Jharkhand. Transaction in order to be inter-state transaction must come from one State to another. As the goods have not moved to Orissa, the same cannot be an inter-state transaction between the petitioner and the seller. When there is no CST purchase by the petitioner from M/s. Saha Brothers, the petitioner-dealer is not entitled to be supplied with form 'C' to furnish to Saha Brothers, Jharkhanda. The documents produced by the petitioner show that the goods were moved by MSPL Ltd., to Paradeep/Visakhapatnam Port. By analyzing various documents furnished by the petitioner in detail, the Revisional Authority upheld the order of opposite party No.3-Assessing Officer, who refused to grant 'C' declaration forms to the petitioner.

9. An Inter-state sale as contemplated under clause (b) of Section 3 is one which is effected by transfer of documents of title to the goods during their

movement from one State to another. In other words, Section 3(b) applies to a sale effected after such despatch but before actual delivery of goods. Documents attached to the writ petition under Annexure-4 series reveal that in some Railway receipts the consignor was shown as M/s. Saha Brothers and the consignee was shown as M/s. MSPL Ltd. In some other Railway receipts both the consignor and consignee are shown as M/s. MSPL Ltd. In those Railway receipts (document of title of goods) the name of the petitioner does not appear. Moreover, in cases where consignor & consignee is described as same person, the question of transfer of title does not arise. Therefore, the petitioner is not entitled to be issued with Form 'C' to claim the concessional rate of tax in respect of movement of goods from one State to another where the petitioner is not a party.

10. There is much argument and counter argument with regard to the petitioner's claim of export sale. The claim of the petitioner that sale to M/s. MSPL Ltd., Karnataka is in course of export and therefore, the said transaction falls under the ambit of Section 5(3) of the C.S.T.Act and qualifies from exemption from tax is also not correct. Section 5(3) of the C.S.T. Act provides that the last sale or purchase preceding the sale or purchase occasioning the export of goods out of the territory of India shall be deemed to be a sale or purchase in course of export. In order to qualify the sale in course of export of goods out of the territory of India within the meaning of Section 5(3), three conditions laid down in the said provisions are to be satisfied. The three conditions are; (i) transaction of such last sale or purchase must take place after the agreement or order received by the exporter from his various buyers, (ii) the last purchase must have been taken place after entering into the agreement with the foreign buyer, (iii) the transaction of such last sale or purchase was entered into for the purpose of complying with the agreement order received by the exporter from his foreign buyer. Therefore, to claim exemption within the meaning of Section 5(3), the transaction between the exporter and the foreign buyer must be entered into first and thereafter, the exporters should enter into the transaction with penultimate seller with a view to fulfilling the commitment with the foreign buyer. The further requirement under Section 5(3) is that both the goods should be the same goods.

11. In the instant case, we find that the foreign buyer placed purchase order with M.S.P.L. Ltd., Karnataka on 18th January, 2010, whereas M/s. Saha Brothers, Jharkhand raised Bills in the name of the petitioner on 04.11.2009, 24.11.2009, 06.12.2009, 27.12.2009, 08.01.2010 (Annexure-5 series) which is prior to the purchase order placed by the foreign buyer on M/s MSPL Ltd., Karnataka. We further notice from copy of Form 'H' in

SL.No.F 176853 at page-93 to the writ petition that M/s. MSPL Ltd., Bangalore has purchased the goods from the petitioner vide Cash Memo No.1 dated 21.08.2009. Thus, the claim of the petitioner that its sale to M/s. MSPL Ltd. is in course of export and fall within the ambit of Section 5(3) of the C.S.T. Act is not tenable.

12. In view of the above, we do not find any infirmity or illegality in the order passed by opposite party Nos.2 and 3 under Annexures-1 and 6 respectively warranting any interference by this Court.

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

Writ petition dismissed.

2011 (II) ILR- CUT- 402

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

W.P.(C) NO.2113 OF 2011 (Decided on 18.05.2011)

LOPAMUDRA MISRA … ….. Petitioner.

.Vrs.

ASST. COMMISSIONER OF INCOME TAX & ANR. ……. Opp.Parties.

1) IN COME TAX ACT,1961 (ACT NO. 43OF 1961) - S.115 BB.

Whether award of Rs.25,00,000/- received on account of TV Game show on 15-11-2000 by the assessee is taxable during the period 2001-02 under the head "Income from other sources" when the amendment to sec. 2(24) (ix)came in to force w.e.f. 01 - 04 - 2002 and the prize amount received on 05 -11- 2000 – Held, the above money can not be said to be income for the period 2001-02. and hence not taxable under the head "Income for other sources".

(Para 14)

2. Discipline – Duty of the assessing authority while giving effect to the order passed by the appellate authority - Assessing authority can not travel beyond the order of the Tribunal –The assessing authority being quasi judicial authority and subordinate to the Tribunal is bound by the decision of ITA - Held, the order of the ITAT that the award received on account of TV Game show can not be assessed as income from other sources is binding on the assessing authority

(Para 18)

Case laws Referred to:-

1.AIR 1992 SC 711 : (Union of India & Ors.-V-Kamlakshi Finance Corpn. Ltd.)
2.AIR 1988 SC 157 : (Haji T.M. Hassan Rawther-V-Kerala Finance Corpn.).
3.AIR 1974 SC 555 : (E.P. Royappa-V-State of Tamil Nadu)
4.AIR 1967 SC 1458 : (State of Andhra Pradesh & Anr.-V-Nalla Raja Reddy).
5.AIR 1990 SC 1814 : (M/s. Dabur India Ltd. & Anr.-V-State of U.P. & Ors.)

For Petitioner - Mr. B.K.Misra Authorized Representative.
For Opp.Parties - Mr. Akhilendra Mohapatra
Sr. Standing Counsel,Income Tax.

B.N. MAHAPATRA, J. The prize money of Rs.25,00,000/- (rupees twenty-five lakhs), which the petitioner-Lopamudra Misra got by exhibiting her talent in a TV Game Show, i.e., "Kaun Banega Crorepati" having been made taxable by the Income Tax Authorities, she has approached this Court by means of this writ petition praying for quashing of order dated 04.11.2009 (Annexure-1) and directing the Assessing Officer to refund the entire advance tax of Rs.7,55,550/- along with interest as provided under First Part of Section 140 of the Income Tax Act, 1961(for short, "Act").

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner-assessee is an individual deriving income from running a Cyber Café-cum-Computer Coaching Centre. She filed return of income showing total income Rs.16,21,630/- for the assessment year 2001-02. In her return, the assessee disclosed income from household property, business and other sources. The same was processed under Section 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny and accordingly notice under Section 142 of the Act was served on her. In course of hearing of the assessment case, the assessee was asked to submit her clarification as to why the award of Rs.25.00 lakhs from the said TV game show shall not be taxed under Section 115BB of the Act. The contention of the assessee before the Assessing Officer was that the award of Rs.25.0 lakhs received by her was not taxable under the Act. Rejecting assessee's explanation, the Assessing Officer completed the assessment under Section 143(3) of the Act holding that the award received from the said TV game show was taxable under Section 115BB of the Act.

3. Aggrieved by the assessment order, the assessee filed an appeal before the Commissioner of Income Tax (Appeal) [for short, 'CIT(A')] on the ground that the Assessing Officer was not justified in applying the provision of Section 115BB of the Act as amendment to Section 2(24)(ix) where an explanation was added vide Explanation (ii) Finance Act, 2001 came into effect only on 01.04.2002 for the first time "brining the receipt from TV game show" within the definition of "income". Therefore, the assessee having received the award on 05.11.2000, provisions of Section 115BB and Explanation (ii) to Section 2(24)(ix) of the Act, which came into effect only by the Finance Act, 2001 with effect from 01.04.2002, cannot be made applicable with retrospective effect. Learned CIT(A) accepted the stand of the assessee taken in respect of the amendment of Section 2(24(ix) of the Act and introduction of explanation (ii) as well as inapplicability of Section 115BB of the Act to the fact situation. However, learned CIT(A) held that receipt of the award from the said TV game show by the assessee is

assessable under the head "income from other sources" and directed the Assessing Officer to determine the quantum of income afresh allowing expenses incurred from such income after affording an opportunity of hearing to the assessee.

4. Being dissatisfied with the order of the learned CIT(A), the assessee filed Second Appeal before the learned Income Tax Appellate Tribunal (for short, 'ITAT') questioning the finding of the learned CIT(A) that the receipt of income from the said T.V. game show by the assessee is taxable under the heading "income from other sources" as well as his direction to the Assessing Officer for making fresh determination of quantum of income. The Income Tax Department filed two appeals before the ITAT, one under Section 154 of the Act bearing ITA No.472/CTK/03 and another bearing ITA No.359/CTK/03. In ITA No.359/CTK/03 the Revenue questioned the order of learned CIT (A) who held that Section 115BB and explanation No.(ii) to Section 2 (24)(ix) of the Act are not applicable to the case of the assessee-petitioner. Against the said appeal, the assessee also filed cross objection. The ITAT heard all these appeals along with Cross-objection and disposed of those by a common order dated 05.08.2004. By the said order, Revenue's appeal was allowed and the assessee's appeal and Cross-objection were dismissed.

5. Against that order, assessee filed appeal under Section 260A of the Act before this Court for adjudication of various questions of law. However, before this Court, the challenge was confined as to whether the receipt of the award by appellant-petitioner on 05.11.2000 can be said to be income and exigible to tax under the Act for the assessment year 2001-02 especially when amendment to Section 2(24(ix) was brought into effect from 01.04.2002. This Court quashed the order of the learned ITAT dated 05.08.2004 and remanded all the matters, i.e., petitioner's appeal, Department's appeal and also petitioner's cross objection to the Tribunal to consider afresh keeping in view the date of amendment of the relevant statute and in particular the date from which the amendment to the statute came into force. Pursuant to the said order of this Court, learned ITAT on 30.04.2009 allowed the assessee's appeal and dismissed the appeal filed by the Department and assessee's cross objection holding that the award of Rs.25.0 lakhs from the said TV game show received by the assessee on 05.11.2000 cannot be considered as income of the assessee so as tobe taxable under Section 115BB of the Act for the assessment year 2001-02 as the amendment to Section 2(24)(ix) of the Act came into force w.e.f. 01.04.2002 which would have the prospective operation. Pursuant to the said order of the learned Tribunal, the Asst. Commissioner of Income Tax,

Circle-2(2), Cuttack issued intimation dated 04.11.2009 to the assessee giving effect to the order of the ITAT in Appeal Nos.341, 359 and 472/CTK/2003 and C.O. No.37/CTK/2003 in IT Appeal No.359/CTK/2003 dated 30.04.2009 by which the revised total income of the assessee was determined at Rs.16,21,630/- (Annexure-1). Hence, the present writ petition.

6. Mr.B.K. Mishra, authorized representative of the assessee submitted that in view of the order of the Tribunal dated 30.04.2009, the prize money of Rs.25.0 lakhs received by the assessee from the said TV game show cannot be assessed as income of the assessee and the assessee is entitled to get refund of Rs.7,55,500/- wrongly paid towards advance tax along with interest as provided under the Act. The order of intimation passed under Annexure-1 is illegal and an attempt has been made by the opp. party-Department to retain a part of the advance tax without authority of law.

7. It was further argued that the Revenue has illegally collected Rs.7,55,500/- as advance tax on 30.03.2001. Opp. parties 1 and 2 with a mala fide intention distorted facts and provisions of the statute and illegally withheld the actual refund due to the assessee. After receipt of the prize money from Star Plus by the assessee, the Assessing Officer on 16.01.2001 issued a notice to the assessee for payment of advance tax of Rs.11.00 lakhs under Section 208 of the Act on or before 31.03.2001. The said notice was accompanied by a challan of Rs.11.0 lakhs. The assessee met the Assessing Officer and informed that she is not liable to pay tax as there was no provision under the Act to treat the receipt of the prize money as income of the assessee. Thereafter, the Asst. Commissioner issued another notice on 16.01.2011 giving reference to his earlier notice dated 16.01.2001 intimating the petitioner that payment of advance tax is due on or before 15.03.2001 for the financial year 2000-01 relating to assessment year 2001-02, any default, deferment in payment of advance tax attracts levy of interest under Sections 234B and 234C of the Act respectively and requested the assessee to make full and final payment of the advance tax by 15.03.2001. He has also deputed one A.Karim, Income Tax Inspector for the said purpose. Thereafter, Assessing Officer started threatening the assessee-petitioner that the Department would start prosecution proceeding immediately after 31.03.2001, by which her career would be damaged and served another notice under Section 208 of the Act. Referring to their telephonic discussion, the Asst. Commissioner clarified to the assessee-petitioner that under Section 115BB of the Act, the assessee is to pay tax at the flat rate of 40% on the prize money and surcharge of 6% thereon. In the said letter, the petitioner was also intimated that her tax liability comes to Rs.10,39,000/- after allowing rebate and deductions under different

provisions of the Act and in case of default to discharge her obligation to pay the said amount, she would be charged with interest, heavy penalty and prosecution proceedings would be initiated against her. In the said letter, she was also intimated that once the penalty proceeding is initiated she would not be left with any defence and she would be imposed penalty to the tune of 300% of the amount of tax sought to be evaded. Being scared of initiation of prosecution and imposition of 300% penalty and on the assurance of refund of advance tax along with interest @ 12% per annum, after getting clarification from Central Board of Direct Taxes (for short, 'CBDT') as directed by the Assessing Officer, the assessee paid Rs.7,55,550/- on 30.03.2001 as advance tax.

8. Awaiting clarification from CBDT, the assessee filed her return on 14.02.2002. Subsequently, by order dated 16.12.2002 passed under Section 154 of the Act, the Assessing Officer determined the income of the assessee at Rs.25.00 lakhs and levied extra tax of Rs.3,89,930/-. Vide notice dated 22.10.2002 under Section 142 of the Act, the petitioner was directed to produce books of account. Another notice of even date under Section 143(2) of the Act was also issued to the petitioner to attend the office of the Assessing Officer on 18.11.2002 at 11.30 AM. The Assessing Officer completed the assessment on 27.01.2003 under Section 143(3) of the Act rejecting the claim of the assessee-petitioner that according to the amendment in Section 2(24) (ix) of the Act, the prize money received from the said TV game show was brought to the tax net only from 01.04.2002 and subsequent assessment years and hence the assessee could not be taxed for such receipt. On 12.05.2009, the authorized representative of the assessee also submitted a copy of the order dated 30.04.2009 of the ITAT before the Commissioner of Income Tax with a request to arrange refund of the entire amount of Rs.7,55,550/-.

9. It was further submitted that though, according to the assessment order dated 27.01.2003 and order dated 05.05.2004 under Section 251 of the Act, the prize money of Rs.25.00 lakhs was included in the total income of the assessee, but in view of the order of the ITAT dated 30.04.2009 (Annexure-2), the said receipt should not be included in total income. Therefore, the assessee is entitled to get refund of the total advance tax of Rs.7,55,550/- with 12% interest per annum. The assessee-petitioner filed Misc. Application before the ITAT bearing ITA No.08-11/CTK/2010. Vide order dated 30.08.2010, the said Misc. Application was disposed of with the observation that since the assessee's appeal was allowed and the Revenue's appeals were dismissed, the Tribunal felt no need to further clarify its above order as the assessee would get the consequential relief in

any case. The Assessing Officer is wrong in determining the income of the assessee at Rs.16,21,630/-, which is part of the prize money and attempting to collect tax thereon. Referring to Section 237 of the Act, Mr.Mishra submitted that a non-existent assessment order cannot be annulled and the return of income lost its existence due to nullity and in terms of Section 139(9) of the Act. Consequent upon the decision of the learned ITAT, the prize money of Rs.25.0 lakhs cannot be said to be the income of the assessee and therefore, payment of advance tax to the tune of Rs.7,55,550/- is refundable in terms of the first part of Section 240 of the Act. Instead of refunding Rs.7,55,550/-, the income Tax authorities have wrongly refunded tax of Rs.2,12,763/- to the petitioner. The petitioner's liability to pay income tax does not arise according to the provisions of Section 4(1) of the Act.

10. Placing reliance upon various judgments of the apex Court and High Courts, it was submitted that the petitioner is entitled to refund of tax paid in advance along with interest. Further, placing reliance on Modi Industries Ltd., Modinagar etc. v. Commissioner of Income Tax, Delhi and another etc. etc. it was also argued that the impugned order is erroneous and liable to be set aside as the direction of the higher authority is not faithfully carried out and the Assessing Officer has passed the impugned order without jurisdiction.

11. Mr.A.K.Mohapatra, learned Senior Standing Counsel for the Income Tax Department submits that there is no infirmity or illegality in the order passed by the Assessing Officer under Annexure-1. The Assessing Officer is perfectly justified in determining the income of the assessee at Rs.16,21,630/- as per the order of the ITAT and granting refund under Section 240 of the Act.

12. On rival contentions of the parties, the question that falls for consideration by this Court is as to whether the Asst. Commissioner, Income Tax, Circle-2(2), Cuttack is justified to determine the income of the assessee at Rs.16,21,630/- while giving effect to the order of the ITAT.

13. The relief sought for by the petitioner is two fold i.e., (i) to quash Annexure-1 by which the ACIT treated the award received from T.V. Show as income taxable under the head "income from other sources" which is contrary to the order of the ITAT dated 30.04.2009, and (ii) the assessee-petitioner is entitled to get refund of Rs.7,55,500/- paid as advance tax under the threat of the Income Tax Authorities along with interest as provided in First Part of Section 240 of the Act.

14. The learned ITAT vide its order dated 30.04.2009 held that the amount of award of Rs.25.00 lakhs received from the said TV game show by the assessee on 05.11.2000 cannot be said to be her income, which is exigible to tax under Section 115BB of the Act for the assessment year 2001-02 as the amendment to Section 2(24) (ix) of the Act has come into operation from 01.04.2002. This finding of the learned Income Tax Appellate Tribunal is in terms of judgment of this Court dated 13.2.2009 passed in the case of the petitioner-assessee in I.T.A. No. 219 of 2004. Further, the Tribunal finally held that the appeal of the assessee is allowed and the two appeals filed by the Revenue and also the cross-objection are dismissed. Admittedly, in its appeal before the Tribunal, the assessee challenged the order of the CIT(A) holding that the award received by the assessee was taxable under the head "income from other sources" which the learned Tribunal held not correct. When the assessee's appeal is allowed, the assessee is justified in saying that award received by her is not taxable under the head 'income from other sources'. This order of the Tribunal has not been challenged by the Revenue before this Court. Thus, the said order has attained finality. Hence, the Asst. Commissioner is not justified to determine the income of the petitioner assessee at Rs.16,21,630/- in which award received from the said TV game show was included in its impugned order passed under Annexure-1 while giving effect to the order of the Tribunal dated 30.04.2009.

15. Another important aspect which needs to be looked at is that after receiving the order of the Tribunal, the Income-tax Department filed Misc. Appeal No.82/CTK/2009 before the Tribunal with the following prayer.

> "The Hon'ble ITAT may be pleased to examine the contents of its rulings in ITA No.341, 359,472 (CTK) of 2003 and pass suitable order holding that a sum of Rs.25 lakhs shall still be assessed to tax as income from other sources for the assessment year 2001-02, even if the explanation (ii) to Section 2(24)(ix) has been introduced w.e.f. 01.04.2002.
>
> The Hon'ble ITAT may direct the Assessing Officer to follow the statutory provision of section 240 of the Income Tax Act, 1961 recomputing the assessable total income limiting the amount as per the Returned filed by the assessee at Rs.16,21,430/-."

16. The learned Tribunal after hearing counsel for both the parties dismissed the said M.A. No.82/CTK/2009 vide order dated 11.02.2010 holding as follows:

> "4. Having heard both sides and on perusal of materials available on record, we find that the learned DR reiterated the submission made in the M.A. could not point out any mistake apparent from the record crept in the order of the learned Tribunal. In view of this, we are of the view that if the plea of the Revenue has accepted it will amount to review of our orders. Law is well settled that we don't have such power and since the Revenue has failed to point out any mistake apparent from the record, the M.A. filed by the Department deserves to be dismissed."

17. The IT Department has also not challenged the above order of the learned ITAT dated 11.02.2010. Thus, the order dated 11.02.2010 has also attained finality.

The assessee filed Misc. Application in I.T.A. No. 08-11/CTK/2009 and the Tribunal disposed of the same on 30.08.2010 with the following observations:

> **"**Since the assessee's appeal was allowed and the revenue's appeals were dismissed,, we feel no need to further clarify our above order as the assessee will get the consequential relief in any case. The A.O. is directed to pass an order giving effect to the order of the Tribunal dated 30.04.2009."

Thus, from the above sequence of events and orders passed by the learned ITAT it becomes amply clear that the order of the ITAT dated 30.04.2009 has attained finality.

18. Now the question that arises for consideration is whether while giving effect to the appellate order, the Assessing Officer can travel beyond the order of the learned Tribunal and assess the receipt of award as income from other sources which has been held by the Tribunal not to be assesseed as such in its order. The answer is certainly in the negative. The Assessing Officer being the quasi judicial authority and sub-ordinate to the Tribunal is bound by the decision of the learned ITAT. The order of the learned ITAT is binding on the Assessing Officer.

19. At this juncture it is profitable to refer to the judgment of the apex Court in the case of ***Union of India and others v. Kamlakshi Finance Corporation Ltd., AIR 1992 SC 711.*** In paragraph-6 of the said judgment it has been observed as follows:

> "The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department — in itself an objectionable phrase — and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws".

20. Therefore, while giving effect to the order of the Tribunal dated 30.04.2009, the Asst. Commissioner cannot determine the total income of the assessee at Rs.16,21,630/-, in which a part of the award received from the said TV game show is included. Learned Assessing Officer while giving effect to the order of the Tribunal is expected to function within the parameters of law. As it appears, the learned Assessing Officer has exceeded its jurisdiction and power while giving effect to the order of the Tribunal which has become final. This shows utter disregard to the orders of the Tribunal, which is not expected from the Assessing officer, who is subordinate to the Tribunal. Therefore, the order passed under Annexure-1 which is impugned in this writ petition, is not only erroneous, but also error in law. It is necessary to make an observation that the impugned order under Annexure-1 lacks judicial propriety. Hence, the order is liable to be quashed, which we direct. The assessee is entitled to get refund of the entire advance tax of Rs.7,55,500/- along with interest, as provided under the Act and we accordingly direct the Asst. Commissioner of Income tax, Circle-2(2), Cuttack to do so.

21. Before parting with the judgment, we feel it necessary to observe that in view of the various communications made by the Assessing Officer to the petitioner which have been quoted in the body of the writ petition, it is difficult to disbelieve the contentions taken by the Assessee in paragraph-4 of the writ petition that being scared of initiation of prosecution and

imposition of 300% penalty and on the assurance of refund of the amount paid as advance tax along with interest @ 12% per annum, the Assessee paid advance tax of Rs.7,55,500/- on 30.03.2008 as directed by the Assessing Officer and finally filed the return on 14.02.2002. The letter of the Asst. Commissioner, Income Tax shows that he deputed one A.Karim for the purpose of making full payment of advance tax by the assessee.

This is certainly not a healthy practice on the part of the authorities acting on behalf of the Revenue in the matter of collection of tax. In order to gain faith of the assessees and create confidence in the minds of the tax payers and for smooth administration of tax law, the Revenue authorities must act in a fair and legal manner.

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

23. The Hon'ble Supreme Court in M/s. ***Dabur India Ltd. and another v. State of Uttar Pradesh and others.*** *AIR 1990 SC 1814,* observed that Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take appropriate steps, but it should not take extra legal steps or adopt the course of manoeuvring. Because of the above discontentment expressed at the Bar, it has become necessary to provide guidelines for just exercise of the power of Revenue authorities. To prevent the abuse of power and to see that it does not become a new despotism, courts are gradually evolving the principles to be observed while exercising such power. New problems call for new solutions.

24. In the result, the writ petition is allowed with the above directions/observations. No order as to costs.

Writ petition allowed.

2011 (II) ILR- CUT- 412

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

W.P.(C) NO.9096 OF 2001 (Decided on 25.04.2011)

HINDUSTAN PETROLEUM CORPN. LTD. …….Petitioner.

.Vrs.

DEBTS RECOVERY TRIBUNAL & ORS. … …….Opp.Parties.

SECURITISATION & RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (ACT NO.54 OF 2002) – S.17.

Action of the Bank taking over possession of the property of the petitioner – Petitioner comes within the meaning of "Person aggrieved" as described U/s. 17 of the Act – Such application can only be treated as an appeal – Held, petitioner is liable to pay the application fee as prescribed in Rule 13 (1) (d) of the Security Interest (Enforcement) Rules, 2004

(Para 10)

Case laws Referred to:-

1.AIR 1973 Orissa 217 : (Santosh Kumar Agarwalla-V-State of Orissa)
2.I(2006) BC I (DB) : (Kalyani Sales Company & Anr.-V-Union of India & Anr.)

For Petitioner - M/s. G.Mukherji, P.Mukherji, A.C.Panda, S.Patra & S.Mishra.
For Opp.Party.3- Mr. S.K.Padhi, Mr. T.Sahu, Mr. F.Ahmed & Mr. C.N.Murty
For Opp.Party 4- Mr. A.Pattnaik

B.P.DAS, J. The petitioner-Hindustan Petroleum Corporation Ltd. (in short, H.P.C.L.), which is a public limited company, is before this Court against the order dated 19.5.2010 passed under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) for sale of the property so also issuance of sale certificate dated 4.6.2010. Peculiarly, the said order has not been annexed to this writ petition.

2. On 13.1.2011 the petitioner filed an appeal under Section 17 of the SARFAESI Act, 2002 before the D.R.T., Cuttack, which was initially

registered as Diary No.05/2011. After scrutiny, the Registrar of the Tribunal issued notice dated 17.1.2011 vide Annexure-2 calling upon the petitioner to remove the following defects :-

> "1) The application fees, i.e., Rs.49,800/- (deficit) is not deposited.
> 2) The original application and the attestation of the Annexure is not as per Rule 9, Sub-rule (2). Annexure not certified as per D.R.T. Circular dtd.6.1.2011.
> 3) Some of the pages of the application are not legible, i.e., Page Nos.22-28, 32, 34, 36 & 42.
> 4) The cloth lined envelopes with acknowledgement cards, duly filled up with required postal stamps is not provided.
> 5) The application is beyond limitation."

3. The petitioner removed all the defects except the one relating to deficit application fee and filed a memo in Annexure-3 stating that he is not liable to pay the said fee as he is neither a loanee nor a guarantor. The Registrar by order dated 22.3.2011 (Annexure-4) declined to register the application under Rule-5(4) of the D.R.T.(Procedures) Rules, 1993. The order declining to register an application owing to defect under Sub-Rule (4) of Rule 5 of the 1993 Rules is an appealable order under Sub-Rule (5) of Rule 5 of Rules, 1993 and the appeal against such order of the Registrar under Sub-Rule (4) shall be made within 15 days of the making of such order to the Presiding Officer concerned in chamber whose decision thereon shall be final. The petitioner has not availed the forum of appeal and has come to this Court directly. Though the question of maintainability and availability of alternative remedy was raised by the learned counsel for the O.Ps., looking at the grievance made by the petitioner, we are inclined to look into the merits of the application and dispose of the same.

4. The crux of the matter is that as per Rule 13 of the Security Interest (Enforcement) Rules, 2002, which provides for fees for applications and appeals under Sections 17 and 18 of the SARFAESI Act, every application under Sub-Section (1) of Section 17 or an appeal to the Appellate Tribunal under Sub-Section (1) of Section 18 shall be accompanied by a fee as provided in the Sub-Rule (2). We are only concerned with Serial Nos.D & E, which are extracted herein below :-

"Nature of application	Amount of fee payable
(d) Where the applicant is an aggrieved party other than the borrower and where the amount of debt due is Rs.10 lakhs and above	Rs.1250+Rs.125 for every Rs.1 lakh or part thereof in excess of Rs.10 lakh subject to a maximum of Rs.50.000
(e) Any other application by any person	Rs.200"

Under this premises, it is profitable to have a close look at the provision of Section 17 of the SARFAESI Act, which is extracted hereunder :-

> "17.Right to appeal-Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, (may make an application along with such fee, as may be prescribed,) to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken."

So any person including the borrower aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 of the SARFAESI Act taken by the secured creditor is at liberty to make an application along with fees to the D.R.T. within a period of forty-five days. Relevant parts of Sub-Section (4) of Section 13 of the SARFAESI Act provides as follows :-

> "13(4) - In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset :

> Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:
>
> Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt."

Hence, the right to appeal arises only when the action as provided under Sub-Section (4) of Section 13 of the SARFAESI Act is taken by the secured creditor and by a person, who is aggrieved by such. Certainly an aggrieved person is a borrower or the guarantor as the case may be. But Section 17 of the said Act allows an appeal to be filed by any person (including the borrower), aggrieved by any of the measures. So the person aggrieved by any action of the Authorised Officer has different connotations, which have been dealt with in many judicial pronouncements. It was held in **Ex parte Sidebotham, In re, Sidebotham,** (1880) 14 *Chancery Division* 458 at page-465, that "a person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." In **Santosh Kumar Agarwalla vrs. State of Orissa,** AIR 1973 Orissa 217, it was held that the words "person aggrieved" do include a person, who has genuine grievance because an order has been made which prejudicially affects his interest. The words "a person aggrieved" were defined in **Ex parte Official Receiver, In re, Reed, Rowen and Co.** (1887) 19 QBB 174 – "a person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to defend."

5. With the aforesaid background of fact and interpretation of the words "persons aggrieved", let us now see whether the petitioner is an aggrieved person within the meaning of Section 17 of the SARFAESI Act. The petitioner is a Public Sector Undertaking and O.Ps.5 to 12 are the owners of the land, which is undisputed. The said land was initially leased out to one M/s.Caltex India Ltd. in the year 1966, which was subsequently taken over by the H.P.C.L. The owner of the land executed a lease agreement with the H.P.C.L. in the year 1976 for a period of twenty years for the purpose of establishing a petrol pump in Bhubaneswar, which expired in the year 1999. Thereafter, a fresh lease agreement was entered into between the legal heirs of the land owner and H.P.C.L. in the year 2004 for a period of five years and the period of lease had also expired and no fresh lease deed has

been executed after the period of five years. Basing upon the aforesaid factual background, the H.P.C.L. rests its claim over the property as a lessee. O.Ps.-5 to 12 became defaulters in respect of certain loans incurred by them from the Bank in question and ultimately, the property was put to auction under Section 13(4) of the SARFAESI Act, vide notice dated 4.3.2010.

6. The petitioner-H.P.C.L., initially filed a writ petition bearing W.P.(C) No.6501/2010 challenging the aforesaid auction sale notice as a lessee and this Court while disposing of the same on 7.4.2010 directed that the land covered under the auction sale notice would be deferred by 15 days so that in the meantime the petitioner could get permission from the higher authority for participating in the auction and further directed that if the petitioner failed to participate in the auction, it would not be necessary for O.P.1-Authorised Officer of the Bank to wait for the petitioner and it would also be open to O.P.1 to go ahead with the auction. In pursuance of the said direction, the petitioner did not participate in the said auction and filed another writ petition bearing W.P.(C) No.10819/2010 challenging the sale of property as well as the certificate issued under Rule 9(6) of the Securities Interest (enforcement) Rules, 2002 so also a petition to review the order of this Court dated 7.4.2010 passed in W.P.(C) No.6501/2010. This Court vide its judgment dated 15.12.2010 disposed of W.P.(C) No.10819/2010 saying that as a statutory remedy is available to the petitioner by way of an appeal, there is no necessity of referring the dispute between the Bank and the petitioner to the Committee of Disputes. As a matter of fact, the main dispute is between the land owner and the Bank, which has given rise to the proceedings under the SARFAESI Act. The petitioner being a lessee in respect of a part of the entire property has been dragged into the dispute. It is strictly not a dispute between two Government bodies. So liberty was given to the petitioner to file an appeal under Section 17 of the SARFAESI Act. It was further observed that the observation made in the earlier writ petition that the petitioner has no right or locus standi to challenge the auction sale notice does not in any manner affect the petitioner's right to file an appeal.

7. Now with the limited question, the petitioner has come to this Court, whether it is liable to pay the application fees. As we have already indicated that as per the fee structure mentioned in Rule-13 of the Security Interest (Enforcement) Rules, 2002, if the petitioner is an aggrieved person other than the borrower, it has to pay fees, which is higher than the fees required to be paid in category (e) of the table, i.e., any other application by any person.

From the interpretation of "person aggrieved", it is crystal clear that the petitioner is an aggrieved person. In this regard, our attention is drawn by the learned counsel for the petitioner to the computer generated judgment passed by the Bombay High Court in the case of **Trade Well, a Proprietorship Firm and Mr. Suniel K.Meheta, Proprietor of Trade Well vrs. Indian Bank (order dated 2.4.2007 passed in Criminal Writ Petition No.2767/2006)** and in paragraph-67 thereof, it is held that the borrower and the third party are not remediless. Remedy is provided in Section 17 where appropriate relief can be given to them. It is after measures under Section 13(4) are taken that an application under Section 17 can be filed by a borrower or any person and in that application, all grievances including the grievance that reasons were not communicated can be voiced. In paragraph-90 of the said judgment, it is held that remedy provided under Section 17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised. So this judgment is no way solve the issue at hand, i.e., whether the petitioner is liable to pay the application fees.

8. Learned counsel for the petitioner further draws our attention to the judgment of the Punjab and Haryana High Court in the case of **Kalyani Sales Company & Another vrs. Union of India & Another,** reported in I (2006) BC 1 (DB), in paragraph-25 of which it is held that in the absence of any fee prescribed in terms of Section 17(1) of the Act, the fee payable could be the fee payable on an application filed for interlocutory order in terms of Serial No.4 of Sub-Rule (2) of 1993 Rules as the application is to the Debts Recovery Tribunal. It is held that an application under Section 17(1) of the Act would be maintainable on payment of a fixed court fee of Rs.250/- till the rules are made in terms of Section 17(1) of the Act. Rule 7 of 1993 Rules provides that every application under Section 19(1) or Section 19(2) or Section 19(8) or Section 30(1) of the Act or interlocutory application or application for review of decision of the Tribunal shall be accompanied by a fee provided in the Sub-rule (2). So this judgment will in no way be helpful to the petitioner as it does not deal with an appeal filed under Section 17(1) of the SARFAESI Act. We have no scintilla of doubt that for an interlocutory application, the amount payable is Rs.250/-. For the sake of persuasion, the order of the D.R.T., Nagpur (2005) 1 BCR-276 is also referred by the petitioner. In view of the decisions which we have referred to above, we are not inclined to refer the said decision. This judgment does not also help the petitioner as it only decides the locus standi of the person coming within the meaning of Section 17(1) of the Act to file an appeal. All those decisions cited by the petitioner will in no way be helpful the petitioner to bring it within the ambit of Sub-Rule (2) of Rule 13(1) of the Rules.

9. The petitioner is now challenging directly or indirectly the action of the Bank taking over possession of the property, over which the petitioner lodges its claim. The petitioner is certainly a "person aggrieved" within the meaning of Section 17 and its application can only be treated as an appeal. Accordingly, the petitioner is liable to pay the application fees as prescribed in Rule 13(1)(d) of the Security Interest (Enforcement) Rules, 2004. The question of limitation shall be taken up only after the application fees are paid and the appeal is registered. Immediately after the payment of the fees, the Tribunal shall take up the issue of limitation and deal with the matter in accordance with law.

The writ petition is accordingly disposed of.

Writ petition disposed of.

2011 (II) ILR- CUT- 419

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

W.P(C) NO. 6550 0F 2008 (Dt.30.03.2011)

SANTOSH KUMAR MOHAPATRA ……Petitioner.

.Vrs.

APPELLATE AUTHORITY-CUM-D.G.M., CENTRAL BANK OF INDIA & ORS. ……Opp.Parties.

SERVICE - Disciplinary Proceeding – When the Disciplinary authority or the appellate authority or both differ with the findings of the Enquiry Officer, they must record their reasons and convey it to the delinquent officer giving him an opportunity to show cause – In this case admittedly the said procedure has not been followed either by the disciplinary authority or by the appellate authority – Held, it is a fit case to remit the matter back to the disciplinary authority for fresh consideration – In the event the disciplinary authority proposes to differ with the findings of the Enquiry officer or proposes any punishment on the basis of the findings of the Enquiry officer he shall issue notice to the petitioner to show Cause along with a Copy of the enquiry report and after receipt of the reply of the petitioner, a decision shall be taken with regard to the punishment.

(Para 7)

For Petitioner - M/s. Aswini Kumar Mishra, J.Sengupta, D.K.Panda, G.Sinha, A.Mishra & S.Mishra.

For Opp.Parties - M/s. S.K.Sarangi, T.Khan & B.K.Behera.

L. MOHAPATRA, J. The petitioner while working as Branch Manager, Central Bank of India, at Gairkata, faced a Departmental Proceeding and was punished by the disciplinary authority. The appellate authority enhanced the punishment and accordingly in this writ application the petitioner not only challenges the memorandum of charge but also the enquiry report in Annexure-6, the findings and punishment imposed by the disciplinary authority in Annexure-9 and the order of the appellate authority in Annexure-11.

2. The petitioner in the Departmental Proceeding faced seven charges such as sanctioning advances to parties beyond his delegated authority by ignoring the group concept, allowing huge excesses without any delegated authority in the account of M/s. U.P. Filling Station and also suppressing the

information in having allowed excesses for which he had no delegated authority, sanctioning a housing loan of Rs.2.50 lacs to one Dilip Kumar Panda in gross violation of loan policy, sanctioning the credit facilities to one Harihara Patra, a defaulter and adjusting the PMRY loan of the borrower by sanctioning cash credit limit for a higher amount and allowing house loan to the said party in spite of the fact that the land was not in the name of the borrower and the owner of the land also was not a co-borrower, sanctioning a term loan of Rs.9.50 lacs to Mrs. Pitambari Rath, aged about 81 years for running an industrial unit knowing fully well that at the age of 81 year, the lady would not be in a position to run any industrial activity, fraudulently allowing demand loan of Rs.17.00 lacs to one P.K. Behera against the norms and also for sanctioning Rs.10.70 lacs to one Mrs. P.S. Samant against a DIC sponsored proposal for Rs.7.20 lacs and permitting the borrower to divert Rs.1.00 lac out of the loan proceeds for payment to one P.K. Behera another borrower. In course of enquiry, evidence was adduced before the Enquiry Officer and in Annexure-6, the report of the Enquiry Officer was submitted. The Enquiry Officer in his report found the petitioner guilty of Charge No.1 in part and Charge No.2 in full. However, he exonerated the petitioner the rest of the six charges. The disciplinary authority though agreed with the findings of the Enquiry Officer in respect of Charge Nos.1 and 2, did not agree with the finding so far as it relates to Charge No.5. The disciplinary authority held that Charge No.5 has been partially proved. The disciplinary authority also imposed separate punishments for each of the charges. In respect of Charge No.1 which was partially proved, the punishment was reduction to two lower stages in the Time Scale of Pay for a period of three years with further direction that the petitioner will not earn increments of pay during the period of such reduction and on expiry of three years period the reduction will have the effect of postponing the future increments of his pay. So far as Charge No.2 is concerned, the punishment of censure was imposed. So far as Charge No.5 is concerned, the disciplinary authority differed with the Enquiry Officer and held the petitioner is partly guilty of the charge and imposed the punishment, which is same as the punishment in respect of Charge No.1.

The petitioner thereafter preferred an appeal against the order of punishment and the appellate authority accepted the finding of the Enquiry Officer as well as the disciplinary authority so far as Charge Nos.1 and 2 are concerned, agreed with the disciplinary authority so far as Charge No.5 is concerned and differed with the Enquiry Officer as well as the disciplinary authority so far as Charge Nos.6, 7 and 8 are concerned. Accordingly, in respect of Charge Nos.1, 2, 5, 6, 7 and 8, separate punishments were imposed by the appellate authority.

3. Shri A.K. Mishra, the learned Senior Counsel appearing for the petitioner assailed the order of the disciplinary authority as well as the appellate authority on the ground that while differing with the findings of the Enquiry Officer, the said authorities did not record their reasons for differing with the Enquiry Officer, nor was the petitioner given an opportunity to show cause at either stage. It was also contended by Shri Mishra, the learned Senior Counsel appearing for the petitioner that the petitioner had not been given adequate opportunity to cross-examine the witnesses in course of enquiry and was also not supplied with the documents on the basis of which the charges had been framed.

4. Shri S.K. Sarangi, the learned Counsel appearing for the opposite party-Bank submitted that though the disciplinary authority did not agree with the findings of the Enquiry Officer so far as Charge No.5 is concerned, the punishment imposed in respect of Charge No.1 and Charge No.5 being the same, no prejudice is caused to the petitioner for not being served with a notice to show cause. With reference to the record, Shri Sarangi, the learned counsel appearing for the Bank fairly submitted before differing with the Enquiry Officer, the disciplinary authority had not given a notice to show cause to the petitioner and it was also fairly submitted by the learned counsel that the appellate authority while differing with the Enquiry Officer's finding as well as the order of the disciplinary authority, did not give any notice to the petitioner to show cause.

5. The records clearly indicate that the disciplinary authority while differing with the Enquiry Officer in respect of Charge No.5 did not communicate his reasons for differing and no notice was also served on the petitioner to show cause. Similarly the appellate authority while differing with the Enquiry Officer as well as the disciplinary authority, did not communicate his reasons and no notice was given to the petitioner to show cause. The law is well settled that when the disciplinary authority or the appellate authority or both differ with the findings of the Enquiry Officer, they must record their reasons and convey it to the delinquent officer giving him an opportunity to show cause. Admittedly the said procedure has not been followed either by the disciplinary authority or by the appellate authority. It is, therefore, a fit case to remit the matter back to the disciplinary authority for reconsideration. The contention of Shri Sarangi, the learned counsel appearing for the opposite party-Bank that no prejudice is caused to the petitioner because of the punishment imposed in respect of Charge Nos.1 and 5 is same, is not acceptable considering the fact that admittedly while differing with the Enquiry Officer in respect of Charge No.5, the disciplinary authority neither recorded his reasons nor gave an opportunity of hearing to the petitioner.

6. We, therefore, set aside the order of the disciplinary authority in Annexure-9 as well as the order of the appellate authority in Annexure-11 and remit the matter back to the disciplinary authority for reconsideration of the case in accordance with law. The other contentions of the learned counsel appearing for the petitioner that the petitioner was not given an opportunity to cross-examine the witnesses and that he had not been supplied with the documents, can be gone into by the disciplinary authority, if such a ground is taken in the reply that may be submitted by the petitioner. We, therefore, do not express any opinion in this regard.

7. For the reasons stated above, the writ petition is allowed. The orders in Annexures-9 and 11 are quashed. The matter is remitted back to the disciplinary authority for fresh consideration. In the event, the disciplinary authority proposes to differ with the findings of the Enquiry Officer or proposes any punishment on the basis of the findings of the Enquiry Officer, he shall issue a notice to the petitioner to show cause along with a copy of the enquiry report and after receipt of the reply of the petitioner, a decision shall be taken with regard to the punishment. The petitioner, therefore, is given liberty to raise all the questions raised in this writ petition in his reply to the show cause and in the event such grounds are taken, the disciplinary authority with reference to the record of the Enquiry Officer, shall consider the same and pass a reasoned order.

Writ petition allowed.

2011 (II) ILR- CUT- 423

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

W.P.(C)NO.10143 OF 2010 (Dt.06.05.2011)

JAI BHAGWAN SANGWAN ……Petitioner.

.Vrs.

UNION OF INDIA & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA ,1950 - ART-309

Reversion – D.P.C. recommended promotion of the petitioner – Departmental proceeding initiated after D.PC. recommended the promotion and petitioner worked in the promotional post for few months – Petitioner having joined the promotional post and having worked for some months the order of reversion could not have been passed without fallowing the due procedure of law – Held, order of reversion is illegal.

(Para 5,6,7)

Case laws Referred to:-

1.AIR 1991 SC 2010 : (Union of India-V- K.V.Jankiraman).
2.2007 (1) OLR 496 : (Mahendra Pratap-V-State of Orissa & Ors.).

For Petitioners - M/s. D.R.Patnaik, N.Biswal & Miss. S.Pattanayak.
For Opp.Parties - Sri Saktidhar Das, Asst. Solicitor General (for O.P.No.1)

L. MOHAPATRA, J. The petitioner in this writ application assails the order in Annexure-7 passed by the Deputy Commandant on 22.5.2010 reverting him to the post of Sub-Inspector from the post of Inspector.

2. The petitioner was appointed as a Sub-Inspector on 6.1.1995 after being selected through SSC. He served in such capacity at different places for 18 years. His case was considered for promotion by the D.P.C. on 30.3.2009 and he was found fit to be promoted for the post of Inspector on the basis of the recommendation of DPC. Before the petitioner was given promotion, a charge memo was issued by opposite party no.4 on the allegation of negligence in duty. The charge is that the petitioner had been intimated to attend the pre course marine training, which was scheduled to be held from 10.5.2009 to 30.5.2009 and even though he had been informed about the training, he got himself admitted in Ayurvedic Hospital, Safdarganj Hospital, New Delhi and obtained a certificate from the doctor of the said

hospital on 15.5.2009 advising him for seven days bed rest in order to avoid the training programme. Accordingly, on the basis of the said allegation, charge was framed for indiscipline and disobedience of order of higher authority. He was found guilty of the charge and was imposed one day pay fine. On depositing the fine, the petitioner was promoted to the post of Inspector under Annexure-5 on 21.8.2009. The certificate appended to the said order of promotion clearly shows that no departmental inquiry was either pending or contemplated against him and that he was not under currency of punishment. Though it is the case of the petitioner that he joined the promotional post and had drawn salary for two to three months before the reversion order was passed, the stand taken in the counter affidavit is that before the petitioner joined in the promotional post the order of reversion was passed in view of the departmental proceeding.

3. Shir Pattnaik learned counsel appearing for the petitioner assailed the order in Annexure-7 basically on two grounds. The first ground taken by the learned counsel is that once the D.P.C. found the petitioner suitable for promotion, initiation of a departmental proceeding subsequent thereto cannot be a ground to deny promotion. The second ground is that the petitioner having been promoted to a substantive post and having joined the said promotional post, he could not have been reverted without following the due procedure of law.

Shri S.D.Das, learned Assistant Solicitor General appearing for the opposite parties-Department submitted that though the departmental proceeding had been initiated against the petitioner after the D.P.C. recommended for his promotion, before he was actually promoted the proceeding had already been started and concluded. Therefore the petitioner could not have been given promotion on the recommendation of D.P.C. and, accordingly, the order of reversion had to be passed.

4. So far as first ground taken by the learned counsel for the petitioner is concerned, admittedly the D.P.C. met on 30.3.2009 and recommended the case of the petitioner for promotion and on the said date no disciplinary proceeding was pending against him. The disciplinary proceeding was started on 31st July, 2009 when a charge memo was served on the petitioner. The proceeding was concluded and as a minor punishment, fine of one day pay was imposed and the petitioner also deposited the said fine on 21.8.2009. On the very same day the order of promotion was issued in Annexure-5 and it is specifically stated in the said promotion order that on the date the said order was issued, no departmental proceeding was pending against the petitioner. In this connection, reference may be made to a judgment of the Hon'ble Supreme Court in the case of ***Union of India***

Vrs. K.V.Jankiraman reported in AIR 1991 S.C. 2010. The Hon'ble Supreme Court in the said judgment held that sealed cover procedure is to be followed only after charge memo is issued to the employee. Merely pendency of a preliminary investigation is not sufficient to enable the authorities to adopt the said procedure. In the case of ***Mahendra Pratap Vrs. State of Orissa and others*** reported in 2007 (1) OLR 496 this Court observed that initiation of a departmental proceeding after recommendation is made by the D.P.C. cannot be a ground to deny the promotion. We are therefore of the view that the departmental proceeding having been initiated after the D.P.C. recommended the case of the petitioner for promotion, pendency or disposal of the departmental proceeding shall not stand on the way of the petitioner to deprive him of such promotion. Moreover, it has been certified in Annexure-5 that on the date of promotion, no departmental proceeding was pending against the petitioner.

5. So far as second ground is concerned, the petitioner admittedly had been promoted to the post of Inspector in Annexure-5 and the said order of promotion was passed on 21st August 2009. The order of reversion was passed on 22nd May, 2010 and there is nothing in the counter to show that the petitioner was working as Sub-Inspector from 21st August, 2009 till 22nd May, 2010. The petitioner having been promoted to the post of Inspector in August, 2009 and the order of reversion passed on 22nd May, 2009, we accept the contention of the learned counsel for the petitioner that the petitioner had in fact worked in the promotional post for few months.

6. In view of the above, the petitioner having joined the promotional post and having worked for some months, the order of reversion could not have been passed without following the due procedure of law.

7. Having found the order of reversion illegal for the reasons stated above, we allow the writ application and set aside the order of reversion in Annexure-7

Writ petition allowed.

2011 (II) ILR- CUT- 426

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

WP(C) NO. 6102 OF 2011(Dt.03.05.2011)

BRUNDABAN PATRA & ANR. …….Petitioners.

.Vrs.

RAJALAXMI PATRA ……..Opp.Party.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT. 2005. (ACT NO.43 OF 2005) - S.12.

Application U/s. 12 before the Judge, Family Court – Maintainability – Family Court has jurisdiction under this Act to grant relief to the victim of domestic violence only if there is an existing legal proceeding before it – In other wards the original and independent proceeding under the Domestic violence Act can not be initiated in the Family Court – An independent and Original proceeding U/s12 of the Act for various relief's is maintainable before the Judicial Magistrate, First Class – Held, the application filed before the learned Judge, Family Court is not maintainable – Instead of quashing the entire proceedings the civil proceeding pending before the learned Judge, Family Court be transferred to the Court of JMFC, Bhubaneswar who can change the nomenclature and register it as a Criminal Case.

(Para 6,7)

Case laws Referred to:-

1.2008(65) AIC 686(Madras High Court) : (M.Palani-V- Meenakshi)
2.2010(93) AIC 405(Bombay High Court) : (Pramodini Vijay Fernandes-V- Bijay Fernandes).
3.2010(87) AIC 385 (Madras High Court) : (Alexander Sambath Abner-V-Miron Lede & Anr.).
4.2010(3) CCC 431(A.P) : (Mohit Yadam & Anr.-V-State of A.P. & Ors.)
5.AIR 2008 Chhattisgarh, P-1 : (Smt. Neetu Singh-V-Sunil Singh)

For Petitioners - M/s. Suvashis Patnaik, S.Mohanty, B.Moharana & A.Barik, Sri Bidhu Bhusana Mohapatra (Caveator).
For Opp.Party - M/s. R.C.Sarangi, S.S.Mohanty, D.Bhatta & M.K.Pattnaik.

S.K.MISHRA, J. The petitioners being the opposite parties in I.A. No.29 of 2011, arising out of C.P. No. 480 of 2011 of the court of Judge,

Family Court, Bhubaneswar assailed the order dated 04.03.2011 restraining them from interfering with opposite party's possession of a portion of the building and also directing them to allow use of electricity and water supply to the portion occupied by the opposite party in this case.

2. The facts leading to filing of this writ petition are undisputed. The opposite party is the daughter-in-law of the petitioners. The husband of the opposite party died leaving behind the opposite party and her infant daughter. The opposite party has been in occupation of the first floor of the building over revenue Plot No.1328, Mouza - Kapilaprasad in Bhimtangi area under Bhubaneswar Tahasil where she has been residing along with infant daughter. She filed an application before the learned Judge, Family Court under Section 23 (2) of the Protection of Women from Domestic Violence Act, 2005, hereinafter referred to as 'the Act', read with Sections 18, 20 and 22 of the said Act on the allegation that after death of her husband the opposite parties, i.e., the present petitioners subjected her, to cruelty to evict her from the building. They disconnected the electricity and water supply connections to the floor under her occupation on 15.01.2001 and they forced her to evict that part of the building.

3. After taking into consideration the pleadings of the parties and the affidavit filed, the trial court was satisfied, *prima facie,* that the present opposite party, i.e., petitioner before the trial judge is the wife of late Dr. Somanath Patra, son of the present petitioners. The opposite parties being the daughter-in-law and her child, being the grand daughter of the petitioners, have been in occupation of the house of their own right. However, the trial court has observed that the present petitioners have threatened to dispossess them by disconnecting the electricity and water supply connections. However, the electricity and water supply was continued in the ground floor and the 2nd floor without any disruption. Hence, finding disconnection of supplies to be intentional with an ulterior objective of evicting the opposite party, the trial court ordered that the electricity and water supply be restored and in case of necessity the name of the consumer be changed to that of the present opposite party by the authorities in charge of supply of water and electricity.

4. In assailing this order, the learned counsel for the petitioners submitted that the learned Judge, Family Court has no jurisdiction to entertain the application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 and the same can be initiated before a Magistrate. Learned counsel for the petitioners also submitted that the order passed by the learned Judge, Family Court without calling for a report from

the Protection Officer is illegal. Therefore, it is submitted that the order passed by the learned Judge, Family Court is without jurisdiction. Hence, he prayed to set aside the same.

Learned counsel for the opposite party, however, contended that the learned Judge, Family Court has jurisdiction to decide the case and hence there is no justification to interfere with the order passed by the learned trial Judge. Learned counsel for the opposite party relying on ***M. Palani vs. Meenakshi,*** 2008 (65) AIC 686 (Madras High Court) submitted that when a civil court passes the order under Section 12(1), it is not necessary to look into the report submitted by the Protection Officer. Similarly, the opposite party relied upon the reported cases of ***Pramodini Vijay Fernandes vs. Vijay Fernandes,*** 2010(93) AIC 405 (Bombay High Court), ***Alexander Sambath Abner vs. Miron Lede and another,*** 2010(87) AIC 385 (Madras High Court), ***Mohit Yadam and another Vs. State of A.P. and others,*** 2010(3) Criminal Court Cases 431 (A.P.) and submitted that an application under Section 7(1) of the Family Court Act read with Section 12 of the Act, 2005 is maintainable before the learned Judge, Family Court. However, the learned counsel for the petitioners has relied upon the reported case of ***Smt. Neetu Singh Vs. Sunil Singh,*** AIR 2008 Chhattisgarh, Page-1, wherein the Chhattisgarh High Court has held that the aggrieved wife cannot move an independent fresh application under Section 12 of the Act. Such an application can only be entertained by a Magistrate having jurisdiction and it is not maintainable before the Judge, Family Court.

5. An examination of the provisions of the Domestic Violence Act reveals that it is an Act intended to provide for more effective protection of rights of women granted under the constitution, who are victim of violence of any kind occurring within the family and for matter connected therewith or incidental thereto. Section-3 among other definitions also defines different type of abuses like physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. Economic abuses includes deprivation of all or any economic or financial resources in which the aggrieved party is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to shared household and maintenance. It also includes the disposal of household effects, any alienation of assets in which the aggrieved party has an interest or is entitled to use by virtue of the domestic relationship or may be reasonably

required by the aggrieved person or her children or her sridhan or any property. It also includes prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to shared household. Chapter-3 of the Act contains Section 4 to 11 which provides for powers and duties of protection officer, service providers, etc. This chapter is not relevant to the present case.

Chapter-IV provides for procedure for obtaining orders or relief. Section-12 of the Act provides that an aggrieved person or a protection officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more relief under the Act. In the proviso it lays down that before passing an order on such an application, Magistrate shall take into consideration any domestic incident report received by him from the protection officer or the service provider.

Sub-section(2) of Section 12 provides that the relief sought for under sub-section (1) may also include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injured caused by the act of domestic violence committed by the respondent. The proviso to sub-section lays down that such amount of compensation or damages shall be set off against the amount payable under such decree passed under the Code of Civil Procedure, 1908 or any other law for the time being in force.

Sub-section-4 provides that the Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court. Sub-section-5 provides that the Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing. Section-13 provides for procedure of service of notice. Section-14 provides for counseling. Section-15 provides for assistance of welfare expert. Section-16 provides for holding of procedure in camera. Section-17 provides for right to reside in a shared household. In sub-section (1) of the said section, it is provided that notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. Sub-section-2 provides that the aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law. This section lays down that irrespective of

any contrary provision in any other law, every woman in a domestic relationship shall have the right to reside in the shared household and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law. This is *non obstante* clause as is evidence from the use of words appearing in sub-section-(1) " i.e. notwithstanding anything contained in any other law for the time being in force". Thus, it appears that the Parliament in its wisdom thought it proper to enact a law to give proper rights to the women in a domestic relationship and provides for effective measures for implementing such right. It is a very progressive piece of legislation and has to be construed keeping in view growing violence against women in the present day Indian society. In the present case there appears to be a violation of the right conferred on the opposite party to reside in a shared household on a property held jointly.

Section-18 provides for protection orders, which can be passed by the Magistrate. Section 19 provides for order relating to residence. Section - 20 provides for monetary relief. Section-21 provides for a custody orders. Section-22 provides for compensation order. Section-23 provides for grant of interim and *ex parte* order. In sub-section (1) it is provided that in any proceeding before him under the Act, the Magistrate may pass such interim order as he deems just and proper. Sub-section (2) of Section-23 provides that if the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, has committed an act of domestic violence or that there is likelihood that the respondent may commit an act of domestic violence, he may grant an *ex parte* order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Sections 18, 19, 20, 21 or 22.

Section-27 provides for jurisdiction. Sub-section(1) of Section 27 lays down the court of Judicial Magistrate of first class or the Metropolitan Magistrate, as the case may be, within the local limits of which an aggrieved person permanently resides etc. The Magistrate, first class has the jurisdiction to grant protection order and other orders under the Act and to try offences under the Act. However, Section-26 provides for relief in other suits and legal proceedings. Sub-section(1) of Section-26 provides for any relief available under sections 18, 19, 20, 21 and 22 may be sought in legal proceeding before a Civil Court, Family Court or a Criminal Court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of the Act. Sub-section (2) of the said section provides that any relief in sub-section (1) may be sought in addition to and alongwith any other relief that the aggrieved person may

seek in such suit or legal proceeding before a civil or criminal Court. Sub-section (3) of the said section provides that in case any relief has been obtained by the aggrieved person in any proceeding other than a proceeding under the Act, she shall be bound to inform the Magistrate of the grant of such relief.

6. Thus, a plain reading of the provisions of the Act reveals that the Indian Parliament in its wisdom thought that the existing law governing the field was inadequate to protect women from domestic violence and, therefore, enacted this particular piece of legislation for more effective protection of rights of women which is granted under the Constitution, who are victims of any kind abuse occurring within the family and for matters connected therewith or incidental thereto. This is a piece of progressive legislation and the provision of the act has to be interpreted accordingly. From the different provisions discussed above, it is seen that the Indian Parliament has left no scope for refusing any relief on technical grounds. However, since the question of lack of jurisdiction is raised in this case, we come to the conclusion that the learned Judge, Family Court has jurisdiction under this Act to grant relief to the victim of domestic violence only if there is an existing legal proceeding before it. In other words, the original and independent proceeding under the Domestic Violence Act cannot be initiated in the Family Court. An independent and original proceeding under Section 12 of the Act for various reliefs as described in the preceding paragraph is maintainable before the Judicial Magistrate, First Class and thus, the application filed before the learned Judge, Family Court is not maintainable.

7. However, keeping in view the very objective of the Act itself and the fact that the court should not take recourse to hide behind technicalities and refuse substantial relief to the parties and its order should be tampered with the concept of justice, this Court comes to the conclusion that instead of quashing the entire proceedings, it shall be proper to transfer the proceedings pending before the learned Judge, Family Court to the court of JMFC, Bhubaneswar with a direction to try and dispose of the application filed by the opposite party as early as possible, preferably within a period of one month from the date of appearance of the parties before it. Since the interim order has been passed, this Court is of the opinion that such order is just and proper though without jurisdiction. The Civil Proceeding No.480 of 2011 be transferred from the court of Judge, Family Court to the court of JMFC, Bhubaneswar who is trying UTP cases. The parties are directed to appear before the said court on 20.05.2011. The learned Judge, Family Court shall transmit the record so as to reach the court of JMFC at least

three days prior to the appearance of parties on the aforesaid date. The Magistrate may change the nomenclature and register it as a criminal case.

The Writ petition is accordingly disposed of. This judgment be communicated to the lower court immediately.

Writ petition disposed of.

2011 (II) ILR- CUT- 433

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

JCRA NO.28 & 29 OF 2001 (Decided on 06.04.2011)

PITABASH LOHARA & ANR. **… …..** Appellant.

.Vrs.

STATE OF ORISSA **……** Respondent.

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

In order to attract Section 27 of the Evidence Act, the following features must be established, namely

(i) the accused must be in police custody,

(ii) while in such custody he gave certain information to the police officer which has led to the discovery of the fact and

(iii) the information must relate distinctly to the facts discovered and not to any other aspect of the case.

Section 27 of the Evidence Act is in fact an exception to Sections 25 and 26. Section 25 of the Evidence Act excludes proof confession to a Police Officer in any circumstances. Section 26 excludes proof of any confession by a person in Police custody, unless made in immediate presence of a Magistrate. If a statement is made whether confessional or not to a Police Officer, which led to discovery of a fact, then it is admissible in evidence. Thus a plain reading of these provisions reveal that a statement which is intended to be used under Section 27 of the Evidence Act cannot be taken to be a confessional statement relating to the occurrence – Held, such statement recorded under Section 27 of the Evidence Act should not be used as a whole some confession of the appellant.

(Para.12)

For Appellant - Sri R.N.Nayak & K.K.Sahoo
For Respondent - Addl. Govt. Advocate
For Appellant - Smt. Mina Kumari Das
For Respondent - Addl. Govt. Advocate

S.K.MISHRA,J. The appellants in both the cases assail their convictions under Section 302/34 of the Indian Penal Code (hereinafter referred to as

"the I.P.C." for brevity) in S.C. No.46/11 of 1999-2000 of the court of learned Addl. District and Sessions Judge, Nuapada.

2. Bereft of unnecessary details, the prosecution gravamen is that on 15.3.1999 in the night the accused persons organized a feast with the deceased in his house and took their dinner. Due to some reason there was a quarrel between the appellants and the deceased. In such quarrel appellant Pitabash Lohara caught hold of the deceased from the back and the other appellant Paramananda Gahir stabbed him by means of a knife, consequently the deceased died instantaneously on the village road of Hirapur.

3. Hearing the noise Dushasan Pandey and others, who were watching the T.V. in the house of the deceased, came out and saw that the appellants were running away along with the weapon of offence, i.e. the knife by withdrawing the same from the chest of the deceased. After the said incident the informant Rudra Charan Patnaik lodged an F.I.R. before the O.I.C., Sinapali on 16.3.1999. On the basis of which the O.I.C. registered the case, took up investigation and after completion of investigation submitted charge sheet against the appellants under Section 302/34 of the I.P.C.

4. To establish the charges levelled, the prosecution examined ten witnesses out of whom P.W.1 is the informant, P.Ws.2,6,7 and 8 are the independent witnesses, who have seen the appellants running away from the spot with the weapon of offence, i.e. the knife after the deceased fell down on the ground. P.Ws.3 and 5 are the post occurrence witnesses. P.W.9 is a witness to the discovery of the weapon of offence on the disclosure statement made by the accused, Paramananda Gahir. P.W.4 the doctor, who had conducted post mortem examination on the dead body of the deceased and P.W.10 is the Investigation officer.

5. After having considered the materials on record, the learned Addl. District and Sessions Judge has come to the conclusion that the death of the deceased was homicidal in nature and the prosecution has proved its case beyond all reasonable doubt that the accused persons committed murder of the deceased in furtherance of their common intention and, therefore, the learned Addl. District and Sessions Judge proceeded to convict them for the offence under Section 302/34 of the I.P.C. and sentenced each of them to undergo imprisonment for life. Such judgment of conviction and order of sentence are assailed in these appeals.

6. In assailing the conviction, learned counsel appearing for the appellants submitted that the learned Addl. District and Sessions Judge has based his findings on conjectures and surmises and has come to a erroneous finding, especially it is contended that the involvement of the accused persons in the crime is not established beyond all reasonable doubt.

7. Learned Addl. Government Advocate submitted that the appellants have been rightly convicted as there is enough evidence against them to establish the charges beyond all reasonable doubt.

8. While considering the case, it is seen that the appellants do not challenge the finding that the death of the deceased was homicidal in nature. P.W.4, who happens to be the doctor and had conducted the autopsy, has stated on oath that on 16.3.1999 he conducted the post mortem examination over the dead body of the deceased and found a stab injury on the right anterior chest wall 11.5 C.M. from the right clavicle 2 C.M. midial and the size of the said injury is stated to be 4.2 C.M. X 2 C.M. in the middle part of gradually tapering towards both ends, making sharp angles at the two extremities. The doctor has opined that the injuries were ante mortem in nature and the death resulted due to shock from profuse hemorrhage, as a result of stab on the heart. Though cross-examined, nothing has been brought out from the mouth of the said witness to discredit his evidence given in Court. Therefore, this Court comes to the conclusion that the death of the deceased was proved to be homicidal in nature.

9. Coming to the evidence led on behalf of the prosecution, it is seen that P.W.2 has stated on oath that in the evening of 15.3.1999 himself, the deceased, Karrtika Tandi, Chowhan Tandi, Dillip Pandey, Premlal Pandey and Garna Bandichor were watching T.V. in the house of the deceased. Sometime thereafter both the appellants came there. They brought some liquor and chicken for preparing a feast. They went to the kitchen room along with the deceased. At about 9.30 P.M. they heard hullah from the road side and came outside and saw the accused persons and the deceased were there. They also found that the accused Pitabash Lohara drew the knife from the chest of the deceased and running away from the spot and the other accused person also ran away with him. He found that the deceased lying on the ground with bleeding injury. The deceased died there. The other witnesses also came there. He has been cross-examined extensively. In cross-examination an important contradiction brought out by the defence. This witness has denied the defence suggestion that he did not state before the Police that the accused Pitabash Lohara withdrew the knife

pierced on the chest of the deceased and having withdrawn the same he ran away from the spot along with the other accused.

A cross reference to the statement of the I.O., P.W.10, reveals that at paragraph-9 of his cross-examination he has stated that P.W.2, Dushasan Pandey, did not state before him that on the date of occurrence the accused Pitabash Lohara withdrew the knife pierced on the chest of the deceased and having withdrawn the same he ran away along with the other accused.

10. P.W.6 is another witness, who states about the occurrence. He has also stated to have seen the accused Pitabash Lohara running away by withdrawing the knife from the chest of the deceased. In cross-examination the defence has confronted the witness that he omitted to state such a fact before the I.O. A further reference to the evidence of P.W.10, reveals that none of the witnesses stated before him that the accused Pitabash Lohara withdrew the knife from the chest of the deceased, but all of them have stated, except Balaram Tandi, that both the accused persons ran away from the spot. Thus, it is clear that none of the witnesses, who have been examined as P.Ws.2,6,7 and 8, have stated before the I.O. in course of investigation that they saw the appellant, Pitabash Lohara withdrawing or pulling out the knife from the chest of the deceased and both the appellants ran away. They stated that they have seen the appellants run away from the spot. The prosecution has developed a new story and, therefore, these statements have to be viewed with suspicion. It is the trite law that whenever a material aspect of the evidence is deposed in the Court, but the same has not been deposed before the I.O. in course of recording of their statements under Section 161 Cr.P.C. Then the credibility of the witness becomes suspect and the normal course is not to accept such evidence to record a conviction of the accused persons, especially when the charges are grave and offences are visited with capital punishment.

11. Another component of evidence, which has been given much emphasis by the learned Addl. District and Sessions Judge, is the statement under Section 27 of the Indian Evidence Act, 1872(hereinafter referred to as “the Evidence Act” for brevity). This can be appreciated by examination of certain paragraphs of the judgment impugned. At paragraph-10, learned Addl. District and Sessions Judge has observed as follows:

> “At the outset it may be stated that the entire case of the prosecution rests on the circumstantial evidence. Because there is no eye witness to the occurrence. In other words none of the witnesses

> has seen any of the accused persons causing stab injury on the person of the deceased. There are only materials available on record that accused, Pitabash Lohara withdrew the knife from the chest of the deceased and both the accused persons running away from the spot. There is no direct evidence to the effect as to which of the accused person has dealt knife blow on the body of the deceased."

Then at last portion of paragraph-11, learned Addl. District and Sessions Judge has further observed that excepting the testimony of P.W.9 and the evidence led by the prosecution under Section 27 of the Evidence Act, there is no eye witnesses to the occurrence. The learned trial judge has further held that the materials as stated above are quite clear and cogent that on the date of occurrence the accused, Paramananda Gahir dealt a knife blow on the chest of the deceased with the help of the other accused, Pitabash Lohara. In order to arrive at this conclusion, learned Addl. District and Sessions Judge has taken into consideration the statement of the accused made under Section 27 of the Evidence Act. The statement has been marked as Ext.10. Examination of the said exhibit reveals that Paramananda Gahir concealed the knife, which is the weapon of offence, and later stated the place where he had concealed it. This fact has been deposed to by P.W.9. From such exhibit, learned Addl. District and Sessions Judge has come to the conclusion that on the date of occurrence while the accused persons and the deceased had a feast, due to some reason quarrel took place among them and accused Paramananda Gahir dealt a knife blow and other accused withdrew the same from the chest of the deceased and both the accused persons ran away from the spot.

12. Section 27 of the Evidence Act provides that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as it distinctly relates to the fact thereby discovered, may be proved. In order to attract Section 27 of the Evidence Act, the following features must be established, namely (i) the accused must be in police custody, (ii) while in such custody he gave certain information to the police officer which has led to the discovery of the fact and (iii) the information must relate distinctly to the facts discovered and not to any other aspect of the case. Section 27 of the Evidence Act is in fact an exception to Sections 25 and 26. Section 25 of the Evidence Act excludes proof confession to a Police Officer in any circumstances. Section 26 excludes proof of any confession by a person in Police custody, unless made in immediate presence of a Magistrate. If a

statement is made whether confessional or not to a Police Officer, which led to discovery of a fact, then it is admissible in evidence. Thus, a plain reading of these provisions reveal that a statement which is intended to be used under Section 27 of the Evidence Act cannot be taken to be a confessional statement relating to the occurrence or how it was perpetuated and who committed the offence etc. like a full-fledged confessional statement. Such statement recorded under Section 27 of the Evidence Act should not be used as a wholesome confession of the appellant. Learned Addl. District and Sessions Judge having done so in arriving at the conclusion as afore described has committed grave error on record.

13. Another aspect of the case is that though the knife was sent for chemical examination, no blood stained was found on it. Moreover, it being a single piece of circumstance does not form a complete chain of circumstances unerringly pointing to the guilt of the accused persons and, therefore, cannot sustain a conviction.

14. Thus, on conspectus of the materials on record and the impugned judgment, this Court comes to the conclusion that the conviction recorded by the learned Addl. District and Sessions Judge is erroneous and requires interference.

Accordingly both the appeals are allowed and the appellants in both the appeals are acquitted of the charges. They be set at liberty forthwith, if their detentions are not required in any other case.

Appeals allowed.

2011 (II) ILR- CUT- 439

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

O.J.C.NO.9310 OF 1999 (Decided on 06.04.2011)

MANMAN DAS **.**……Appellant

.Vrs.

UNION OF INDIA AND ORS . ……Respondents

SERVICE – Adhoc promotion – Adhoc promotee has no claim to continue in the promotional post and he is liable to be reverted on selection of a regular incumbent or other exigency of public service – Such incumbent carries only a limited right and can not stake any claim to the post – At the most he can claim the salary of the higher post for the period of his incumbency therein and nothing beyond it.

(para.7)

Case laws Referred to:-

1.AIR 1995 SC 974 : (State of Orissa & Anr.-V-Pyari Mohan Misira)
2.AIR 1991 SC 1145 : (Ramakant Shripad Sinai Advalpalkar-V- Union of India & Ors.)
3.AIR 1999 SC 838 : (Selva Raj-V- Lt. Governor of Island, Port Blair and Ors.)
4.AIR 1999 SC 897 : (A.K.Sarma & Anr.-V-Union of India & Anr.)
5.AIR 1997 SC 251 : (Sreedam Chandra Ghosh-V-State of Assam & Ors.)

For Petitioner - M/s. G.K.Mishra, G.N.Mishra & S.B.Das.
For Opp.Parties - Mr. Akhyaya Kumar Mishra (O.P.1)
M/s. Anindya Kumar Mishra, H.M.Das & A.K.Sahoo(O.P.2)

C.R. DASH, J. This writ petition is directed against the order of Central Administrative Tribunal (C.A.T.), Cuttack Bench Cuttack.

2. The petitioner joined the railway service as substitute 'Khalasi' on 25.06.1974 at Kharagpur. On establishment of Mancheswar Carriage Repair Workshop in Orissa, he opted to come to aforesaid Mancheswar Carriage Repair Workshop as 'Khalasi Helper' (semi skilled). Accordingly, he joined in Mancheswar Carriage Repair Workshop on 01.03.1985. During his incumbency he passed several tests including the Grade-II test and was promoted to Grade-II with effect from 01.01.1989. Shri S.S. Rao, (opposite party no.3), who had joined railway service subsequent to the petitioner on

23.10.1976 had also opted to come to the Mancheswar Carriage Repair Workshop. Said Shri S.S. Rao (opposite party no.3) was promoted to Grade-I on ad hoc basis with effect from 01.08.1987. Being aggrieved by promotion of opposite party no.3, the petitioner represented before the authorities on 22.02.1991. The petitioner also passed Grade-I test and was promoted to Grade-I on Ad hoc basis vide order dated 15.05.1991 (Annexure-1). The order of promotion passed vide Annexure-1 was cancelled vide order dated 05.09.1992 (Annexure-2) and the petitioner was reverted to the Grade-II post. The petitioner moved the Central Administrative Tribunal, Cuttack Bench Cuttack (C.A.T.) seeking relief to quash the cancellation order dated 05.09.1992 Annexure-2 and further seeking a declaration to the effect that he is senior to opposite party no.3.

3. Learned Tribunal on consideration of contentions of the parties and especially the submission of opposite party nos. 1 and 2 to the effect that opposite party no.3 had joined Mancheswar Carriage Repair Workshop on 01.01.1983 much prior to joining of the petitioner there on 01.03.1985, held that the petitioner's case being not one of adjustment of opposite party no.3 in the promotional post held by the petitioner prior to his reversion vide Annexure-2, and the relief of quashing of Annexure-2 as sought for by the petitioner being not dependent on question of inter se seniority between the petitioner and opposite party no.3, and the cause of action regarding the question of inter se seniority and question of cancellation of the promotion of the petitioner vide annexure-2 being based on different causes of action, the prayer of the petitioner for declaration of his seniority over opposite party no.3 is not maintainable under the rule and even on merit, and such claim is also hit by the provision Law of Limitation. On the point of the relief of quashing of Annexure-2, learned Tribunal refused to interfere especially in view of the nature of the promotion order vide Annexure-1 which was completely an ad hoc promotion without prejudice to the seniority dispute and absence of right on the part of the petitioner to officiate in that post in the event of amendment, modification or cancellation of the order at any time.

4. Learned counsel for the petitioner does not impugn the order of the Tribunal on the issue of inter se seniority between the petitioner and opposite party no.3. He, however, impugns the order of the learned Tribunal on the issue of quashing of Annexure-2 on the ground that once the petitioner having promoted and held the promotional post, the promotion order could not have been cancelled without giving an opportunity of being heard to the petitioner. It is further submitted that the right of the petitioner having been affected substantially by issuance of the cancellation order vide Annexure-2, equity demands that the order of cancellation of promotion

should have been quashed and the petitioner should have been treated to have continued in the promotional post with all the consequential financial benefits from the date of his promotion without being affected by the cancellation order vide Annexure-2. Learned counsel for the petitioner relies on a decision of this Court rendered in the case of **Ram Binay Sharma Vrs. Chairman, Coal India Ltd. and others** (W.P.(C). No.4047 of 2007, disposed of on 17.06.2008).

Leaned counsel for the opposite party nos. 1 and 2 on the other hand, supports the order of the Tribunal and submits that the petitioner, in view of the nature of the promotion order given in his favour, had no right of being heard on cancellation of the said order of promotion.

5. The order of promotion vide Annexure-1 reads as follows:-

> " xxx xxx xxx xxx
>
> The following ad hoc promotion is ordered with the approval of the competent authority to have immediate effect.
>
> Sri M.M. Das (UR), Fitter (MW), Gr.II, T. No.3232 in scale Rs.1200-1800/-RP is promoted on adhoc basis as fitter (MW) 1 in scale 1320-2040/- RP against the vacancy of Sri Laxman Rao Fitter G.I. (MW) transferred to S&C organization (VSKP) on deputation.
>
> N.B.:1. The above promotion is arranged purely on adhoc basis which will not confer any right or title to officiating incumbents to continue as such in future or seniority and is without prejudice to the seniority dispute, if any.
>
> 2. The above ad hoc promotion will have effect till such time Sri Rao comes back to MCSW.
>
> 3. The undersigned reserves the right to amend/modify/cancel the above order at any time partly or fully without assigning any reason there of.
>
> xxx xxx xxx xxx"

(only the relevant portion extracted)

The impugned order vide Annexure-2 reads as follows:-

" xxx xxx xxx xxx

Consequent upon receipt of the substantive position of Sri M.M. Das, Fitter (M/W) Gr.I (ad hoc) from his parent unit i.e. KGPW as on 31.12.87 vide letter No.506/Cadre/MCS/Misc/119 dated 4.1.92 as Sk. Gr.III w.e.f. 16.8.90 his substantive status is revised as Khalasi Helper as on 31.12.87 and placed at Srl. No.37A of Kh.Helper seniority list published vide this office letter No.CRW/MCS/P-119/Seniority/K.H/Semi skilled/3007 dtd. 2.9.89 and named placed below Sri Narayan Padhi and above Sri V. Rajeswar Rao.

N.B. : 1. The revised position is prepared and published based on substantive status of staff as on 31.12.87 (AN) received from parent unit. On receipt of any further position from Division/Workshop, the seniority of staff published vide above quoted Nos. may also be changed if deem proper.

2. This should be given wide publicity among the staff and ensure that concerned staff should note their position invariably.

xxx xxx xxx xxx"

(only the relevant portion extracted)

6. A cursory reading of the order vide Annexure-1 makes it clear that the promotion of the petitioner was purely an ad hoc promotion and the same was subjected to two different conditions. One of the conditions was that the petitioner was to continue in the said promotional post till return of the incumbent Sri Laxman Rao, against whose vacancy the petitioner was promoted. Another condition was that the petitioner shall have no right to continue in the promotional post and the authority concerned had the right to amend, modify or cancel the promotion order at any time partly or fully without assigning any reason thereof. The cancellation order vide Annexure-2 clearly shows that the order of cancellation was necessitated on revision of seniority list.

7. The promotion to the petitioner was given on ad hoc basis vide Annexure-1 without prejudice to the claim of seniority dispute and on receipt of revised seniority list, the promotion order was cancelled vide Annexure-2 and the petitioner was reverted to the Grade-II post which he was holding earlier to his promotion. It is well settled in law that a temporary promotee

does not have a right to the post and he is liable to be reverted on selection of a regular incumbent or other exigency of public service. Such an incumbent carries only a limited right and cannot stake any claim to the post. In the case **State of Orissa and another Vrs. Pyari Mohan Misira,** AIR 1995 S.C. 974, the Hon'ble Supreme Court upheld reversion of the officer therein and held that reversion was justified as he was holding the higher grade post on ad hoc basis and his mere prolongation in the said post would not ripen into a regular service to claim substantive status. In the case of **Ramakant Shripad Sinai Advalpalkar Vrs. Union of India and others**, AIR 1991 S.C.1145, the Hon'ble Supreme Court explaining the concept of ad hocism observed; "the person continues to hold a substantive lower post and discharges the duty of a higher post, essentially as a stop gap arrangement". Similar view has been reiterated by the Hon'ble Supreme Court in **Selva Raj Vrs. Lt. Governor of Island, Port Blair and others**, AIR 1999 S.C. 838, **A.K. Sarma and another Vrs. Union of India and another**, AIR 1999 S.C.897 and **Sreedam Chandra Ghosh Vrs. State of Assam and others**, AIR 1997 S.C. 251 observing that such incumbent can claim, at the most, the salary of the higher post for the period of their incumbency therein and nothing beyond it. It is clear from the case laws, therefore that an ad hoc promotee has no claim to continue in the promotional post and he is liable to be reverted on public exigencies or otherwise.

8. The case of Ram Binay Sharma (supra) on which learned counsel for the petitioner relies heavily is distinguishable in the facts of the present case. In the case of Ram Binay Sharma, the petitioner was saddled with a minor penalty of censure in a disciplinary proceeding. Sometime after that he was promoted to the next higher post. Subsequently, the promotion was cancelled on the ground that the petitioner had been censured earlier in a disciplinary proceeding and such fact was not placed before the Department Promotion Committee at the time the question of promotion of the petitioner was considered. This Court on consideration of rival contentions of the parties and different case law on the point held that as the petitioner was already selected and promoted by the Departmental Promotional Committee though by mistake, the order cancelling the promotion is bound to affect his right and the cancellation is bad without compliance of the rule of natural justice. The case in hand is, however, different. In the present case, the petitioner was given promotion which was purely ad hoc and the same was cancelled on exigencies detailed in the cancellation order vide Annexure-2 and elaborated in the counter affidavit filed by the opposite party nos. 1 and 2 and such facts were also taken into consideration by the learned Tribunal. In view of such fact, the case of Ram Binay Shama has no application to the facts of the present case.

9. In view of the above, we do not find any justification to interfere with the impugned order and the writ petition is accordingly dismissed.

Writ petition dismissed.

2011 (II) ILR- CUT- 445

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

CRLA. NO.212 OF 1996 (Decided on 17.01.2011).

PRAFULLA KU. PANDA @ BHALU ……...Appellant.

.Vrs.

STATE OF ORISSA …….Respondent

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

Dying declaration – I.O. stated that he requested the Sub-Collector as well as the treating doctor to record dying declaration and thereafter he recorded the same in presence of witnesses – Non-recording of dying declaration by the Sub-Collector and treating doctor not explained – None of the witnesses spoke about the dying declaration – Held, it would not be prudent to base conviction on a dying declaration made to the Investigating Officer which is not signed by the person making it and has not taken in the presence of witnesses.

(Para 9)

Case law Relied on :-

AIR 2008 SC 411 : (State of U.P.-V-Atar Singh & Ors.)

Case law Referred to:-

AIR 1974 SC 2165 : (Palak Ram-V-State of U.P.)

For Appellant - M/s. S.D.Das, S.K.Samantary, A.K.Choudhury, D.Dhar, A.K.Nayak, L.Samantaray, B.K.Sinha, A.Mohanty.

For Respondent - Mr. Soubhagya Ketan Nayak (Additional Govt. Advocate)

PRADIP MOHANTY, J. This Criminal Appeal is directed against the judgment and order dated 24.7.1996 passed by the learned Additional Sessions Judge, Berhampur in S.C. No.30 of 1995 (S.C. No.352/95 GDC) convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution, in short, is that on 14.6.1995, P.W.17, who is the father of the deceased, lodged information at Baidyanathpur P.S.

stating therein that his daughter (deceased) had married to the appellant two years ago. At the time of marriage, he had given some dowry according to his capacity to the appellant. Soon after the marriage, the deceased along with the appellant was staying jointly with her parents-in-law. After some days, the appellant started assaulting the deceased by taking liquor. Since the appellant assaulted his elder brother, last year, the elder and younger brothers of the appellant left the deceased in the house of her father (informant) and, thereafter, they became separate from the appellant. When the mother-in-law requested the informant, he allowed the deceased to come to the house of the appellant. Thereafter, the appellant used to assault the deceased. On 14.6.95, after getting information, the informant went to medical and found his daughter completely burnt and unable to say anything. At the medical, the informant got information from the local people that on 13.6.95 at about 9.00 PM, the appellant poured kerosene on the person of the deceased and set her body into fire in order to kill her. The deceased sustained burn injuries throughout her body and when she cried for help, the neighbours came and extinguished the fire. The deceased succumbed to injury on 15.06.1995 at the hospital. During investigation police visited the spot and hospital, made inquest over the dead body, sent the same for post mortem and after completion of all the formalities filed charge-sheet against the appellant under Sections 302/498-A, IPC.

3. The plea of the appellant is of complete denial of the allegations.

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

5. Learned Additional Sessions Judge after conclusion of the trial while acquitting the appellant of the charge under Section 498-A, IPC convicted him under Section 302, IPC basing upon the dying declaration (Ext.17) and sentenced him as already stated hereinbefore.

6. Miss. Sonita Biswal, learned counsel for the appellant challenged the judgment of conviction mainly on the following grounds:

"(i) Absolutely there is no clinching evidence to convict the present appellant under Section 302 IPC and the dying declaration basing upon which the trial court has convicted the appellant is not a valid document;

(ii) Inquest report (Ext.2) does not show anything about the suspicious circumstances or the unnatural death or the cause of death; and

(iii) Ext.10 has not been proved by the prosecution and conviction cannot be recorded solely basing upon the dying declaration without any corroboration.

7. Mr. Nayak, learned Additional Government Advocate contended that the dying declaration (Ext.17) has been recorded by the IO in presence of P.Ws.5, 14 & 17. Ext.17 has been proved by the IO and corroborated by the above witnesses. Conviction can be made solely on the basis of the dying declaration. P.W.10 is a child witness, who specifically stated before the IO implicating the present appellant with the crime. Ext.10, the statement of P.W.10, was recorded by the Judicial Magistrate (P.W.9) and he proved the same. The motive has been proved by the father of the deceased (P.W.17). Therefore, the trial court has not committed any illegality in convicting the present appellant under Section 302 I.P.C.

8. Perused the LCR. P.W.1 is the doctor, who treated the deceased first and specifically stated that on 13.6.1995 the deceased was admitted to the female surgical ward with 80% burn injuries. She was semi-conscious, disoriented and was in peripheral circulatory failure. The burn injuries were on the chest, both upper limbs, chest wall, back, both lower limbs and perineum. The condition of the deceased never improved and she was not in a fit stage to give dying declaration although he moved for requisition of a Magistrate. She expired on 15.9.96. In cross-examination, a suggestion was made to which he admitted that accidental cases are very common especially among women and children on account of their loose garments catching fire while sitting near the chulla. P.W.2 is the Scientific Officer, who visited the spot and took the photographs of the room and submitted his report vide Ext.3. P.W.3 has scribed the FIR at the instruction of the informant. In cross-examination, he has admitted that he had not endorsed that he read over and explained the contents to the informant. P.W.4 is a post occurrence witness, whose house is adjacent to the house of the appellant. In his chief, he admitted that he did not know how the deceased died and she sustained burn injuries inside her house. In cross-examination, he admitted that there was no quarrel between the deceased and the appellant and he was absent when his wife sustained burn injuries. Later he came in a tempo and took his wife to the hospital where she died.

P.W.5 is another post occurrence witness and neighbour of the accused. He deposed that hearing hue and cry at about 9.00 PM in the

house of the accused he went there and found the deceased was on ablaze. When they asked, the deceased slowly replied that while taking kerosene the same poured on her and her body came in contact with fire from the chula. Leading questions were put to this witness but he denied his knowledge. In cross-examination, he specifically stated that he came from outside and tried to put off the fire in course of which he sustained burn injuries on his hand. He also admitted that both the appellant and deceased were living happily in the house.

P.W.6 is another post-occurrence and independent witness. He in his examination-in-chief has stated that on the date of occurrence he found gathering near the house of the appellant. He went there being called by others and found the appellant and his neighbour extinguishing fire from the house of the appellant. The deceased was found burning and the appellant extinguished fire from her body. He took the injured to the hospital in a tempo and she was not able to talk. This witness also declared hostile by the prosecution and leading questions were put to him but he denied the same. P.W.7 is a seizure witness and proved Ext.5, the seizure list, and Ext.6, the list of dowry articles.

P.W.8 is also a post occurrence witness. He specifically stated that there was a gathering in the house of the accused. He went there and found the deceased with burn injuries. The accused was not there and arrived at the house at that time. The accused and other local people extinguished fire from the body of the deceased and took her to the hospital. This witness also declared hostile and leading questions were put to him but he denied the same. In cross-examination by the prosecution, he stated that he put his signature on Exts.7, 8 and 9 but he did not know anything about the seizure of any dowry articles. In cross-examination by the defence, he admitted that he signed at the police station at the instance of the police personnel. He also stated that accused and his wife were living happily in their house.

P.W.9 is the J.M.S.C. who recorded the statement of P.W.10 under section 164 Cr.P.C. and also proved Ext.10. He also stated that P.W.10 signed in his presence. In cross-examination, he admitted that he had not recorded the statement of P.W.10 in verbatim though he had ascertained the fact from him.

P.W.10 is the child witness, who turned hostile and leading questions were put to him but he denied the same. He also did not admit his signature on Ext.17.

P.W.11 is the doctor, who examined the accused and found the following injuries:

"(1) Blister 1 c.m. X 0.5 c.m in medial aspect of left little finger at the tip 1st degree of burn with erythematuous changes present in inner border of left palm extending from wrist joint upto the tip of the litter finger adjacent to the blister.

Singing of hairs in right side of chest and abdomen present 4 c.m. away from umbilicus in abdomen and 7 c.m. below at the tip of right nipple.

(2) Abrasion 2 c.m. X 0.5 c.m. over left clavicle at the outer one-third present."

He opined that injury no.1 could have been caused by coming in contact with dry heat and injury no.2 could have been caused by coming in contact with rough surface. Both the injuries were simple in nature.

On the same day, P.W.11 also conducted the post mortem examination over the dead body of the deceased and found the following injuries:

> "The hairs were singed in frontal scalp region, eye brows, eye lashes and pubic hairs were burnt. The hairs in axilla on either side were in tact. Breasts were engorged and milk was coming out from breasts on pressure. Body does not emit any peculiar smell. Burn injures epidermo-dermal burn covering almost 85 to 90 per cent body surface with blisters present. On removal of the epidermis on places, reddish bare area seen. Burns were more deep on inner aspect of both the thighs, legs, outer aspect of both upper limbs. Burn was less prominent over abdomen and a free area of size 13 cm X 16 cm situated over abdomen extending 1 cm above the umbilicus and 1 cm above symphysis pubis placed transversely. Under surface of both breasts both axillas were free from burn. A patch of size 6 cm X 6 cm was free of burn situated 2 cm above the anal-cleft posteriorly. The burnt area was smeared with carbon shoots."

He opined that all the burn injures were ante mortem in nature and could have been caused by dry heat. The cause of death was due to shock as a result of above burn injuries. In cross-examination, he specifically stated that

the injuries observed by him were possible by coming to the close contact or proximity of the flame.

P.W.12 is the doctor who assisted P.W.11 in conducting the post-mortem examination over the dead body of the deceased. P.W.13 is a witness to the inquest and the dead body challan under Ext.13 and also a witness to the seizure list (Exts.14 and 15). P.W.14 is a post occurrence witness who also stated that the back door of the house was found open and he along with P.W.5 threw water to put off fire. The appellant came in a Tempo and took the deceased to the medical in that Tempo. He also proved Exts.7, 8, 9, 15 and 16.

P.W.15 is the IO who deposed that on 14.06.1995, as per the direction of the I.I.C., he investigated into the matter, examined the informant, visited the spot, requested Scientific Officer to inspect the spot and examined the deceased in the medical college. On arrival at the medical, he found victim was not in a fit state of condition to give answer. He applied to the Sub-Collector, Berhampur to record the dying declaration of the injured lady as her condition was deteriorating at that time by deputing a Magistrate. He also requested the treating doctor to record the dying declaration but as per the opinion of the doctor, the condition of the victim was below normal and the doctor advised not to disturb the victim. Thereafter, he examined the victim and recorded her statement in presence of Mangulu Sahu, Tuna Behera and Simanchal Panigrahi. He had not obtained the LTI/signature as the same was not required under section 161 Cr.P.C. He also examined Mangulu Sahu and Tuna Behera available at site. After completing all formalities, he filed charge-sheet.

P.W.16 is the Certificate Officer-cum-Executive Magistrate in whose presence, police conducted inquest over the dead body of the deceased. In cross-examination, he admitted that he cannot say as to whether the name of the father of the deceased finds place in the report or not.

P.W.17 is the father of the deceased. He deposed that his daughter came to her matrimonial home after her marriage and used to stay there. His son-in-law used to take liquor at time. He also rebuked him some time for his drinking habit. He stated that one person of their village came to medical and on his return, he informed him about his daughter. He went to the medical and found his daughter with burn injuries through out her body and unable to talk. The family members of the in-law house were present along with some neighbours. Thereafter, he went to the PS and lodged the FIR. FIR corroborated the statement of this witness. In cross-examination, he

admitted that the FIR was scribed at the police station and he put his signature and he dictated the FIR at the instruction of the police.

9. On scrutiny of the entire evidence, it is crystal clear that the conviction has been based on the dying declaration (Ext.17). The IO mentioned names of three witnesses in whose presence the statement of the deceased was recorded. Ext.17 bears no signature of those witnesses, namely, Mangulu Sahu, Tuna Behera and Simanchal Panigrahi (father of the deceased). Mangulu Sahu has been examined as P.W.14. In his evidence, he has not whispered a single word about recording of the dying declaration. Similarly, Kuna Behera (P.W.5) has not been examined by the prosecution. All the above witnesses have not stated about the dying declaration. They specifically stated that the deceased was not in a position to give statement. The doctor (P.W.1), who examined the injured, also specifically stated that the deceased was not in a position to give statement and she was semi-conscious. The father of the deceased (P.W.17) admitted the said fact. The IO stated that he applied to the Sub-collector to record the dying declaration of the deceased as her condition was deteriorating at that time. He also requested the treating doctor to record the dying declaration but the doctor said that the condition of the victim was below normal and advised him not to disturb the patient. Thereafter, he recorded the dying declaration in presence of P.Ws.5, 14 and 17. But since none of these witnesses (P.Ws.5, 14 and 17) speaks a single word about the dying declaration, it is difficult to place any reliance on Ext.17. In fact, no corroboration is there with regard to dying declaration. The Magistrate (P.W.9) recorded the statement of P.W.10 under section 164 Cr.P.C. which has been denied by P.W.10 while he was cross-examined by the prosecution. Therefore, his evidence cannot be utilized against the appellant. By referring to a decision in the case of ***Palak Ram V. State of U.P.;*** *AIR 1974 SC 2165* the Apex Court has held in ***State of U.P. V. Atar Singh and others; AIR 2008 SC 411*** that it would not be prudent to base conviction on a dying declaration made to the investigating officer which is not signed by the person making it and has not been taken in the presence of witnesses. The present case squarely covers by the aforesaid decision.

In view of the above, there is absolutely no material to convict the present appellant. Accordingly, the judgment and order dated 24.7.1996 passed by the learned Additional Sessions Judge, Berhampur in S.C. No.30 of 1995 (S.C. No.352/95 GDC) convicting the appellant under section 302 I.P.C. and sentencing him to undergo imprisonment for life is set aside.

10. The Criminal Appeal is accordingly allowed.

2011 (II) ILR- CUT- 452

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

CRA NO,225 OF 1996 (Decided on 15.02.2011)

ASHOK KUMAR DAS & ANR. …… Appellants.

.Vrs.

STATE OF ORISSA ……Respondent.

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

Dying declaration – Person who records dying declaration must be satisfied that the deceased was in a fit state of mind.

In this case conviction based on the dying declaration (Ext-5) recorded by the Executive Magistrate at 6 PM on 31.07.1995 – None examination of the independent witness present at the time of recording – Endorsement of the Magistrate on Ext-5 shows at 6.15 PM on the same day deceased was found in half conscious stage for which she was not able to put her signature on Ext-5 – Failure to take the thumb impression / signature on Ext-5 makes the same vulnerable – Held, this Court is not inclined to accept the dying declaration as a true and voluntary statement – Impugned judgment of conviction and sentence is setaside.

(Para 9)

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

F.I.R – Occurrence took place on 27.07.1995 – F.I.R lodged on 30.07.1995 – Evidence of the father of the deceased (P.W.8) shows that he was engaged in the treatment of his daughter and he could not immediately decide what to do – Held, delay in lodging F.I.R. can not affect the prosecution case.

(Para 9)

Case law Referred to:-

AIR 2002 SC 2973 : (Laxman -V- State of Maharashtra).

For Appellants - M/s. R.K.Pattanaik, S.C.Puspalak, T.K.Sahoo, C.R.Behera, S.S.Jena, P.K.Nayak,S.C.Beura & A.N.Samantaray.

For Respondent - Mr. Soubhagya Ketan Nayak (Addl. Govt. Advocate)

PRADIP MOHANTY, J. This Criminal Appeal is directed against the judgment and order dated 06/07.08.1996 passed by the learned Additional Sessions Judge, Jajpur in S.T No.522 of 1995 (2/96).

Although this appeal was initially filed by three appellants, due to death of appellant no.3-Smt. Sasikala Das on 04.03.1998 it has abated against her and is confined to appellants 1 and 2.

2. The case of the prosecution is that on 30.07.1995, the father of the deceased (P.W.8) lodged an F.I.R. before the I.I.C., Dharmasala Police Station alleging therein that his deceased-daughter had married Ashok Kumar Das (appellant no.1) three years prior to the date of occurrence. He had fulfilled all the demands of the in-laws of his daughter at the time of marriage. But, after marriage the accused persons had been demanding further dowry and on account of non-fulfilment of the same torturing his daughter. On 27.07.1995, the accused persons poured kerosene on his daughter and set her ablaze, for which she sustained severe burn injuries and succumbed to the same while undergoing treatment in the S.C.B. Medical College & Hospital, Cuttack. On receipt of the written report, the I.I.C. registered the case and directed P.W.18 to take up investigation. Accordingly, P.W.18 proceeded with the investigation and ultimately filed charge-sheet under Sections 498-A/302/304-B/34, IPC read with Section 4 of D.P. Act against the appellants

3. The plea of the appellants is that the deceased committed suicide by self immolation as she could not adjust herself in the matrimonial house.

4. In order to prove its case, prosecution examined as many as 18 witnesses including the doctor and the investigating officer and exhibited 15 documents. The defence examined three witnesses in support of its plea.

5. Learned Additional Sessions Judge, who tried the case, acquitted the appellants of the charge under Section 304-B, IPC and Section 4 of the D.P. Act. He, however, convicted all the appellants for commission of the offence under Section 302/34, IPC inter alia basing upon the dying declaration recorded by the Executive Magistrate (P.W.15) and appellant no.1 (Ashok Kumar Das) for commission of offence under Section 498-A, IPC basing upon the evidence of P.Ws.8 and 10, and sentenced all the appellants to undergo rigorous imprisonment for life for the offence under Section 302/34, IPC and appellant no.1 (Ashok Kumar Das) to undergo rigorous imprisonment for six months for the offence under Section 498-A,IPC.

6. Mr. Pattanaik, learned counsel for the appellants assails the conviction of the appellants on the following grounds:

(i) Dying declaration recorded by the Executive Magistrate (P.W.15) is not believable and acceptable, since there is no certificate by the doctor that the deceased was in a fit state of mind to give such declaration;

(ii) No signature/thumb impression was obtained from the deceased in the dying declaration recorded by P.W.15 nor was the same proved by any independent witness including the staff nurse, who was present at the time of recording of such declaration;

(III) There was delay in lodging the FIR and the prosecution failed to explain the same; and

(iv) Conviction of appellant no.1 under Section 498-A, IPC is bad in law, since there is no evidence on record that the deceased was subjected to cruelty/harassment by appellant no.1 on account of non-fulfilment of demand for dowry.

7. Mr.Nayak, learned Additional Government Advocate, vehemently contends that the dying declaration (Ext.5) was recorded by the Executive Magistrate (P.W.15) on 31.07.1995 in presence of the parents of the deceased and the independent witnesses. The occurrence took place three and half years after the marriage. P.Ws.8 and 10 have specifically deposed about the cruelty meted out to the deceased by appellant no.1 for non-fulfilment of his demand for a scooter by the parents of the deceased. Therefore, the learned Additional Sessions Judge has rightly convicted the present appellants and as such the impugned judgment and order calls for no interference by this Court.

8. Perused the LCR. P.W.1 is the sister-in-law (JAA) of the deceased. Her evidence is that she had gone to attend the call of nature to the field and on return found the deceased had sustained burn injuries and the villagers were taking her to the hospital. In cross-examination, she stated that none of the accused persons were present in the house and the husband of the deceased was serving as a Clerk in Kabirpur High School.

P.W.2 is a seizure witness. He deposed that in his presence police seized the T.V. and other articles given by the parents of the deceased at the time of marriage and he put his signature in the seizure list. However, in

cross-examination, he admitted that the contents of the paper had not been read over to him.

P.W.3 is a co-villager of the appellants who deposed that when he along with others were playing cards in the village common room, he heard sound 'MARI GALI, MARI GALI' and rushed to the house of the appellants and found the deceased was caught by fire. They poured water on her to extinguish the fire and shifted the deceased to Dharmasala PHC. In cross-examination, he admitted that at the time of occurrence the appellant-Ashok had gone to school and no other inmate was present in the house. While carrying the deceased to the hospital, he met appellant-Chandramani on the way at a distance of 1 km from the place of occurrence. He also specifically admitted that the doctor asked the deceased as to how she was burnt to which she replied that she herself poured kerosene on her. He further stated that he had never heard about any cruelty shown to the deceased relating to dowry.

P.W.4 is a seizure witness in whose presence police seized one cot, one TV and some utensils under Ext.3. In his examination-in-chief, he has specifically deposed that he cannot say why the articles were seized. In cross-examination, he admitted that he did not know the contents of Ext.3.

P.W.5 is the Barber, who stated to have performed his duty in the marriage of the deceased and appellant-Ashok. He deposed that during marriage he had seen that father of the deceased had given five gold rings to appellant-Ashok. P.W.6 is the Priest, who stated to have performed his duty in the marriage of the deceased and appellant-Ashok.

P.W.7 is a co-villager whose house is situated near the house of the appellants. He stated that hearing hullah that the deceased was burnt he rushed to the house of the appellants and found the deceased had sustained burn injuries. The deceased was taken to Dharmasala PHC from where she was shifted to Cuttack. In cross-examination, he has stated that on being asked by the doctor as to how she was burnt, the deceased replied that she herself poured kerosene on her body and tried to burn herself.

P.W.8 is the informant and father of the deceased. In his examination-in-chief, he stated that at the time of marriage, father-in-law of his deceased daughter (appellant no.2) had demanded a scooter and cash of Rs.25,000/- to which he refused and accordingly the matter was dropped for sometime. But, when appellant no.2 insisted, the demand was settled at cash of Rs.15,000/-, one T.V, gold ornaments and other articles, and the

marriage between the deceased and the appellant-Ashok was solemnised. He further deposed that after 3 to 4 months of the marriage the deceased told him that she was not being shown good behaviour by the appellant-Ashok, as the scooter was not given to him. In July, 1995, the brother-in-law of the deceased (Dier) informed him that the deceased caught fire due to leakage of cooking gas and that she was shifted to S.C.B. Medical College, Cuttack. He went to Cuttack and found that the entire body of his daughter was burnt. On 30.7.95, he lodged report (Ext.4) before the police on whose requisition the Magistrate (P.W.15) came and asked his injured daughter about the cause of injuries on her person. In his presence, she told that the appellants poured kerosene on her and set fire to her body. Her statement was reduced to writing by the Magistrate under Ext.5, on which he signed. In cross-examination, he admitted that after getting information he rushed to S.C.B. Medical College, Cuttack and there he found the appellants were present on her side. By then, the deceased was able to talk but she used to lose her sense at times and the said condition continued till her death. He further admitted that at the time of recording of the statement by P.W.15, both the doctor and the nurse were present.

P.W.9 is the sister of the deceased who has stated that on getting information about the incident from the younger brother of appellant-Ashok, she intimated the said fact to her father and went to the hospital along with her mother and found that the deceased had sustained burn injuries throughout her body. In her cross-examination, she admitted that she found her sister senseless at the hospital.

P.W.10 is the mother of the deceased who corroborated the evidence of P.W.8 with regard to the demand of dowry made by the appellants at the time of marriage. In cross-examination, she admitted that the condition of the deceased was very serious.

P.W.11 is the ASI of police then attached to Mangalabag PS who after receiving information from S.C.B. Medical College, Cuttack made a preliminary inquiry, intimated to Dharmasala PS about the death of the deceased and sent the dead body for post-mortem examination. P.W.12 is the constable who guarded the dead body. P.W.13 is the Sr. Clerk of S.C.B. Medical College & Hospital, Cuttack and a witness to the seizure of bed-head ticket and zimanama. P.W.14, who has been examined by the prosecution as a seizure witness, stated that nothing was seized in his presence and that on being asked by police he put his signature on the seizure list (Ext.3).

P.W.15 is the Executive Magistrate who has recorded the dying declaration of the deceased. The deceased stated before him that while she was sleeping, appellants poured kerosene and set fire on her body. To the query of P.W.15, the deceased gave the above answer in a feeble voice which was recorded in verbatim in presence of her parents. He also stated that he recorded the statement of the deceased at 6.00 PM and at 6.15 the condition of the deceased deteriorated and she was not able to make any further statement. Her parents, father-in-law and some other co-villagers were present at the time of recording of such statement on which they had signed. In cross-examination, P.W.15 admitted that one Nirupama had put her signature on Ext.5 but he cannot say whether she was a staff nurse or not. The doctor was not present at the time of recording of Ext.5 and he (P.W.15) had not obtained any certificate from the doctor with regard to the fitness of the deceased for recording her statement. He further admitted that he did not obtain the signature/thumb impression of the deceased on Ext.5, as she was not in a proper state of mind by the time of its recording.

P.W.16 is the Addl. Tahasildar, Cuttack who held inquest over the dead body and proved inquest report Ext.6.

P.W.17 is the doctor, who conducted autopsy over the dead body of the deceased. He opined that all the injuries were ante mortem in nature covering 60-65% of the body and might have been caused by flame and fire. The death was due to shock resulting from the said burn injuries.

P.W.18 is the investigating officer, who investigated into the matter, visited the spot, examined the witnesses and seized the kerosene container from the house of the appellants in presence of the witnesses. On 13.9395, H.R.P.C. took charge of the investigation and seized the bed-head ticked and filed charge-sheet after re-examining the witnesses. In cross-examination, he admitted that he examined Nirupama, the staff nurse, and one Jadunath Parida, but said Nirupama and Jadunath were not cited as witnesses by the Inspector, who submitted charge-sheet. It has been elicited from him in cross-examination, that on 31.07.1995, he went to the hospital and found the deceased in an unconscious condition. He has also admitted that P.W.8 had not stated before him that the Magistrate asked the deceased about the cause of her injuries in his presence to which she replied that her father-in-law, mother-in-law and husband had poured kerosene and set fire on her body and that statement was reduced to writing by P.W.15 on which he signed.

9. It is found from analysis of evidence made above that the death of the deceased took place three and half years of her marriage due to burn injuries. When the deceased caught fire, the appellants were not present in the house. Hearing the cry of the deceased, P.Ws.3 and 7 arrived and with the help of other villagers removed her first to Dharmasala PHC and from there to S.C.B. Medical College, Cuttack. As is evident from the impugned judgment, the appellants have been convicted under section 302/34, IPC mainly basing on the dying declaration (Ext.5) recorded by the Executive Magistrate (P.W.15). As it appears, on 31.07.1995 at about 6.00 PM the dying declaration (Ext.5) was recorded by P.W.15 and at that time some of the independent witnesses were present including the staff nurse Nirupama and one Jadunath Parida. But, these two independent witnesses, namely, Nirupama and Jadunath have not been examined by the prosecution to prove Ext.5. No certificate has been obtained from the treating doctor with regard to the fitness of the deceased for giving her statement. On Ext.5, P.W.15, who recorded the statement of the deceased, had given an endorsement that at 6.15 PM deceased was found half conscious (COMA), for which she was not able to put her signature on the dying declaration (Ext.5). Failure to take the thumb impression/signature on the dying declaration makes the same vulnerable. The I.O. admitted that on 31.07.1995 at about 8.15 AM he went to the hospital and found the deceased in half conscious stage. P.W.8 has stated the said fact in the FIR. It has been held by the apex court in the case of ***Laxman V. State of Maharashtra;*** AIR 2002 SC 2973 that what is essentially required is that person who records the dying declaration must be satisfied that the deceased was in fit state of mind. In the said case, further it has been held that where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. Therefore, by applying the above ratio, this Court is not inclined to accept the dying declaration as a true and voluntary statement. As regards delay in lodging the FIR, admittedly the occurrence took place on 27.07.1995 and the FIR was lodged on 30.07.1995. In view of the evidence of P.W.8 that he was engaged in the treatment of his daughter and that he could not immediately decide what to do, the delay in lodging the FIR cannot affect the prosecution case.

So far as the conviction of appellant-Ashok Kumar Das under Section 498-A, IPC is concerned, there is no direct material against him with regard to subjecting the deceased to cruelty and harassment.

10. In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Jajpur in S.T No.522 of 1995 (2/96) is set aside and the appellants are acquitted of the charges.

Appeal allowed.

2011 (II) ILR- CUT- 460

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

JCRLA NO.57 OF 2002 (Decided on 9.8.2011)

SRIKANTA PATTANAIK …… Appellant.

.Vrs.

STATE ……Respondent.

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

No material to indicate that the appellant had prepared to commit murder of the deceased – No premeditation – Appellant had no required intention or knowledge in causing the fatal injury – Injury on the deceased's head was inflicted by assaulting with lathi with the knowledge that it is likely to cause death – Held, appellant is liable to be convicted U/s.304, Part-II instead of Section 302 of the I.P.C.

(Para 10)

For Appellant - Mr. Gouri Shankar Pani
For Respondent - Mr. Anupam Rath
Addl. Standing Counsel

B.K.PATEL,J. By the impugned judgment and order dated 30.11.2002 passed by the learned Additional Sessions Judge(F.T.C.), Bolangir in S.C.No.49-B/1 of 2002, appellant has been convicted and sentenced to imprisonment for life under Section 302 of the I.P.C. for having committed murder of deceased Basanti Singh @ Pattanaik.

2. Deceased was married to one Sambhu Singh. They had a son P.W.1 and a daughter P.W.2. However, said Sambhu Singh deserted the deceased since 8 to 9 years prior to the occurrence after which he was not heard of. Appellant kept the deceased as his wife. Both of them lived together in a hut in front of which they were running an egg shop. P.Ws. 1 and 2 used to take their food with the deceased but resided with deceased's father informant P.W.4 and mother P.W.3. P.Ws. 5,6 and 7 are deceased's brothers.

3. Prosecution case is that occurrence took place at about 7 P.M. on 4.11.2001. P.Ws. 1 and 2 along with deceased were sitting in the egg shop.

Appellant came with a stick M.O.VI in a drunken state and quarreled with deceased. In course of quarrel he dealt blow by means of M.O.VI on deceased's hand and dragged her inside their house. Out of fear P.Ws. 1 and 2 went to the house of their grand-mother P.W.3 and narrated the incident. P.W.3 came to the house of deceased and appellant, and found that deceased was lying with bleeding injury on her head. She was gasping and unable to talk. Appellant was lying nearby. P.W.3 narrated the incident to her husband P.W.4 on his arrival. P.W.4 also went to the spot. On the basis of First Information Report scribed by P.W.9 and handed over to I.I.C., Town P.S., Bolangir case was registered. P.W.16 Sub-Inspector of Police was directed to take up investigation. P.W.15 another Sub-Inspector of Police took appellant and deceased to hospital where deceased was declared dead whereas appellant was admitted for treatment. Witnesses were examined. Dead body of the deceased was subjected to post-mortem examination by P.W.17 a lady Assistant Surgeon at District Headquarters Hospital, Bolangir. Seizure of incriminating articles including M.O.VI was effected. On completion of investigation, charge sheet was submitted against the appellant.

4. Appellant took the plea of denial.

5. In order to substantiate the charge, prosecution examined 17 witnesses P.Ws. 1 to 17. P.Ws. 1 to 7, P.W.9, and P.Ws.15 to 17 have already been introduced. P.W.8 is a witness to inquest. P.W.13 is an eye-witness. P.W.10 is a police Havildar and P.W.11 is a police constable. P.W.12 is a witness to seizure of M.O.VI. P.W.14 happens to be a post-occurrence witness. Prosecution also relied upon documents marked Ext.1 to 15 and material exhibits M.Os. I and VI.

No defence evidence was adduced.

6. Placing reliance mainly upon evidence of eye-witnesses P.Ws. 1,2 and 13 stated to have been corroborated by medical evidence and other incriminating circumstance learned trial court held the prosecution to have proved the charge against the appellant beyond reasonable doubt.

7. In assailing the impugned judgment and order, Shri G.S.Pani, learned counsel for the appellant contended that evidence of the so-called eye-witnesses P.Ws. 1,2 and 13 is not reliable. None of them deposed to have seen the appellant causing injury on deceased's head. Admittedly, appellant was also lying unconscious at the place of occurrence. He had injuries which remained unexplained. In such circumstances,

earned trial court was not correct in recording conviction against the appellant. Alternatively, it was argued that admittedly deceased had sustained only one injury on her head in course of the occurrence. Occurrence was preceded by quarrel between appellant and deceased. Appellant also sustained injury and became unconscious in course of occurrence which indicates that deceased also assaulted the appellant. In such circumstances, appellant should have been held to have committed offence under Section 304 Part-II of the I.P.C.

8. Mr. Anupam Rath, learned Additional Standing Counsel supported and defended the impugned judgment and order. It was contended that prosecution case is supported by evidence of not only deceased's son P.W.1 and daughter P.W.2 who were being looked after by the appellant but also an independent witness P.W.13. Appellant quarreled with deceased and dragged her inside house. He assaulted the deceased with M.O.VI causing fatal injury with intention to cause her death. Medical evidence as well as circumstance of seizure of blood stained M.O.VI corroborates the ocular evidence. Therefore, appellant has rightly been convicted under Section 302 of the I.P.C.

9. Having scrutinized the materials on record upon reference to rival contentions, it is found that there is no basis to support appellant's plea of innocence. It appears from the medical evidence of P.W.17 that in course of post-mortem examination she found lacerated injury over deceased's right side vertex which was ante mortem in nature. On dissection linear fracture of right parietal bone over the vertex with contusion of underneath brain substance and subdural haematoma were found. Death of deceased was occurred due to injury to brain. P.W.17 appears to have examined lathi M.O. VI and opined that injury on the deceased could be caused by such lathi. Both P.Ws.1 and 2 deposed that appellant came in a drunken state holding something in his hand and quarreled with the deceased. Thereafter, appellant dragged the deceased inside the house. P.W.1 stated to have seen the appellant dealing a blow on deceased's hand. P.Ws. 1 and 2 rushed and informed P.W.3, their grand-mother regarding the occurrence. Evidence of P.Ws.1 and 2 has not been discriminated in any manner. Rather, P.W.2 acknowledged in her cross-examination that the appellant used to maintain and provide education to P.Ws.1 and 2. P.W.13 the other eye witness testified to have seen the occurrence while sitting at a distance of about 25 feet from the house of the appellant. He deposed that appellant came being drunk after which altercation took place between him and the deceased. Appellant catching hold of the neck of the deceased took her to their house. P.Ws.1 and 2 went away running to the house of P.W.4. Ten to

fifteen minutes thereafter P.W.3 came and called him saying that deceased was being assaulted. P.W.13 accompanied P.W.3 to the house of the appellant and saw the deceased lying with bleeding head injury. Appellant was also lying near her. P.W.3 deposed that on being told by P.W.1 she went to the house of the appellant and found that deceased was lying with bleeding injury on her head. Appellant was also lying flat. She testified that her husband P.W.4 arrived at about 10.00 P.M. and thereafter went to the police station. Deceased's father informant P.W.4 deposed to have been told that the deceased had been murdered when he returned from his egg shop. He found the deceased lying with blood coming out from her head. Her body and cloth were stained with blood. Appellant was lying nearby. He testified to have lodged the F.I.R. It appears from the evidence of P.W.5 that spot house is situated at a distance of about 35 feet from his shop. P.W.5 also testified that appellant and deceased were quarreling in front of their house and the appellant dragged the deceased catching her hair into her house. Evidence of P.W.16, investigating police officer regarding seizure of lathi M.O. VI from the spot finds support from the evidence of seizure witness P.W.12. Thus, it is established beyond reasonable doubt that the deceased sustained fatal injuries on her head and died due to assault with lathi M.O. VI by the appellant.

10. However, it is evident that assault on the deceased was preceded by quarrel between the appellant and deceased. P.W.13 categorically testified that there was altercation between them. Fatal blow on the deceased was dealt inside the house. Soon after the occurrence deceased as well as the appellant were found lying at the spot. P.W.15 who took the deceased and the appellant to the hospital testified that appellant was admitted into the hospital for treatment as he had injury on his right arm. Appellant was found lying unconscious with injury on his hand immediately after the occurrence. Therefore, physical tussle between the appellant and the deceased inside the house cannot be ruled out. There is no material to indicate that the appellant had prepared or planned to commit murder of the deceased. There is no material to indicate pre-mediation. Also, appellant does not appear to have dealt more than one blow on deceased's head. Proved circumstances do not establish that appellant had required intention or knowledge in causing the fatal injury on deceased to constitute offence of murder as provided under Section 300 of the I.P.C. However, injury on the deceased's head was inflicted by assaulting with lathi with the knowledge that it is likely to cause death. Therefore, the appellant is liable to be convicted under Section 304, Part II of the I.P.C. instead of Section 302 of the I.P.C.

11. Accordingly, the appeal is allowed in part. Impugned judgment and order are modified to the extent that appellant is convicted under Section 304, Part II of the I.P.C. and sentenced to undergo rigorous imprisonment for eight years.

Appeal allowed in part.

2011 (II) ILR- CUT- 465

M.M.DAS, J.

W.P.(C) NO.6796 OF 2011 (With Batch) (Decided on 10.05.2011)

SWARNAREKHA ROUT & ORS. .....Petitioners.

.*Vrs.*

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

Education – Appointment for Sikhya Sahayak – As per advertisement candidates require B.A. Degree or any equivalent degree having Oriya as a subject till matric and B.Ed. training recognized by N.C.T.E – Petitioners belong to the districts of Keonjhar, Dhenkanal and Jajpur – They acquire B.A. Degree and passed Sikhya Sastri from Rastriya Sanskrit Sansthan – Their applications for appointment as Sikhya Sahayak was ignored – Hence the writ petition.

Held, petitioners who have acquired B.A. degree from an University and there after acquired Sikhya Sastri degree, shall be considered for the post of Trained Graduate Arts teachers in the aforesaid three districts. (Para 10)

Case law Referred to:-

2010 (I) O.L.R. 22 : (Madhusudan Sahu-V-State of Orissa & Ors.)

For Petitioner- M/s. Gyaneswar Satapathy, B.P.B.Satapathy, K.K.Swain, P.N.Mohanty, B.Jena, R.P.Das, P.K.Mohapatra, P.K.Rath, P.K.Satapathy, R.N.Parija, A.K.Rout, S.K.Pattnaik, Bijay Ku.Pattnaik, Mahendra Ku.Sahoo, S.K.Rath (In all)

For Opp.Parties - Standing Counsel (School & Mass Education Deptt.) (In all)

M.M. DAS, J. Since all the aforesaid writ petitions involve similar questions of fact and law, they were heard together and are disposed of by this common judgment.

2. In the aforesaid writ petitions, a common question has been raised by the petitioners, i.e., ignoring their cases/applications for appointment as Sikhya Sahayaks in the districts of Keonjhar, Dhenkanal and Jajpur on the ground that the B.Ed. degree obtained by them known as “Sikhya Sastri

Degree" cannot be considered to be B.Ed. degree for the purpose of being considered for appointment as Sikhya Sahayaks.

3. Learned counsel for the petitioners submitted that the petitioners were applicants for being appointed as Trained Graduate Arts teachers, pursuant to the advertisement made in respect of the above districts in the daily Oriya newspaper. The eligibility criteria in the said advertisement, which have been annexed to the writ petition with regard to Trained Graduate Arts teachers is that a candidate should have obtained Bachelor of Arts Degree (B.A. Degree) or any equivalent degree having Oriya as a subject till matric and B.Ed. training recognized by N.C.T.E.

4. It appears from the facts of the case and the materials produced that pursuant to the order dated 29.6.2010 passed in W.P. (C) No. 1361 of 2010 along with a batch of similar matters, the notification dated 19.11.2009 and the consequential advertisement made by the Government for appointment of Sikhya Sahayaks stood quashed and the direction issued by this Court that the Government shall take immediate steps for recruitment of such teachers (Sikhya Sahayaks) strictly in accordance with the existing rules after ascertaining the exact number of different types of teachers required to be recruited in the various schools already existing or to be opened/up-graded as proposed,the Government took a resolution on 10.1.2011 considering the fact that the Right of Children to Free and Compulsory Education Act, 2009 came into force with effect from 1.4.2010 and the State Government has framed the rules thereunder which have been operative from 18.10.2010, all the functions of elementary education will be transferred in phases to Zilla Parishad and other Panchayati Raj institutions. The relevant provision of the said policy decision with regard to the eligibility of the teachers to be recruited is as follows:-

> "6.1. The candidates must have passed +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and C.T. Training from a recognized Board/University or +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and 2 year Diploma in Education (Special Education) a course recognized by Rehabilitation Council of India (RCI) or B.A., B.Sc., (or its equivalent examination declared by appropriate authority) and B.Ed. from a recognized University or B.A., B.Sc. and one year B.Ed. (Special Examination) a course recognized by Rehabilitation Council of India (RCI). The +2 candidates must have Odia as a subject up to Class-VII and B.Ed. candidates must have Odia as a subject up to Class-X".

5. The petitioners have prosecuted their course in Sikhya Sastri from Rastriya Sanskrit Sansthan, which has been established under the Ministry of Human Resources Development, Government of India, having a status as Deemed University. The certificates granted to the petitioners mention the degree as B.Ed. It appears that some of the petitioners were also included in the provisional select list. The Government of Orissa, in the School and Mass Education Department, by letter dated 6.4.2002 addressed to all the Collectors under the subject , "Qualification of Sastri and Sikhya Sastri Examination for the purpose of engagement of Educational Volunteers under SSS., EGS, AIE and SSA", intimated the Collectors that the issue regarding equivalence of Sikhya Sastri of Rastriya Sanskrit Sansthan, with that of B.Ed. examination of Utkal University has been brought to the notice of the Government. The Utkal University has clarified that Sikhya Sastri Examination of the said institution is recognized as equivalent to B.Ed. examination of Utkal University on reciprocal basis. The Collectors were, therefore, informed that wherever the Village Education Committee chooses to engage a person with Sastri and Sikhya Sastri qualification, such option should also be taken into consideration subject to the other conditions contained in the guidelines. However, the said direction was issued for a limited purpose of engagement of Education Volunteers and was not made applicable for regular teachers or any other purpose. The above instruction of the Government was considered by this Court in W.P. (C) No. 10653 of 2003. This Court disposed of the said writ petition by order dated 3.11.2004 observing as follows:-

> "A degree obtained from one University if recognized by another University to be equivalent to a degree of that University, such equivalence should be for all purposes and it cannot be said that for some purpose Sikhya Sastri degree will be held to be equivalent to B.Ed. degree of Utkal University and for other purposes, it should be held not equivalent to B.Ed. degree.

6. The NCTE by a public notice has recognized the institutions of the State which are affiliated to the Rastriya Sanskrit Sansthan with regard to imparting Sikhya Sastri course to the students as per the resolution of the Eastern Regional Committee of the NCTE on 12..7.2004. The Utkal University, as already stated above, has also recognized the Sikhya Sastri degree to be equivalent to B.Ed. degree.

7. In the counter affidavit filed by the School and Mass Education Department, the prayer made by the petitioners has been vehemently opposed on the ground that the advertisement did not provide in the eligibility criteria that a Trained Graduate Arts teacher can have B.Ed.

degree or any equivalent degree. According to the learned counsel for the Department, as decided by this Court in the case of ***Madhusudan Sahu v. State of Orissa and others***, 2010 (I) OLR 22, the candidates must follow the advertisement and no candidate can claim any right of his own choice beyond the stipulation of the advertisement. The other contention raised on behalf of the Department was that the schools required trained Arts graduate teachers and the candidates having Sikhya Sastri degree though may be considered to be a Trained Graduate , but they have not obtained the B.Ed. degree in respect of other subjects except Sanskrit inasmuch as Sanskrit trained teachers are not required to be recruited. A syllabus of Sikhya Sastri Course was produced before me from which it is revealed that the candidates prosecuting Sikhya Sastri course have to study various subjects including method of teaching for which the prescribed books are written in English and the medium of teaching of those subjects like, English, History, Economics, Geography, Civics etc. appear to be in English considering the text books prescribed.

8. Therefore, in view of conclusion of this Court in the order dated 3.11.2004 passed in W.P. (C) No. 10653 of 2003 that a degree cannot be construed to be equivalent to another degree only for limited purposes and not equivalent for other purpose, as well as considering the fact that some of the petitioners have graduated themselves in B.Ed. course from the University of the State and thereafter, have obtained the Sikhya Sastri degree, which has already been held to be equivalent to B.Ed. degree for all purposes, the cases of such petitioners could not have been ignored while considering them for appointment in the Trained Graduate Arts posts, more so when, the NCTE has recognized the same, which also was prescribed in the advertisement.

9. As it is submitted by the petitioners that in spite of the interim orders passed by this Court staying further appointment to such posts, some appointments have been made after the interim order was passed, if such allegation is true, persons appointed after the interim order was passed cannot be considered to have been validly appointed. However, the appointments made prior to the passing of the interim order will not be invalidated on any ground as a right has accrued in favour of such appointees by the date the interim order was passed and such persons have not been impleaded as parties to these writ petitions.

10. In conclusion, therefore, the petitioners in the aforesaid writ petitions, who have acquired B.A. degree from an University and thereafter have acquired Sikhya Sastri degree, shall be considered for the post of Trained Graduate Arts teachers in the aforesaid three districts.

11. Since the process of appointment is in progress, necessary steps for consideration of the case of the petitioners and others having acquired B.A. degree from an University and, thereafter, Sikhya Sastri degree, shall be considered for such appointment along with other left out applicants within a period of three weeks from today.

12. With the aforesaid directions, the writ petitions are disposed of. There shall be no order as to costs. The interim order passed earlier stands vacated.

Writ petition disposed of.

2011 (II) ILR- CUT- 470

M.M.DAS,J

F.A.O No.127 OF 2011(Decided on 29.07.11)

PADMABATI BEHERA & ANR. ……..Appellant.

.Vrs.

UNION OF INDIA ……..Respondent.

RAILWAY CLAIMS TRIBUNAL ACT, 1987 (ACT No. 54 of 1987), SEC-17. r/w SEC. 5 OF LIMITATION ACT.

Delay in claiming compensation against Railways – Delay is more than six and half years – Tribunal refused to condone delay – Hence this appeal.

Sufficient cause for not making the application within the period specified – Sufficient cause should be given a liberal interpretation for doing substantial justice – But such liberal interpretation has also a limitation – It cannot mean that any period of delay without sufficient explanation can be condoned on the ground that sufficient cause should be given a liberal interpretation.

In the present case ground taken by the applicant that he was ignorant of the fact as well as law for which there was delay – Held, learned Tribunal has not committed any error in rejecting the claim application filed by the appellant on the ground of delay.

Case law Referred to:-

AIR 2002 (SC) 1201 : (Ram Nath Sao@ Ram Nath Sahu & Ors.-V- Gobardhan Sao & Ors.)

For Appellant - M/s. Gajendranath Rout.
For Respondent - M/s. A.Mishra.

Heard Mr.Rout, learned counsel for the appellants and Mr. Mishra, learned counsel for the respondent.

This appeal has been filed against an order passed by the Railways Claims Tribunal, Bhubaneswar rejecting the application filed by the appellants for award of compensation on the ground of delay.

It appears that the alleged incident took place on 20.06.2001 and the application was filed on 15.12.2008, i.e., with a delay of more than six and half years.

Learned Tribunal considering the grounds stated in the application for condonation of delay refused to condone the same and dismissed the claim application. The application was filed under section 16 of the Railways Claims Tribunal Act, 1987 (for short the 'Act') for which limitation is provided under section 17 of the said Act. Under section 17(i)(b) of the Act, any application filed under section 13 (I-A) for compensation shall be filed within one year. Sub-section (2) of section 17 empowers the Tribunal to condone the delay, if any, in filing such application, if sufficient cause for not making the application within the period specified is shown by the applicant. In the instant case, the only ground, which was taken by the applicant, was that the applicant was ignorant of the fact as well as the law for which there was a delay. This can never be construed to be sufficient ground for condoning the delay.

Learned counsel for the appellants submit that while condoning the delay the term sufficient cause should be given a liberal interpretation for doing substantial justice. In support of his contention, he refers to the case of **Ram Nath Sao @ Ram Nath Sahu and Others Vrs. Gobardhan Sao and Others** reported in A.I.R. 2002(SC) 1201.

I have considered the submissions made by the learned counsel for the appellants as well as Mr. Mishra, learned counsel for the respondent in this appeal. It is no doubt true that for rendering substantial justice, the term sufficient cause should be liberally interpreted in a case. But such liberal interpretation also has limitation. It cannot mean that any period of delay without sufficient explanation can be condoned on the ground that sufficient cause should be given a liberal interpretation.

I, therefore, while repelling the contention of the learned counsel for the appellants find that the learned Tribunal has not committed any error in rejecting the claim application filed by the appellants on the ground of delay.

The appeal being devoid of merit is accordingly dismissed.

Appeal dismissed.

2011 (II) ILR- CUT- 472

M.M.DAS, J.

W.P.(C) NO.7132 OF 2011(With Batch) (27.04.2011)

DR. NIHAR RANJAN PARIDA & ORS. …….Petitioners.

.Vrs.

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

EDUCATION – Admission for P.G. (Medical) Course 2011 – Multiple choice questions with four suggested answers – Candidates to mark the most appropriate answer – Correctness of 63 questions challenged – Questions with more than one correct answers including spelling mistakes – Clause 10-17 of the prospectus will not help if answers to all the questions are demonstratively wrong – Held, nine questions having more than one correct answers should be considered by an expert committee constituted by this Court. (para.24)

Case laws Referred to:-

1.1991 (I) OLR 514 : (Priyadarshini Acharya etc.-V-State of Orissa represented by the Secretary, Department of Health & Ors.)

2.(1959) 2 All ER 433 : (Baldwin Francis Ltd.-V-Patents Appeal Tribunal)
3.AIR 1983 SC 1230 : (Kanpur University & Ors.-V-Samir Gupta & others.)
4.77(1994) CLT 624 : (Chandan Mishra & Ors.-V-Convenor, M.B.B.S./B.D.S. Selection Board & others.)

For Petitioners - M/s. Pami Rath, J.Mohanty, Sabyasachi Tripathy, A.K.Panda, P.K.Sahoo, B.Routray, D.K.Mohapatra, P.K.Sahoo, D.Mohapatra, S.Das, S.Jena, K.Mohanty, B.B.Routray, S.D.Das, N.C.Mohanty, S.K.Das, M.K.Behera, P.Ranjan, A.P.Bose & R.K.Mahanta.

For Opp.Parties - Addl. Govt. Advocate (for O.P.Nos. 1,2)
Mr. R.C.Mohanty (for O.P.No.3)
Mr. J.Patnaik, Sr. Counsel &
Mr. Ashok Parija, Sr. Counsel (for intervenors)

M.M.DAS, J. Since all the aforesaid writ petitions involve similar questions of fact and law, they were heard together and are disposed of by this common judgment.

2. The short facts relevant for deciding these cases are that, an entrance examination was held on 23.01.2011 by the Convenor, P.G. Medical Selection Committee, 2011-cum-Dean and Principal of V.S.S. Medical College, Burla for selecting candidates to take admission to P.G. (Medical) Course 2011. The petitioners were candidates in the said entrance test. The questions set in the entrance examination were multiple choice questions, each question having four suggested answers. The candidates were required to mark the most appropriate answer in the question answer book-let. The petitioners, being not selected for admission to P.G. (Medical) Course, 2011 and having found from the model questions and answers, which were available in the website by the examining body as per Clause – 10.17 of the Prospectus, that many of the answers suggested to be correct answers to the questions set in the entrance examination, were wrong, have raised objections to such evaluation of the answers given by them. Clause – 10.17 of the Prospectus reads as follows:-

> "10.17. The Model Question & Answer will be made available in the website i.e. www.orissa.gov.in **(Click views for all advertisement)** on the next day of examination and accordingly the candidates will be given scope to file objection, if any, within 7 (seven) days from the date of completion of the examination before the Chairman, who will take up the matter with a committee of experts and the decision of the Committee would be final and binding on the part of the candidates. In case the objection is found true, the marks will be awarded accordingly at the time of evaluation of the answer sheets. After the stipulated period is over, no objection in any form will be entertained and liable to be rejected".

Some of the writ petitioners, pursuant to the aforesaid clause filed their objections in respect of 26 questions. Some of the other petitioners though have questioned the correctness of the answers to a total number of 63 questions and though claimed that they filed objections pursuant to the aforesaid clause, but filing of such objections has been disputed by the opposite parties.

Cases of the present nature blossom before this Court like seasonal flowers each year after the entrance examinations are conducted, which clearly exhibit the despondency on the part of the candidates and repeated interference of this Court with the system of examination and selection of candidates, exhibits the malleable and vulnerable nature of questions set and answers suggested by the examining body. Even though this Court in various decisions has prescribed guidelines and precautionary measures to

be taken by the examining authorities for avoiding such repeated litigations to come up before this Court, however, again similar questions have been raised in the aforesaid writ petitions, which have been earlier raised time and again before this Court in respect of entrance tests conducted in previous years. This itself tells upon the efficiency of the examining body with regard to setting questions and suggesting answers in the entrance examination where candidates are required to answer 300 multiple choice questions within three and half hours meaning thereby that each question is to be answered within less than a minute time.

3. Before adverting to the specific disputes raised by the petitioners in the writ petitions, it would be appropriate to note that by now it is well settled that multiple choice and objective test is different from traditional system of examination and in a multiple choice/objective test, one of the answers indicated is the correct or most appropriately correct answer and the rest are answers either wholly incorrect or incorrect though appear to be correct. It is also well settled that the answers to the question, as indicated must not carry two correct answers enabling the examiner to select one as the key answer, as this would introduce an element of gamble. The above proposition was laid down by this Court in the case of ***Priyadarshini Acharya etc. v. State of Orissa, represented by the Secretary, Department of Health & others,*** 1991 (I) OLR 514. In the said case this Court was examining the allegation of wrong evaluation of answers on the basis of wrong suggested answers to multiple choice questions. This Court laid down that if the expert body takes a view, which no reasonable person can take, or where the method adopted or decision taken is clearly unreasonable and perverse, the Court should interfere. Relying on the observations of Lord Denning in ***Baldwin Francis Limited v. Patents Appeal Tribunal (1959)*** 2 All ER 433 and quoting a passage therefrom, this Court in the said case accepted the view of Lord Denning, who observed that even on technical matters, a Court can hear argument of counsel and consult text books, technical dictionaries etc. or even be informed through assessors, and the Court's jurisdiction is not to be shut out merely on the ground of technicality of the matter. Observing thus, this Court proceeded to analyze the suggested answers to the questions, which were complained of. Referring to various text books, on the principle that an answer if shown demonstratively to be wrong, from the accepted text book, but is suggested to be correct answer, held that the Court can interfere, as otherwise a candidate who has given the correct answer, is deprived of the marks for the said question just because a wrong answer has been suggested to be a correct answer for the said question and thereby it may so happen that a meritorious candidate will be left out from taking admission. Ultimately this

Court reiterated the view of the Supreme Court expressed in ***Kanpur University & others v. Samir Gupta & others*** AIR 1983 SC 1230 and recommended that henceforth the question should be modulated by a body of experts chosen by the State Government and objective type questions should be set in such a manner that questions having ambiguous import are not set. The answer should contain one correct answer and the rest should be either incorrect or nearly correct leaving no scope for reasoning or argument except merely involving tick- marking the correct answer. The question therefore has to be clear and equivocal and as was recommended by the Supreme Court, the Government was directed that if attention of the Government or the examining body is drawn to any defect in the key answer or to any question, timely decision should be taken to declare the exclusion of the suspected question from the paper so that no marks are assigned to it. With regard to a question being shown to be demonstratively wrong, the Supreme Court in the case of Kanpur University & others (supra) laid down that the key answers should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct. The Supreme Court further held that where it is proved that the answer given by the student is correct and the key answer is incorrect, the students are entitled to relief asked for. In case of doubt, unquestionably the key answer has to be preferred. But if the matter is beyond the realm of doubt, it would be unfair to penalize the students for not giving an answer, which accords with the key answer i.e. to say with an answer, which is demonstrated to be wrong.

(emphasis supplied)

4. The first question to be dealt with in the present case is with regard to the dispute as to whether objection was raised by some of the petitioners in respect of 63 numbers of questions as per Clause – 10.17 of the Prospectus within the time stipulated.

5. In the writ petitions, which involve these 63 questions, the initial averment was that objection with regard to answers suggested to the said questions were raised before the Convenor, who assured the petitioners to look into their grievance within a short time. The said averment was developed further in the rejoinder affidavit by stating that written objections were filed, which were sent Under Certificate of Posting in accordance with Clause – 10.17 of the Prospectus. The Selection Committee however, has denied such allegations and has asserted that no such objections were

received with regard to 63 questions. However, with regard to 26 questions, it was admitted that objections were received.

6. Mr. B. Routray and Mr. Sanjit Mohanty, learned senior counsel appearing for the petitioners, however, urged that Clause – 10.17 of the Prospectus cannot be construed to be mandatory, more so, when, the conditions mentioned in the said clause with regard to publication of the questions and the correct answers in the Government website on the next day of the examination was deviated by the Admission Committee itself and such questions with correct answers were only made available in the website on the third day of the examination.

7. Mr. Sanjit Mohanty, learned senior counsel further argued that even assuming that the objections with regard to 63 questions have not been filed, the case of the petitioners, who have alleged incorrect evaluation in respect of the said 63 questions cannot be thrown out solely on the basis of Clause 10.17 of the Prospectus if they successfully exhibit before the Court that the suggested answers to all those questions are demonstratively wrong. He further submitted that disallowing the prayer of the petitioners would amount to accepting an illegal and arbitrary action on the part of the State to be correct and that if this is done, many meritorious candidates will be deprived of admission, whereas, candidates with less merit, who have given wrong answers, would be selected, which would be violating the mandates of Article 14 of the Constitution.

8. Mr. Ashok Parija and Mr. Jagannath Patnaik, learned senior counsel appearing for the intervenors, who are some of the selected candidates, vehemently opposed the contentions raised by Mr. Mohanty and submitted that when a procedure has been laid down in the Prospectus to raise objections with regard to any wrong answers suggested by the examining body, without following such procedure, the petitioners, who have not filed objections, cannot be allowed to raise objections to the correctness of the answers suggested to said 63 questions on any ground, at this stage. In view of the decisions referred to above, this Court is of the opinion that even accepting that no objection has been filed with respect to 63 questions, in accordance with Clause – 10.17 of the Prospectus, the doors of justice cannot be shut for the petitioners, who allege that wrong answers have been suggested to such questions, if they succeed in demonstratively showing that the answers suggested by the examining committee are wrong, as otherwise, it would amount to this Court closing its eyes to apparent illegality committed by the examining body and depriving the candidates, who have given the correct answers from obtaining marks for

the said questions over and above being awarded with negative marks as per the Prospectus. The objections raised therefore with regard to maintainability of such allegation by some of the petitioners, who have not filed objections in accordance with Clause – 10.17 of the Prospectus, stands overruled.

9. Before examining the objections to each of the aforesaid 63 questions, which also contain some of the questions out of the 26 questions for which, objections were filed and the Convenor by constituting a committee verified the said 26 questions and decided not to take any action with regard to 13 numbers of questions, corrected the answers earlier suggested to eight questions and found five questions to be ambiguous deciding to award full marks to all the candidates in respect of those five questions, it would be appropriate to divide the said 63 questions to different categories.

10. Before doing so, another question raised by Mr. Routray with regard to the irregularity in setting the questions, is required to be dealt with. Mr. Routray submitted that Clause – 9.2 of the Prospectus though prescribed that question papers containing 300 questions should be divided into two parts. The first part will consist of non-clinical and para-clinical subjects and the second part will consist of clinical subjects and it further prescribed that there should be subject-wise number of questions as given in Appendix - II of the Prospectus, the said specified number of questions, subject-wise were not set in the question paper and there was a deviation thereto. For example, he submitted that Appendix – II of the Prospectus prescribed number of questions to be set subject-wise in each part of the question paper and therefore a candidate, who is required to answer 300 questions within three and half hours, had the choice of not preparing for the entrance examination in some of the subjects thereby getting more time to concentrate on the rest of the subjects in which, more number of questions were to be set. He therefore submitted that the number of questions deviated should be eliminated.

11. The entrance test being conducted for P.G. (Medical) Course on completion of which course, the said successful doctors would be known as specialists and keeping in view Clause – 9.3 of the Prospectus, which provides that the questions in both parts shall be of MBBS standard and shall cover all the subjects of MBBS Course, this Court is unable to accept the contention raised by Mr. Routray that any deviation made with regard to appendix II of the Prospectus with regard to specific number of questions required to be set in respect of different subjects would entail such deviated

number of questions to be eliminated inasmuch as this Court is of the view that when the eligibility criteria to appear in the entrance test is that the candidates must have passed MBBS degree and it was specified that all the questions shall be set from MBBS Course, it was incumbent upon a candidate, who seeks to do specialization in a particular subject in P.G. (Medical) Course, to prepare for all questions that may be set covering of all the subjects of MBBS Course.

12. The 63 questions in respect of which, objections have been raised can be categorized into four categories, such as,

(i) Questions/answers with spelling mistakes;
(ii) Questions set out of MBBS Course ;
(iii) Number of questions set in deviation to Clause – 9.2 and Appendix II of the Prospectus, and
(iv) Questions with more than one correct answers;

13. It is relevant to mention here that with regard to the correction made by the Convenor in respect of 13 questions after its verification by a Committee constituted for that purpose, as uploaded to the website were question Nos. 22, 32, 34, 75, 140, 147, 152, 163, 176, 189, 269, 275 and 297. Out of the above 13 questions, in respect of five questions, i.e., questions Nos. 75, 140, 163, 176 and 269, the Committee decided to award full marks to all the candidates as the said questions were found to be ambiguous. Under the first category, i.e., questions with spelling mistake, some of the petitioners have alleged the following questions to be containing spelling mistake of such nature, which cannot be ignored and, therefore, it is asserted that all candidates should be awarded marks for those questions. The said questions are, question Nos. 69, 197, 22, 133, 86, 156, 67, 216, 177, 141, 247, 159, 84, 161, 261, 246, 271, 36, 03, 169, 76, 155, 91, 38, 110, 280, 231, 278, 18, 81, 41, 57, 179, 284, 124, 137, 37, 60, 158, 186 and 224.

14. In order to appreciate the contentions raised by the learned counsel for the respective parties, it would be appropriate to deal with each of the above questions.

Question No. 22

This was one of the questions in regard to which, objection was raised by the candidates alleging that the answer “B” suggested is wrongly spelt as, instead of “stretch reflex”, it has been printed as “stress reflex”. The petitioners further contended that the correct answer to the question is “stretch reflex”, but the expert committee constituted after objections were filed suggested answer “A”, i.e., “flexor reflex” is the correct answer.

Mr. Routray, learned senior counsel for the petitioners also submits that the exact question was set in the P.G. Entrance Examination of the year 2010, which was also challenged before this Court. In the said year, the suggested answer was “stretch reflex” and when some of the candidates, who answered “flexor reflex”, i.e., answer “A” as correct, were denied from getting any marks for the said question.

Mr. R.C. Mohanty, learned counsel for the Convenor, on the other hand, contended that as the said answer has been spelt as “stress reflex”, which is not a correct answer and answer “A” , i.e., “flexor reflex” is the correct answer and, therefore, the expert committee corrected the original suggested answer “B” to “A”.

The question no.22 was “During the recovery of the spinal shock which of the following reflex appears first ?

A. Flexor reflex
B. Stress reflex
C. Extension reflex
D. Postural anti-gravity reflex.

Both the parties in support of their respective cases filed extracts from the text book of Medical Physiology by Arthur C. Guyton, and John E. Hall, which is an accepted authority in medical psychology. The said book with regard to the above question mentions that the first reflexes to return are the stretch reflexes followed in order by the progressively more complex reflexes: flexor reflexes, postural anti-gravity reflexes and remnants of stepping reflexes.

This Court, therefore, finds that when the question was specific with regard to the first reflexes that appears while recovering from spinal shock, answer “A” i.e., “flexor reflex” as corrected by the expert committee is shown to be demonstratively wrong. The only correct answer to the above question appears to be “stretch reflex” which was never suggested as one of the answers.

In view of the above, all the candidates are entitled to get full marks for this question.

Question No. 86

The allegation is made that the word “clarification” mentioned in the question is wrong and it should have been “classification”. Reference is

made to the text book of forensic medicine and toxicology by Krishnan and Modi's text book of medical jurisprudence and toxicology.

As contended by the petitioners, the question should have been Gordon's "classification of death" and not "clarification of death".

As it is demonstratively shown that the question becomes ambiguous due to the spelling mistake, all the candidates should be awarded with full marks.

Question No. 155

The allegation is made that the question involves a wrong spelling. Instead of "corclinoma", it has been spelt as "carcelinoma". The question is type of "corclinoma" lung responding best to chemotherapy. The spelling mistake being such, which will mislead the candidate in answering the question, all candidates should be awarded full marks for the question.

Question Nos. 247, 271, 246, 159, 84, 261, 03,133, 76, 91, 110, 231, 18, 41, 179, 284, 60, 156 and 186.

The spelling mistakes alleged in these questions appear to be clearly printing errors and very much understandable by the candidates. Therefore, the allegation in respect of the aforesaid questions that the candidates were misled by such printing error cannot be accepted.

Question Nos. 69, 161, 36, 169, 38, 67,141, 216, 177, 278, 81, 57, 124,137, 37, 158, 197, 224 & 280,

On examining the spelling mistakes alleged by the petitioners to be appearing in the suggested answers in the above questions it is found that the said printing mistakes are very much understandable by the candidates and hence no interference in this regard is called for.

15. The above conclusions of this Court are based on the ratio of the case of ***Chandan Mishra and others v. Convenor, M.B.B.S./B.D.S. Selection Board and others,*** 77 (1994) CLT 624. In the said case, dealing with similar allegations with regard to the wrong printing of the question and/or the answers, in agreement with the submissions made on behalf of the petitioners therein, this Court concluded that there should not be any printing error, but the contention that the candidates were confused and/or prejudiced, was not accepted basing on the experts appointed by the Court, who found that the errors were of such character that any average student

can know what the correct word was and would not be confused. In the facts of this case also, as concluded above, many of the questions alleged to be suffering from printing mistakes/spelling mistakes are either understandable or intelligible and will not create any confusion or prejudice to the candidates in any manner, as found above.

16. As already stated, it is a settled law that the Court being not an expert in technical matters, should not ordinarily sit on judgment over the views of the examiners. But if the expert body takes a view, which no reasonable person would take, the Court should interfere and if the procedure or system is demonstratively unreasonable and operates harshly, it would not be legitimate to contend that the Court should hold its hand and refuse to interference.

17. The second type of question against which objection has been raised is alleged to be out of MBBS Course contrary to Clause – 9.3 of the Prospectus. Mr. Routray, learned counsel submitted that one question is of this type, i.e., question No.33. However, neither the syllabus of MBBS Course referring to the said subject nor any other materials have been produced before this Court to show that the said question was out of course. The contention raised by the petitioner therefore is unacceptable.

18. With regard to the questions set in deviation of Clause – 9.2 and appendix II, as already observed above, the said Clause of the Prospectus cannot be treated to be mandatory and no interference is called for in that regard.

19. Coming to the last category of questions, which are objected to, alleged to be the questions having more than one correct answer or ambiguous, the said questions are, question nos. 34, 147, 152, 189, 139, 12, 15, 275 and 32.

20. However, the above nine questions alleged to be having more than one correct answers resulting in ambiguity have not been examined by any expert committee.

21. Nothing is brought before this Court by the opposite parties that the questions after being set for the entrance examination, were examined by the Admission Committee, which consists of experienced doctors and found to be rightly set with right answers suggested thereto.

22. On perusal of the above questions and various text books by recognized authors, submitted by both the parties, this Court finds that the

said questions as well as answers thereto are technical in nature and the Court should not ordinarily sit in judgment over the correctness of the suggested answers, it being not the expert in such technical mattes. However, prima facie, this Court on going through the text books produced with reference to the answers for the above questions, is satisfied that the above nine questions are required to be examined by an expert body.

23. In conclusion, therefore, this Court is of the view that out of the first category of question allegedly having spelling mistake or wrongly printed, in respect of the question Nos. 22, 86, and 155 all the candidates should be awarded full marks.

24. With regard to the last category of questions, i.e., nine questions having allegedly more than one correct answers, as observed above, this Court feels it appropriate that the said nine questions should be reconsidered by an expert committee and for that purpose, this Court constitutes a committee of experts, consisting of the Professor & HOD, Department of Medicine of SCB Medical College & Hospital, Cuttack, Professor & HOD, Department of Anatomy of MKCG Medical College & Hospital, Berhampur, Professor & HOD, Department of Physiology of SCB Medical College & Hospital, Cuttack, Professor & HOD, Department of Microbiology of MKCG Medical College & Hospital, Berhampur, Professor & HOD, Department of ENT of MKCG Medical College & Hospital, Berhampur and Professor & HOD, Department of SPM of SCB Medical College & Hospital, Cuttack. The Convenor shall place the above nine questions with the suggested answers, which have been marked as correct answers before the Expert Committee, who shall find out, if the answers suggested as correct answers, are in fact the correct answers or more than one correct answer has been suggested to any of the said questions or none of the answers suggested are correct or any of the said questions are ambiguous. If they find that the answers suggested to be the correct answer is either not the correct answer or there are more than one correct answers to any of the questions or there are no correct answers suggested or any question is ambiguous, the candidates shall be given full marks for such types of questions. The Expert Committee should examine the above nine questions in accordance with the directions issued above and give their report to the Convenor by 10th of May, 2011. Basing on the said report and the finding of this Court that all the students will be entitled to full marks for the questions indicated above, which suffered from spelling mistakes, a fresh merit list of the successful candidates shall be prepared by 16th of May, 2011 and the candidates shall be called for counselling from 27th of May, 2011 and admission shall be concluded latest by 6th of June, 2011. Shifting/extension

of the last date for admission to P.G. (Medical) Course is directed keeping in view the peculiar circumstances of the case.

25. Before parting with the case, it is felt appropriate to issue further directions to the opposite party – State that from the ensuing year, i.e., from 2012 onwards, if any entrance test is held by the State for admission to P.G. (Medical) Course, the P.G. (Medical) Selection Committee shall take all care and caution to see that no printing/typographical errors appear in either the questions or the suggested answers and the questions should be clear and unambiguous having one of the suggested answers, as the most appropriately correct answer and the other answers to be incorrect or though appear to be correct, are not correct. Any deviation from this, would be at the sole risk and responsibility of the said P.G. Admission Committee.

With the aforesaid observations and directions, the writ applications are disposed of.

Writ petitions disposed of.

2011 (II) ILR- CUT- 484

R.N.BISWAL, J.

W.P.(C) NO.10506 OF 2011 (Decided on 26.07.2011)

SARASWATI MALLIK …….Petitioner

.Vrs.

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

ORISSA PANCHAYAT SAMITI ACT, 1959 (ACT NO.7 OF 1960) – S.46-B

Special Meetings convened U/s.46-B of the Act for voting of no confidence against Chairman and Vice-Chairman of the Samiti – Members having a right to vote – Held, a conjoint reading of both Section 16(1) and 18(2) of the Act as well as the circular of the Government Dt.3.12.1994 under Annexure-A/4 it is crystal clear that M.P., MLA, Sarpanches and elected Samiti members being members of the Samiti have right to vote at the meeting of the Samiti.

(Para 8)

Case laws Referred to:-

1.1987(I) OLR 335 : (Jagadish Pradhan & Ors.-V-Kapileswar Pradhan & Ors.)
2.2001(II) OLR 44 : (Smt. Kanti Kumbhar-V- State of Orissa & Ors.)

For Petitioners - M/s. Asim Amitav Das, M.B.Ray, B.K.Parida, S.Mohanty, B.S.Ahu.
For Opp.Parties - M/s. Manoj Ku, Mishra & S.Senapati
Addl. Govt. Advocate

R.N.BISWAL,J. As per the writ petition, the petitioner was elected as Chairperson of Gudvella Panchayat Samiti in the last election held in the year 2007.She discharged her duties as per the provision of law contained in Orissa Panchayat Samiti Act (hereinafter referred as "the Act") and Rules framed there under. As she did not comply with the illegal demands of some Panchayat Samiti members, they forming an unholy combination tried their best to dislodge her from the office of Chairperson. They held a meeting on 8.4.2011 and passed a resolution to bring no confidence motion against the petitioner and made a requisition to the Sub-Collector, Bolangir to fix the venue date and time for holding such meeting. Accordingly, the Sub-Collector issued notice along with requisition on 15.4.2011 to all the Samiti

members indicating that the meeting would be held on 26.4.2011 at 9 A.M. in the Block office meeting hall under Annexure-1 series. The petitioner seriously doubted the authenticity of the signatures found in the requisition as well as in the proceeding of the meeting. The notice was not accompanied by the proposed resolution containing the reasons to be moved in the no confidence motion against her.

2. It is the further case of the petitioner that as required under law, notice of the meeting regarding no confidence motion is to be sent to the members having right to vote, but, in the present case, notice has been issued to the Member of Parliament Bolangir, MLA,Titilagarh and panchayat Samiti members along with all Sarpanchs**.** So, the notice is defective. Under such circumstances, she prays to quash the notice dated 15.4.2011 as illegal and arbitrary.

3. Opp**.**parties nos. 5 to 23, all of whom are members of the panchayat samiti, in their counter affidavit inter alia contended that notice was issued to all the members of the panchayat samiti in accordance with law. The requisition and the proposed resolution were enclosed with the notice. They claimed that all of them have signed in the proceeding of the meeting, requisition and the proposed resolution.

4. Op.party nos.2 to 4 in their counter affidavit contended that on receipt of the requisition along with copy of the proposed resolution for convening a special meeting in connection with no confidence motion against the petitioner, the Sub-Collector, Bolangir (Opp.party no.3) in exercise of his power conferred under Section 46-B of the Act correctly issued the notice under Annexure-1 series. Out of total 26 members of Gudvella Panchayat Samiti, 19 members signed the requisition. After receipt of the requisition, opp.party no.3 requested the B.D.O., Gudvella Block to verify the genuineness of the signatures of the signatories found on the requisition and the proposed resolution by comparing the same with their signatures given in the proceeding book of the panchayat samiti. Accordingly, the signatures were compared and the B.D.O.,Gudvella Block vide letter dated 13.4.2011 intimated the Sub-Collector, Bolangir that the signatures on the proposed resolution and the requisition were genuine.

5. Learned counsel for the petitioner submits that the notice sent to the members of the panchayat samiti does not contain the proposed resolution, as required under Section 46-B(2)(c) of the Act. He further submits that notice of meeting regarding no confidence motion has to be addressed only to the members having right to vote**.** In the present case, notice has been

issued to the Members of Parliament Bolangir, MLA Titilagarh, Panchayat Samiti members along with all sarpanchs. So, the notice is defective. Furthermore, learned counsel for the petitioner submits that the signatures contained in the resolution as well as in the proceeding of the meeting dated 8.4.2011 appear to have been forged to the naked eye, but, the Sub-Collector, has not taken any steps to verify those signatures. So, according to him the notice deserves to be quashed.

6. Learned counsel for the opp.parties nos.5 to 23 submits that no proforma of the requisition or the proposed resolution has been prescribed under the Act or Panchayat Samiti Election Rules. In absence of such proforma, the requirement of Section 46-B(2)(c)would be satisfied, if they are substantially complied with. The proposed resolution is there at page 11 of Annexure-1 series. So according to learned counsel for opp. parties 5 to 23, it cannot be said that the proposed resolution was not sent with the notice to the members of the panchayat samiti.

7. On perusal of Annexure-1 series, the copy of proposed resolution is found at page 11. As rightly submitted by learned counsel appearing for opp.parties 5 to 23 no proforma has been prescribed under the Act or the Panchayat Samiti Election Rules either with regard to requisition or the proposed resolution. In the decision in the case of **Jagadish Pradhan and others Vs.Kapileswar Pradhan and others**,1987(I)OLR 335 rendered by a Division Bench of this Court, on 24.3.1985 the petitioner therein and one Surendra Prasad Nayak, resolved expressing their want of confidence on the chairman and requested the Sub-Divisional Officer in the said resolution to take necessary action in the matter. The Vice-Chairman sent the said resolution on 27.3.1985 to the Sub-divisional Officer. On receipt of the same the Sub-divisional Officer gave notice on 3.4.1985 for a meeting to be held at the office of the panchayat samiti on 15.4.1985 at 11 A.M. with a copy of resolution dated 24.3.1985. It was held that in the resolution dated 24.3.1985, it was clearly mentioned about absence of confidence of the signatories on the Chairman. Merely because the resolution was not in a separate document, it cannot be said that the action thereupon becomes illegal. So in the present case, even if it is presumed that the so-called proposed resolution found at page 11 of Annexure-1 series, is not a proposed resolution in the strict sense of the term, since the requisition sent to the Sub-Collector indicates want of confidence of the signatories thereto on the petitioner, the notice cannot be held to be bad in law. No reason is required to be given on the requisition or the proposed resolution for initiating no confidence motion against the Chairman/Chairperson as held by

this Court in the case of **Smt.Kanti Kumbhar** Vs**. State of Orissa and others** 2001(II)OLR 44.

8. Learned counsel appearing for opp.parties 5 to 23 further submits that as per Section 16(1)of the Act, every Block shall have a Samiti consisting of the members, namely:

> (a) the Chairman and the Vice-Chairman of the Samiti elected in the manner provided in Sub-section (3);
>
> (b) one member elected directly on the basis of adult suffrage from every constituency within the Block in the prescribed manner;
>
> (c) Sarpanchs of the Gram Panchayats situated within the Block;
>
> (d) every member of the House of the People and the Legislative Assembly representing constituencies which comprise wholly or partly the area of the Samiti; and
>
> (e) every member of the Council of States who is registered as an elector within the area of the Samiti.

Section 18(2) of the Act envisages that all the members of the Samiti specified in Sub-Section (1) of Section-16 shall have the right to vote at the meetings of the Samiti. Thus on a conjoint reading of both Section 16(1) and 18(2)of the Act, it is crystal clear that M.P., M.L.A. Sarpanchs and elected Samiti Members being members of the Samiti have right to vote at the meetings of the Samiti. It has been clarified in the Circular dated 3.12.1994 of the Gov. under Annexure-A/4 that Sarpanchs, M.L.A and M.P being members of the Panchayat Samiti have right to vote in the special meetings convened under section 46-B of the Act. So, it is wrong to say that they have no right to vote in the meeting of want of confidence on the Chairperson. I am one with the submission of learned counsel appearing for opp.parties 5 to 23 in this regard.

9. As regards the allegation of forging of signatures on the requisition and the resolution passed in the meeting, as stated earlier ,in their counter affidavit opp.parties 2 to 4 contend that after receipt of the requisition,

opp.party no.3 vide letter dated 11.4.2011 requested the B.D.O. Gudvella Block to verify the genuineness of the signatures of the signatories found on the requisition and the proposed resolution by comparing the same with their signatures in the proceeding book of Gudvella Panchayat Samiti. Accordingly, the B.D.O. compared and verified the signatures and in his letter dated 13.4.2011 intimated the Sub-Collector, Bolangir that the signatures found on the proposed resolution and the requisition were genuine .This averment of opp.parties 2 to 4 has not been countered. Moreover, all the 19 signatories in the requisition and the proposed resolution, who have been arrayed as opp.parties 5 to 23 stated in the counter affidavit as stated earlier, that they have put their signatures on the requisition and the proposed resolution. Under such circumstances, it cannot be said that the signatures found on the requisition and resolution were forged.

10. In the above premises, the writ petition stands dismissed being devoid of merit. In view of dismissal of the writ petition, the Misc. Case Nos. 6383 and 7180 of 2011 stand disposed of. No cost.

Writ petition dismissed.

2011 (II) ILR- CUT- 489

INDRAJIT MAHANTY, J.

CRLMC. NOS.1689 & 1690 OF 2006 (Decided on 28.06.2011)

SANKARSANA BEHERA .....Petitioner.

.Vrs.

STATE OF ORISSA .....Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.197.

Sanction – Act or omission done by public servant for which he was charged – If it is prima-facie found that the act or omission for which the accused was charged has reasonable connection with the discharge of his duty then it must be held to be official and Section 197 Cr.P.C. will apply.

In the present case the petitioner was working as Block Development Officer and the construction work of the building has been assigned to the Junior Engineer to carry out the work departmentally – In the process of such assignment it is alleged that certain forest produce were used for construction of the Block office – The alleged act against the accused-petitioner was clearly an act which the accused-petitioner allegedly committed in due discharge of his official duty – Held, sanction U/s.197 Cr.P.C. is mandatory prior to passing of the order of cognizance – Order taking cognizance against the petitioner is quashed. (para.8)

Case laws Referred to:-

1.AIR 2008 SC 1992 : (Anjani Kumar-V-State of Bihar & Abr.)
2.2009(II) OLR.504 : (Sri Debasis Panigrahi-V-State of Orissa & Anr.)

For Petitioner - M/s. Laxman Pradhan, A.Pradhan, D.Pr.Das & N.Hota.
For Opp.Party - Mr. S.Kanungo (Addl.Standing Counsel)

I.MAHANTY, J. Both the applications have been filed by the petitioner-Sankarsana Behra with a prayer to quash the orders dated 28.3.2006 in 2(b)C.C. Nos.3 & 4 of 2006, by which orders the learned S.D.J.M., Gunupur

has been pleased to take cognizance against the petitioner for the offences under Sections 21 of O.T.T. Rule, 1980 and 27(3)(a) of O.F.A, 1972.

2. Learned counsel for the petitioner submitted that while the petitioner was working as "Block Development Officer" at Gudari Block in the district of Rayagada on 12.9.2005 as well as on 14.9.2005, the campus of the Panchayat Samiti, Gudari was searched by the Forest Range Officer, Gudari Range and found Sal poles, 3rd Class Misc. Poles and small Salia bamboo pieces at the Panchayat Samiti campus after they had been used as construction materials of the block building under the supervision of the Junior Engineer of the Block.

3. It is further stated that the offence reports dated 12.9.2005 (CRLMC No.1690 of 2006) and 14.9.2005 (CRLMC No.1689 of 2006) under Annexure-2 series, were filed and registered as 2(b)CC Case Nos. 3 and 4 of 2006 in the court of the learned S.D.J.M., Gunupur impleading the present petitioner as the sole opposite party, who was then working as B.D.O. for the alleged offence under Sections 21 of OTT Rule, 1980 and under Section 27(3)(a) of O.F.A, 1972.

4. The petitioner has challenged the orders of cognizance dated 28.3.2006, inter alia, on the ground that the said order suffers from the infirmity of want of sanction as contemplated under Section 197 Cr.P.C. The construction that was carried out for that of the block office buildings and that too, by the Junior Engineer attached to the block and clearly the allegation relates to acts in due discharge of official duty, therefore, learned counsel for the petitioner prays that the prosecution case may be quashed for want of sanction.

5. Learned counsel for the petitioner placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Anjani Kumar v. State of Bihar and another,** AIR 2008 SC 1992, wherein the Hon'ble Supreme Court came to hold that once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. It is further observed that if it is prima facie, found that the act or omission for which the accused was charged which has a reasonable connection with the discharge of his duty then it must be held to be official, to which applicability of Section 197 Cr.P.C. cannot be dispute.

Reliance was also placed on the judgment of this Court in the case of **Sri Debasis Panigrahi v. State of Orissa and another,** 2009 (II) OLR-504,

wherein the Division Bench of this Court while discussing with the scope of Section 482 Cr.P.C., came to hold in the said case that the learned Magistrate in course of passing the order of cognizance has acted in a most casual and mechanical manner and has failed to apply his judicial mind to the very nature and extent of the allegations made in the complaint and issued process against the petitioners therein.

In this respect, Section 197 Cr.P.C. was taken into consideration and the Division Bench of this Court came to hold that allowing the petitioner to invoke Section 197 Cr.P.C., it must be shown that the accused had committed the alleged act while acting or purporting to act in the discharge of his official duties. Such act must fall within the scope and range of the official duties of the public servant and after it is found that the said act comes within the official duty of such public servant, protection of Section 197 Cr.P.C. is available and not otherwise.

6. Learned Additional Standing Counsel for the State submitted that he has received instructions from the office of the Divisional Forest Officer, Rayagada Division vide letter dated 19.5.2007 in which it is stated that no sanction order has been obtained under Section 197 Cr.P.C. to initiate criminal proceeding against the petitioner-Sankarsan Behera.

7. After hearing the learned counsel for both the parties and on perusing the impugned orders of cognizance dated 28.3.2006 in both the cases, it is clear therefrom that while the orders of cognizance have been passed, there is no whisper of any finding as to the applicability or otherwise of Section 197 Cr.P.C.

8. In the facts of the present case, it is clear that the petitioner was working as Block Development Officer and the construction work of the building or extension thereto, has been assigned to the Junior Engineer to carry out the work departmentally. It is in the process of such assignment, it is alleged that certain forest produce (wooden poles) were used for construction of block office. Hence, it would be suffice to note that the alleged act against the accused-petitioner was clearly an act which the accused-petitioner allegedly committed in due discharge of his official duties and, therefore, sanction under Section 197 Cr.P.C. is mandatory prior to passing of order of cognizance.

9. In view of the aforesaid facts and the case laws cited hereinabove, I am of the considered view that in the absence of sanction under Section 197 Cr.P.C., the orders dated 28.3.2006 passed by the learned S.D.J.M.,

Gunupur in 2(b)CC Nos.3 & 4 of 2006 taking cognizance against the petitioner for the offence under Sections 21 of OTT Rule, 1980 and 27(3)(a) of O.F.A, 1972 is wholly without any authority of law and hence, it is directed to be quashed. The L.C.R. be returned immediately.

10. The CRLMC is allowed accordingly.

Application allowed.

2011 (II) ILR- CUT- 493

ARUNA SURESH, J.

S.A NO.79 OF 1986 (Decided on.17. 05. 2011)

GUNJAR BEWA …….. Appellant.

.Vrs.

NAKULA LENKA & ORS. … ….Respondents.

SPECIFIC RELIEF ACT, 1963 - (ACT NO.47 OF 1963) - S.37 (2)

Permanent injunction - Suit land owned by Government – Plaintiff is an encroacher and does not claim title but claimed possesory right only- His possession not disturbed by Government but by the defendants by subsequent encroachment – Defendants threatened to trespass the land in plaintiff's possession – Held, plaintiff has better title than the defendants to seek relief of perpetual injunction against them in order to protect his possession in the suit property .

(Para 19 & 20)

Case laws Referred to:-

1.1968 sc 1165 : (Nair Service Society Ltd.-V-K.C.Alexander).
2.AIR 1972 SC 2299 : (Kallappa Setty-V-M.V.Lakshminarayan Rao).
3.AIR 1989 SC 2097 : (Krishna Ram Mahale-V- Mrs. Shobha Venkat Rao)
4.ILR 1963 Cuttack 482: (Gadadhar Sahu-V-Karsanbasta Patel)
5.1974(1) CWR 568 : (E.Mangulu & Ors.-V-Paddili Sriramlu)

For Appellant - Mr. R.C.Rath.
For Respondents - None

ARUNA SURESH, J. Impugned in this appeal is the judgment dated 24.12.1985 and decree dated 10.1.1986 of the First Appellate Court whereby the judgment dated 17.3.1981 and decree dated 2.4.1981 of the Munsif, Dhenkanal(Civil Judge, Junior Division) has been reversed.

2. Appellant herein (plaintiff) filed a suit being T.S. No.26 of 1976 for permanent injunction in respect of property in Plot No.3906 Khata No.2099 of last settlement situated in Dhenkanal town measuring an area of Ac.0.42 decimals against the respondents herein (defendants) seeking following reliefs:

(a) for a decree of permanent injunction restraining the defendants not to dismantle the house of the plaintiff standing on the suit plot either by themselves or through any of their agencies.
(b) for a decree directing the defendants not to go over the suit land till the title to the suit land is declared by competent authority.

3. Case of the plaintiff is that the suit land is a Government land. In the remark column of last settlement (Ext.3-khatian), he has been shown in forcible possession of the land since 1944. An encroachment Case No.50 of 1966 was initiated by Tahasildar, Dhenkanal against him. Vide order dated 27.12.1967, Tahasildar observed that he was in unauthorized possession for about 23 years and impose penalty of Rs.462.30 and Rs.231.15 under Section 3 & 5 of the Orissa Prevention of Land Encroachment Act with the directions to vacate the encroachment at once.

4. He had constructed a residential house on the impugned plot about 35 years back. He had also enclosed that area and had grown some trees and other plantation etc. and had been using the same as a Bari. He also claimed adverse possesory rights in the property in suit.

5. The defendants are alleged to have broken the fence, destroyed the plants and damaged the vegetables on 23.8.1976 and started leveling the ground to erect houses. He immediately filed a complaint before the SDJM, Dhenkanal. However, the defendants constructed seven temporary huts. When plaintiff came to know from the defendants that they intended to dismantle his house and throw out his family who are living there, he apprehended dispossession from his house at the hands of the defendants. Hence, he filed the suit.

6. Defendants no.1,2,3 & 5 contested the suit by completely refuting the assertions made by the plaintiff in the plaint including his claim of possessory rights over the impugned land. The contested defendants also challenged the maintainability of the suit on various grounds like non-joinder and mis-jointer of parties, non-maintainability of the suit for non-implementation of Govt. of Orissa as co-defendants and also having not claimed the relief of possession, in view of his assertion in the plaint that defendants had encroached upon part of the impugned land.

7. The suit was decreed by the trial Court on 21.9.1977 against which respondents went in appeal. The Appellate Court set aside the judgment and decree of the trial Court and remanded back the case vide judgment dated 4.7.1978 for fresh disposal.

8. The trial Court after framing of additional issues, recorded fresh evidence of the parties and after giving due opportunity of hearing, decreed the suit of the plaintiff vide judgment dated 17.3.1981.

9. Aggrieved by the said judgment and decree, defendants filed T.A No.7 of 1981. The Appellate Court vide impugned judgment dated 24.12.1985 allowed the appeal and set aside the judgment and decree of the trial Court holding that a suit for permanent injunction in the absence of relief for possession and declaration of title was not maintainable.

10. In this appeal, following substantial question of law as framed on 6.5.1986 needs adjudication.

> "Whether a suit for permanent injunction only would be maintainable in respect of land in possession of the plaintiff where he has no title on the allegation that others having no better interest than him are interfering with his possession?"

11. None has appeared on behalf of the respondents despite matter having been listed for final hearing in the regular list for about more than a month. Under the circumstances, in the absence of respondents' counsel, Mr. R.C. Rath, appearing for the appellant has been heard. He has submitted that the Appellate Court went wrong in holding that the suit for permanent injunction in the absence of relief of declaration of title and possession was not maintainable. He has argued that defendants had no better title in the suit property than that of the plaintiff as both of them admit that the impugned land is owned by the Government and, therefore, their status is not more than a trespasser. He has further submitted that since plaintiff is in prior possession of the suit property and defendants are subsequent alleged encroachers, plaintiff is entitled to protect his possession against them. He has emphasized that the trial Court was right in holding that suit as filed by the plaintiff was maintainable.

12. I find much force in the submissions made by the learned counsel for the appellant. Admittedly, Government of Orissa is the owner of the impugned land and plaintiff is an encroacher since 1944. Therefore, the plaintiff has claimed only possessory rights in the suit land qua the defendants. There is no dispute that possession of the plaintiff over the suit land is not disturbed by the State Government but has been disturbed by the defendants by subsequent encroachment.

13. It is no longer res integra that first trespasser can protect his possession against everyone except the true owner. This principle of law

was conceded to by the learned counsel appearing for the defendants before the trial Court. A trespasser has no right to disturb peaceful possession of long time of any person on any suit property and he cannot reap benefits of his illegal act. Relief of permanent injunction accordingly cannot be refused to the plaintiff to protect his possession against interference of defendants and for that the latter could also be injuncted not to interfere in any manner with peaceful possession of the suit land by the plaintiff including construction by him of any structure on that land.

14. **In Nair Service Society Limited Vs. K.C. Alexander 1968 SC 1165**, the Supreme Court reaffirmed the proposition of law laid down in Perry Vs. Clissold:-

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against all the world but the rightful owner. -------"

15. **In AIR 1972 SC 2299 M. Kallappa Setty Vs. M.V. Lakshminarayan Rao** while examining the question of possession of the plaintiff in the said case, the Apex Court observed :-

> "5.-------- Plaintiff can on the strength of his possession resist interference from persons who have no better title than himself to the suit property. Once it is accepted, as the trial Court and the first appellate Court have done, that the plaintiff was in possession of the property ever since 1947 then his possession has to be protected as against intereference by someone who is not proved to have a better title than himself to the suit property."

Similar are the observations of the Supreme Court in **Krishna Ram Mahale V. Mrs. Shobha Venkat Rao AIR 1989 SC 2097.** It was held that since the appellant was found to be in possession of the suit property, he was entitled for a decree of permanent prohibitory injunction against the respondent from trespassing upon that property and interfering with his peaceful possession and enjoyment of the same, as respondent did not claim any title in the disputed property.

16. **In Gadadhar Sahu V. Karsanbasta Patel ILR 1963 Cuttack 482** as referred to by the counsel for the appellant, it was held:-

> "7. The position of law is now well-settled that a person in possession of land without title has an interest in the property which

> is heritable and good against all the world excepting the true owner. This interest, unless the true owner interferes, is transferable.--------"

17. This proposition of law has been followed by this Court in **E. Mangulu and others Vs. Paddili Sriramlu 1974 (1) CWR 568**.

18. In the instant case, plaintiff has only claimed possessive rights. True that he has also averred title by adverse possession against the Government for which he had served a notice under Section 80 C.P.C, however, that is not the subject matter of the present suit. The defendants have not claimed any better title than that of the plaintiff in the impugned land. The trial Court while deciding issue no.3 & 4, on analysis of the evidence of the parties oral as well as documentary, held that plaintiff was the trespasser first in time on the impugned land and since thereafter remained in continuous possession, and therefore, was entitled to hold his possession against the defendants, who had no right to dispossess him from the impugned land. The Appellate Court did not interfere in the finding of fact by the trial Court that plaintiff was in possession of the land in suit prior in time and defendants were subsequent encroachers. In fact, the Appellate Court did not give any specific finding against the fact finding of the trial Court on issues no.3 & 4. The Appellate Court only considered the findings of the trial Court on issue of maintainability of the suit and while disagreeing with it, allowed the appeal. The relevant findings of the appellate Court are in para 8 of the judgment. It reads :

> "The dispute appertains to Ac.0.42 decimals of land under Plot No.3906, Khata No.2099 situated in Dhenkanal town. The plaintiff has filed the suit merely for permanent injunction on the allegations that the defendants are threatening to dispossess him there from without any manner of right. At the same time, he also avers in paragraph 9 of the plaint that the defendants have constructed seven numbers of temporary thatched huts on the disputed land. The defendants have raised an objection to the maintainability of the suit as framed. In view of this admission in para 9 of the plaint, they have also raised this question of maintainability of the suit in the trial Court which the trial Court has decided under issue no.1. The trial Court has held in favour of the plaintiff on the ground that both being trespassers, one who has been dispossessed can file a suit for permanent injunction against the other without seeking declaration of title, recovery of possession. This view is clearly erroneous. The plaintiff has not only admitted in his plaint that the defendants are in possession of some portions of the disputed land, but also, it is in the evidence that the plaintiff is not

> in possession of the entire land. Plaintiff as P.W.1 admits that the defendants have forcibly occupied the suit land. P.W.2 Banchhanidhi Naik also says that the defendants are in forcible possession of the suit land. Therefore, in view of the admission in the plaint, as well as the admission in the evidence of the witnesses, the plaintiffs should have amended the relief sought for and made the suit one for declaration of title and recovery of possession. That no having been done, the plaintiff who is not in possession of the land, cannot maintain a suit for permanent injunction simplicitor.------"

19. The aforesaid observations of the Appellate court are apparently against the settled principle of law as discussed above. The Appellate Court adopted erroneous approach while considering the maintainability of the suit and observing that trial Court had wrongly held in favour of the plaintiff that both being trespassers, one who has been dispossessed, can file a suit for permanent injunction against the other without seeking declaration of title and recovery of possession. It is pertinent to note that relief claimed by the plaintiff in the suit for permanent injunction was to restrain the defendants from dismantling his house standing on the suit plot either by themselves or through any of their agencies and further for directing the defendants not to visit the suit land till the title to the same was declared by the competent authority. Plaintiff did not claim any relief of permanent injunction as regards part of the open land bari which was allegedly encroached by the defendants. Defendants as per their own case had claimed possession of Ac.0.10 decimals of land out of total disputed land of Ac.0.42 decimals. Therefore, the trial Court rightly held that plaintiff was entitled to file a suit for permanent injunction against the defendants for protecting his possession in respect of the suit land which was not trespassed by the defendants.

20. Hence, I conclude that the suit for permanent injunction without claiming any relief of possession and declaration in respect of the land in suit in which plaintiff has not claimed any title, is maintainable against the defendants. Since the defendants had threatened to trespass the land in plaintiff's possession, he had the right to seek relief of perpetual injunction against the defendants to protect his possession in the property in suit.

21. In view of my discussion as above, the impugned judgment and decree of the appellate court is accordingly set aside. There are no orders as to cost. Trial Court record as well as First Appellate Court's record be sent back along with an attested copy of this order forthwith.

Appeal allowed.

2011 (II) ILR- CUT- 499

SANJU PANDA, J.

RFA NOS.201 & 279 OF 2009 (Decided on.16..03.2011)

CHIEF EXECUTIVE OFFICER, CESCO .....Appellant

.Vrs.

PRABHATI SAHOO & ORS. .....Respondents.

Electricity – Death due to electrocution – While the deceased was coming form the betel vine with a pump set on his head he came in contact with the live conductor wire hanging at a lower height – Defendants were negligent in maintaining the live conductor wire – Held, the widow/children /parents of the deceased are entitled to compensation – However in the matter of computation of compensation the approach shall be slightly broad based but it should be just and fair compensation and just compensation can not be equated to a bonanza.

(Para 14)

Case laws Referred to:-

1.2005(II) OLR 389 : (Nirmala Nayak & Ors.-V- Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. & Anr.)
2.2007 (I) CLR 516 : (Ketaki Lenka & Anr.-V-CESCO & Ors.)

For Appellant - M/s. Bibhudendra Dash, P.K.Mohanty & K.Panda.
For Respondents - M/s. B.H.Mohanty, D.P.Mohanty, P.K.Swain & M.Pal.
M/s. Sarat Ch. Panda(I), R.Das Nayak, M.K.Mazumdar, S.Mohanty & D.K.Nayak.
M/s.Dinesh Kumar Mohanty & D.K.Ratha

S. PANDA, J The point involved being similar in both the appeals, they were heard together and are being disposed of by this common judgment.

2. RFA No.201 of 2009 arises from the impugned judgment and decree dated 7th March, 2009 and 21st March, 2009 respectively passed by the learned Civil Judge (Senior Division), Nimapara in Money Suit No.40/71 of 2000/1998.

RFA No.279 of 2009 arises from the impugned judgment and decree dated 6th August, 2009 and 20th August, 2009 respectively passed by the

learned Civil Judge (Senior Division), Nimapara in Money Suit No.41/72 of 2000/1998.

3. The facts, as narrated in the records, are as follows:

In RFA No.201 of 2009, the plaintiff-respondents are widow, minor children and parents of the deceased Laxmidhar Sahoo and in RFA No.279 of 2009, the plaintiff-respondents are widow, children and parents of the deceased Chandramani Sahoo. Both the deceased are sons of Jhatu Sahoo and Karunakar Sahoo. On the date of occurrence, the age of the deceased was 30 and 40 years respectively. On 3rd November, 1997 both the brothers had been to their betel vine to irrigate the same. While the deceased Chandramani was coming from the field carrying the pump set on his head, the pump set came in contact with a live conductor as a result of which it was immediately charged at the spot as the open electric line was hanging at a very low height. When deceased Chandramani was struggling after coming in contact with electric shock, his brother Laxmidhar tried to save him. However, both the brothers succumbed being charged with electric current at the spot. The defendants were negligent in maintaining the proper height of the live electric wire. As such, the deceased came in contact with the high voltage electric current and lost their lives. Therefore, the defendants are liable to pay compensation for their negligent act. The deceased were doing agricultural and labour work. So, the plaintiffs claimed compensation of Rs.11,00,000/- in Money Suit No.41/72 of 2000/1998 and Rs.8,50,000-/- in Money Suit No.40/71 of 2000/1998.

4. Though defendants 1 to 6 received notice, they did not file any written statement. In both the suits, they were set ex parte except Chief Executive Officer, CESU Ltd., IDCO Tower, defendant no.7. He contested the suit by filing written statement in Money Suit No.40/71 of 2000/1998 taking a stand that a three-phase low transmission line was supplied to the lift irrigation point of one Gopinath Swain who is represented by his sons defendants 2 to 4. The said line was disconnected due to non-payment of electrical dues since 23rd March, 1997. Therefore, if the death was due to electrocution then the same might have been possible due to the pilferage or theft of electricity by the deceased by hooking process. He also took a stand that the money suits were not maintainable as they were not negligent in any manner in compliance of the statutory duties. Hence, the plaintiffs are not liable to get any compensation.

5. In support of their case, both the parties adduced oral as well as documentary evidence.

6. On the above pleadings, the trial court formulated as many as four issues in Money Suit No.40/71 of 2000/1998 which are as follows :

> "(i) Whether the suit is maintainable under law?
>
> (ii) Whether defendant no.7 was negligent and did not perform its statutory duty which caused the death of Laxmidhar due to electrocution?
>
> (iii) Whether D.7 is liable to pay compensation and what should be its quantum?
>
> (iv) What more reliefs the plaintiffs are entitled to?"

7. In Money Suit No.41/72 of 2000/1998, the trial court determined the following questions :

> "Whether the deceased got electrocuted due to negligence of the defendants? And, What will be the quantum of compensation in case the deceased died due to electrocution?"

8. On an analysis of the evidence adduced by the parties and the materials available on record, the trial court came to the conclusion that the suits are maintainable and are not barred by law of limitation. The plaintiffs proved that there was negligence on the part of the defendants for which deceased died due to electrocution and the defendants failed to prove that there was no negligence on their part. Therefore, defendant no.7 is liable to pay the compensation to the dependants of the deceased. On such findings, the trial court awarded Rs.2,50,000/- as compensation taking into consideration the dependency of the plaintiffs.

9. Learned counsel for the appellants challenging the impugned judgment submitted that there are materials available on record, which were not considered by the trial court and the negligence of the deceased was contributory. Therefore, the plaintiff-respondents are not entitled to any compensation as they were taking electric line by hooking process.

10. Learned counsel appearing for the plaintiff-respondents submitted that the age of the two deceased was 30 years and 40 years on the date of occurrence and the plaintiffs were fully depending upon the deceased as they were the only earning members of the two families and death occurred due to the negligence of the defendants in maintaining the proper height of

the live conductor wire for which the deceased came in contact with the same and died at the spot.

11. The plaintiffs have also filed cross-objections for enhancement of the compensation amount.

12. From the rival submissions of the parties and looking at the evidence available on record, it appears that the plaintiffs clearly proved that the defendants were negligent in maintaining the live conductor wire. The deceased came in contact with the said wire as it was at a lower height. The defendants tried to bring out that the deceased unauthorisedly took the line by hooking process and because of their own negligence they died. However, after lodging of the FIR about the incident, no seizure was made by the investigating authorities. Neither the police investigated the matter nor did the defendants produce any cogent material to show that supply of electricity was totally cut off; rather they took a stand that electricity was supplied to one Gopinath Swain. They produced the register which reveals that the electricity was supplied to one Gopinath Sahoo. The fact remains that the death occurred due to electrocution, as reflected in the post-mortem report. The plaintiffs duly proved the fact that while coming from the betel vine with a pump set on his head, the deceased came in contact with the live conductor wire hanging at a lower height and succumbed due to electrocution. The plaintiffs who are the widow and children of the deceased Chandramani Sahoo and widow, minor children and parents of the deceased Laxmidhar Sahoo were depending on the deceased.

13. The principle of res ipsa loquitur is the rule of evidence whereby the negligence of the alleged wrong doer may be inferred from the fact that the incident happened. The fact itself is sufficient to reveal what has happened. The character of the incident and the circumstances attending it can reasonably be believed that in absence of negligence the incident would not have occurred. Therefore, this Court considering the materials on record comes to a conclusion that due to rashness and negligence of the defendants, the incident took place and the finding of the trial court is confirmed.

14. Law is well settled that there cannot be any rigid or mathematical precision in the matter of determination of compensation. It is granted for the injury and loss suffered. Sustaining the loss and the intention behind grant of compensation is to put back the affected party as far as possible in the same position as if the injury has not taken place, by way of grant of pecuniary relief. In the matter of computation of compensation, the

approach shall be slightly broad based but it should be just and fair compensation and just compensation cannot be equated to a bonanza. Application of fair and equitable principle and a reasonable approach should be taken while determining the compensation.

15. This Court, taking into consideration its decisions reported in **2005 (II) OLR 389** (Nirmala Nayak & others v. Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd., and another, **2007(I) CLR 516** (Ketaki Lenka and another v. CESCO & others), the age of the deceased, their income and applying guess-works, modifies the quantum of compensation awarded by the learned Civil Judge (Senior Division), Nimapara in Money Suit No.41/72 of 2000/1998 and determines the compensation at Rs.1,00,000/- (rupees one lakh) with simple interest at the rate of 5 per cent per annum. Out of the total amount, plaintiffs 2,3,4 and 5 will get Rs.20,000/- (rupees twenty thousand) each. Plaintiff no.1 being the widow will get the rest of the amount out of which Rs.20,000/- shall be kept in her name in a fixed deposit in any nationalized Bank for a period of five years.

16. So far as RFA No.201 of 2009 is concerned, this Court modifies the quantum of compensation passed by the learned Civil Judge (Senior Division), Nimapara in Money Suit No.40/71 of 2000/1998 and determines the compensation at Rs.2,00,000/- (rupees two lakhs) with simple interest at the rate of 5 per cent per annum. Out of the said amount, Rs.40,000/- each shall be kept in fixed deposit in any nationalized Bank in the name of widow for a period of five years and in the names of the minors till they attain majority. Rest of the amount shall be disbursed to the plaintiffs on proper identification/application.

With the above modifications, both the appeals are allowed in part. Cross-objections filed by the claimants are dismissed.

The Misc. Case is accordingly disposed of.

Appeal allowed.

2011 (II) ILR- CUT- 504

S.C.PARIJA, J.

WP(C) NOS.6382,6384,6939 OF 2011 (19.08.2011)

DIPESH KU. SAHOO & ORS. ……Petitioners.

.Vrs.

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

Education – Admission to technical courses – AICTE fixed eligibility criteria of 50% marks for general candidates and 45% for reserved category – Orissa JEE-2011 to implement the same for the academic session 2011-12 – Action challenged – Ground is 30% of the students will be debarred from appearing before the Orissa JEE -2011 and number of seats in private colleges will remain vacant.

No impropriety or illegality committed by AICTE in prescribing eligibility criteria – Purpose is to maintain quality education which is in national interest – Moreover AICTE has refixed the eligibility criteria for admission to under Graduate courses and reduced the same from 50% to 45% for general category candidates, and 45% to 40% for reserved category candidates for the academic year 2011-12 - Direction issued to the Orissa JEE - 2011 to extend the benefit of such revised norms to the candidates who have appeared in the joint entrance examination, pursuant to interim order of this Court dated 22.3.2011 passed in WP(C) No. 6939 of 2011 – Held, direction issued to Orissa JEE that no admission is given to any candidate who do not fulfill the minimum eligibility criteria, irrespective of the class or category he/she belongs to.

(Para 24)

Case laws Referred to:-

1.AIR 1985 SC 1059 : (Dr. Dinesh Kumar & Ors.-V-Motilal Nehru Medical College, Allahabad & Ors.)
2.(1996) 5 SCC 731 : (Shri Chander Chinar Bada Akhara Udasin Society-V- State of J & K)
3.AIR 1998 SC 1227 : (Ravindra Kumar Rai-V-State of Maharashtra & Ors.)
4.AIR 2003 SC 355 : (T.M.A Pai Foundation -V- State of Karnataka)
5.AIR 2003 SC 3724 : (Islamic Academy of Education & Anr.-V-State of Karnataka & Ors.)

6.AIR 2005 SC 3226 : (p.a. Inamdar & Ors.-V-State of Maharashtra & Ors.)
7.AIR 1999 SC 2894 : (Dr. Preeti Srivastava & Anr.-V-State of M.P.& Ors.)
8.AIR 2004 SC 1861 : (State of Tamil Nadu-V-S.V.Bratheep)
9.AIR 2011 SC 1429 : (Visveswaraya Technological University & Anr.-V-Krishnendu Haldar & Ors.)
10.2011(4) SCALE 578: (Mahatma Gandhi University & Anr.-V-Jikku Paul & Ors.)

For Petitioners - Shri R.K.Rath, Sr.Advocate
Pami Rath & J.Mohanty with him for Petitioners.
Shri V.Narasingha, Addl.Govt.Advocate for O.P.No.1
J.K.Mishra,Sr.Advocate S.S.Mohanty, P.C.Behera with him for O.P.No.2
Shir S.Palit, A.K.Mahana, A.Mishra, A.Kajriwala & D.N.Patnaik for O.P.No.s 3 & 4.

For Opp.Parties - Shri S.K.Padhi, B.Routray, Sr. Advocates, D.Pr.Dash, B.K.Mishra & S.K.Barik With them for petitioner.
Shri V.Narasingha, Addl. Govt. Advocate for O.P.No.1
Shri s.Palit, a.K.Mahana, A.Mishra, A.Kajriwala & D.N.Patnaik for O.P.No.2 & 3
Shri A.K.Mohapatra, H.K.Ratsingh for O.P.No.4
Shri J.K.Mishra, Sr.Advocate
S.S.Mohanty & P.C.Behera with him for O.P.No.5

S.C. PARIJA, J. The common question involved in these three writ petitions is whether the All India Council for Technical Education ("AICTE" for short) was justified in fixing the minimum eligibility criteria of 50% marks at the qualifying examination for general candidates and 45% for reserved category, for admission to Under-Graduate Degree Courses in Engineering & Technology and Post-Graduate Degree and Post-Graduate Diploma Courses in MBA, MCA and similar courses, for the academic year 2011-12 and the Orissa Joint Entrance Examination, 2011 ("Orissa JEE-2011" for short) in implementing the same for the current academic session 2011-2012.

2. W.P(C) No.6382 of 2011 has been filed by some students aspiring for admission to Post Graduate Degree and Diploma Courses like MBA, MCA and other similar courses. W.P.(C) No.6384 of 2011 has been filed by some of the un-aided private Colleges imparting professional courses like MBA and MCA, whereas W.P.(C) No.6939 of 2011 has been filed by the Association of self-financed private Engineering Colleges of Orissa.

3. The petitioners in all these writ petitions do not question the power and authority of the AICTE to fix the minimum eligibility criteria for admission to technical and professional courses. They however, question the propriety and fairness of such action of the AICTE in fixing the minimum eligibility criteria suddenly in December, 2010 for the first time, making it applicable for the academic session 2011-12, as a result of which, students who had no prior notice of the same, have been deprived of competing in the joint entrance examination conducted by the Orissa JEE-2011. The petitioners also assail the action of the Orissa JEE-2011 in mechanically implementing the eligibility norms fixed by the AICTE, without taking into consideration the ground realities that prevails in the State, as the same would debar more than 30% of the bona fide students from appearing in Orissa JEE-2011, for admission to Degree Courses in Engineering/Technology and Post-Graduate Degree and Diploma Courses in MBA, MCA and other similar courses. It is the common plea of all the petitioners that by implementing the minimum eligibility norms prescribed by the AICTE for the academic session 2011-2012, large number of seats in private colleges imparting education in Engineering and Technical courses and professional courses like MBA and MCA will remain vacant.

4. It is the contention of all the petitioners that as Orissa JEE-2011 holds common entrance test to regulate admission to technical and professional courses, there was no justification to impose the minimum eligibility norms. It is submitted that as students appearing in Orissa JEE-2011 come from different States having different types of qualifying examinations, where the standard of marking is bound to vary, the fixing of minimum eligibility criteria is neither proper nor justified. In this regard, learned counsels have relied upon the decision of the apex Court in the case of ***Dr. Dinesh Kumar and others –Vrs– Motilal Nehru Medical College, Allahabad and others***, AIR 1985 S.C.1059, wherein the Hon'ble Court has observed as under:-

> "It would be wholly unjust to grant the admissions to students by assessing their relative merits with reference to the marks obtained by them not at the same qualifying examination where standard of judging would be reasonably uniform but at different qualifying examinations held by different State Governments or Universities where the standard of judging would necessarily vary and not be the same. That would indeed be blatantly violative of the concept of equality enshrined in Article 14 of the Constitution."

5. Learned counsels have also relied upon a decision of the apex Court in ***Shri Chander Chinar Bada Akhara Udasin Society –Vrs– State of J.& K.*** (1996) 5 SCC 731, wherein the Hon'ble Court while considering the question of admission to Medical Colleges and the need for a Common Entrance Examination, has observed as under:-

> "It need not be pointed out that the percentage of marks secured by different applicants at different types of examinations at the higher secondary stage cannot be treated as uniform. Some of such examinations are conducted at the State level, others at the national level including the Indian School Certificate examination. The percentage secured at different examinations are bound to vary according to standard applied by such examination bodies, which is well known. As such, a common entrance examination has to be held."

6. The petitioners have also relied upon a decision of the apex Court in ***Ravindra Kumar Rai –Vrs– State of Maharashtra and others***, AIR 1998 S.C.1227, wherein the views taken in the aforesaid decision in Shri Chander Chinar Bada Akhara Udasin Society (supra) has been reiterated.

7. It is alleged by the petitioners in W.P.(C) No.6382 of 2011 and 6384 of 2011 that students coming through other All India Entrance Tests, like CAT, XAT and MAT, securing less than 50% marks at the graduation level qualifying examinations have been issued with allotment letters by the Orissa JEE-2011, for admission to Post-Graduate Degree Course in MBA, while denying such benefit of relaxation of eligibility norms to other candidates.

8. It is contended by the petitioner-Association in W.P.(C) No.6939 of 2011 that subsequent to the joint entrance examination conducted by Orissa JEE-2011, the AICTE has revised its norms by reducing the minimum eligibility criteria to 45% for general category and 40% for reserved category at the qualifying examination, for admission to Degree Courses in Engineering and Technology. It is submitted that candidates who have appeared in the entrance examination conducted by the Orissa JEE-2011, pursuant to the interim order of this Court dated 22.03.2011, are entitled to the benefits of such revised eligibility norms.

9. Learned counsel for the AICTE with reference to the counter affidavit filed submits that to promote quality in technical and professional education,

the AICTE in exercise of power under Section 23(1) read with Sections 10 and 11 of the All India Council for Technical Education Act, 1987, framed the All India Council of Technical Education (Grants of Approvals for Technical Institutions) Regulations, 2010, which came into force with effect from 10.12.2010. Pursuant to such Regulation, the AICTE published the "Approval Process Hand Book (2011-12)", under which the eligibility norms for Under Graduate Degree Programme (full time) and Post-Graduate Degree and Post Graduate Diploma Programmes (full time) were specified. As per the said eligibility norms, candidates intending to pursue Degree Courses in Engineering and Technology and Post-Graduate Degree and Diploma Courses in MBA, MCA and similar courses, were required to secure at least 50% marks in the qualifying examination in the specified subjects. For candidates belonging to reserved category, the said minimum eligibility criteria was fixed at 45%. This eligibility norms have been prescribed by the AICTE with the avowed object of promoting quality in technical education and ensuring excellence, which is applicable to all technical and professional institutions in the country.

It is further submitted that new AICTE Regulation, 2010 was published in the Gazette of India on 10.12.2010 and wide publicity has been given both in the print and electronic media as well as in the AICTE website for the benefit of the concerned students.

10. Learned counsel appearing for the Policy Planning Body and Orissa JEE-2011, submits that Appendix-1 of the "Approval Process Hand Book (2011-12)" issued by the AICTE contains the norms and standards as regards duration and entry level qualifications for various full time Degree Courses in the Engineering and Technology and Post Graduate Degree and Post-Graduate Diploma Courses in MBA, MCA and similar courses. The members of the Policy Planning Body decided to follow the norms of minimum percentage of marks at the qualifying examination, as has been prescribed by AICTE, as the eligibility criteria for the candidates appearing in the joint entrance examination conducted by Orissa JEE-2011, as the same is binding on them. It is further submitted that fixation of such minimum eligibility criteria maintains and promotes better standard in technical education and ensures academic excellence. In this regard, it is submitted that the Orissa JEE-2011 has only implemented the norms prescribed by the AICTE, which cannot be faulted.

11. As regard the allegation of the petitioners in W.P.(C) Nos.6382 of 2011 and 6384 of 2011 that students coming through other All India Entrance Examinations, like CAT, XAT and MAT have been issued with

allotment letters, even though some of them did not secure minimum 50% marks at the qualifying examinations, it is submitted that 15% of the seats in private colleges under Orissa JEE-2011 are reserved for the candidates coming through All India Entrance Examinations for MBA programme, from the merit list of CAT, XAT and MAT. It is submitted that, 5% of the seats are allotted to each category in that order, i.e., CAT, XAT and MAT and the seat remaining vacant in any category within the allotted 5% automatically goes to the next category in that order.

12. It is submitted that in the CAT and XAT, which are All India Entrance Examinations, the minimum eligibility criteria of 50% is prescribed and therefore, no students securing less than 50% in the qualifying examination are allowed to appear in those entrance tests. However, in the case of MAT, there is no minimum percentage as eligibility criteria and therefore some students, who have cleared MAT and come within the quota reserved for candidates of All India Entrance Examinations, but do not fulfill the minimum eligibility criteria, have only been issued with the provisional allotment letters. It is fairly submitted that the eligibility norms, prescribed by the AICTE is also applicable to the candidates coming through MAT.

13. Biju Patnaik University of Technology in its preliminary counter affidavit filed in W.P.(C) No.6939 of 2011, has reiterated the stand taken by the Orissa JEE-2011 regarding implementation of the minimum eligibility norms fixed by the AICTE for the candidates desirous of taking admission to Degree Courses in Engineering and Technology and Post-Graduate Degree and Diploma Courses in MBA, MCA and similar courses. It has been stated by the University in its counter affidavit that AICTE has in the meantime revised and re-fixed the entry level qualifying mark for Under Graduate Degree Courses in Engineering and Technology at 45% for general category candidates and 40% for reserved category for academic year 2011-2012, as per AICTE notification dated 4.7.2011.

14. There is no dispute that the AICTE is a statutory body established under the All India Council for Technical Education Act, 1987, with a view to ensure proper planning and coordinated development of the technical education system through out the country, the promotion of qualitative improvements of such education in relation to planned quantitative growth and the regulation and proper maintenance of norms and standards in the technical education system and for matters connected therewith. It is also not disputed that the AICTE has the power and authority to fix the minimum eligibility criteria for students intending to take admission in Degree Courses

in Engineering and Technology and Post-Graduate Degree and Diploma Courses in MBA, MCA and other similar courses.

15. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. (See ***T.M.A.Pai Foundation –Vrs– State of Karnataka***, AIR 2003 S.C.,355).

16. Both in ***Islamic Academy of Education and Anr. –Vrs– State of Karnataka & Ors.***, AIR 2003 SC 3724 and ***P. A. Inamdar and Ors. –Vrs– State of Maharashtra and Ors.***, AIR 2005 SC 3226, the Supreme Court has emphasized the need for merit based admission to technical and professional courses, for ensuring educational standards and maintaining excellence in professions, which is in national interest.

17. In ***Dr. Preeti Srivastava and Anr. –Vrs– State of M.P. and Ors***, AIR 1999 SC 2894, a Constitution Bench of Supreme Court held as under:

"It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List-III. *Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List-I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications, in addition to those prescribed under Entry 66 of List-I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education* in the institutes of higher education."

18. In ***State of Tamil Nadu –Vrs– S.V.Bratheep***, AIR 2004 SC 1861, the question for consideration was whether it was permissible for the State Government to prescribe higher qualifications for purposes of admission to the Engineering Colleges than what had been prescribed by the AICTE. The Supreme Court, taking note of its earlier decisions, observed as follows:-

"xx xx xx. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges……Excellence in higher education is always insisted upon by series of decisions of this Court including Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.

Argument advanced on behalf of the respondents is that the purpose of fixing norms by the AICTE is to ensure uniformity with extended access of educational opportunity and such norms should not be tinkered with by the State in any manner. We are afraid, this argument ignores the view taken by this Court in several decisions including *Dr. Preeti Srivastava case that the State can always fix a further qualification or additional qualification to what has been prescribed by the AICTE and that proposition is indisputable. The mere fact that there are vacancies in the colleges would not be a matter, which would go into the question of fixing the standard of education. Therefore, it is difficult to subscribe to the view that once they are qualified under the criteria fixed by AICTE they should be admitted even if they fall short of the criteria prescribed by the State.*"

19. In the case of ***Visveswaraya Technological University & Anr. – Vrs– Krishnendu Haldar & Others***, AIR 2011 S.C.1429, similar question again came up for consideration as to whether the State Government/University could fix a eligibility criteria higher than those prescribed by the AICTE and whether the eligibility criteria for admission to Engineering courses stipulated under the Statutory Rules and Regulations of the State Government/University could be relaxed or ignored and the candidates who do not meet such eligibility criteria can be given admission on the ground that a large number of seats have remained unfilled in professional colleges, if such candidates possess the minimum eligibility criteria prescribed under the norms of AICTE. In the said case, the State of Karnataka had fixed higher eligibility criteria than those prescribed by the AICTE. The Hon'ble Court after referring to its various earlier decisions on the issue, has come to hold as under:-

"The proliferating unaided private colleges, may need a full complement of students for their comfortable sustenance (meeting the cost of running the college and paying the staff etc.). But that cannot be at the risk of quality of education. To give an example, if 35% is the minimum passing marks in a qualifying examination, can it be argued by colleges that the minimum passing marks in the qualifying examination should be reduced to only 25 or 20 instead of 35 on the ground that the number of students/candidates who pass the examination are not sufficient to fill their seats? Reducing the standards to 'fill the seats' will be a dangerous trend which will destroy the quality of education. If there are large number of vacancies, the remedy lies in (a) not permitting new colleges; (b) reducing the intake in existing colleges; (c) improving the infrastructure and quality of the institution to attract more students. Be that as it may. The need to fill the seats cannot be permitted to override the need to maintain quality of education. Creeping commercialization of education in the last few years should be a matter of concern for the central bodies, states and universities.

No student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact the State/University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the University. Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or 'adversely affect' the standards if any fixed by the Central Body under a Central enactment. The order of the Division Bench is therefore unsustainable."

20. The vexed question of whether the State Government/University can prescribe additional eligibility norms over and above the minimum eligibility criteria prescribed by the AICTE, for admission to Engineering course again came up for consideration before the apex Court in a very recent case of ***Mahatma Gandhi University and Anr. –Vrs– Jikku Paul and Ors***., in 2011 (4) SCALE 578, wherein the Hon'ble Court has affirmed and reiterated the views taken in Visveswaraya Technological University (supra).

21. On an analysis of the various decisions cited above and the principles decided therein, the legal position that emerges is that both the AICTE as

well as the State/University can prescribe minimum eligibility criteria for regulating admission to technical and professional courses, in order to maintain the quality of education and ensure excellence in higher education, which is in national interest. However, the standards so prescribed should be realistic, which are attainable and are within the reach of the candidates. The minimum eligibility norms prescribed by the AICTE/State Government/University cannot be relaxed or reduced to facilitate filling up of vacant seats in private technical and professional colleges, as the need to fill the seats cannot be permitted to override the need to maintain quality of education.

22. As regard the plea of the petitioners in all the writ petitions that the action of the AICTE in suddenly prescribing such eligibility criteria and not providing sufficient time and opportunity to the aspiring students intending to take admission in Engineering and other professional courses, the same is not correct, as the AICTE had published the prescribed eligibility norms since December, 2010, which is much prior to the final semester/term of the respective qualifying examinations as well as the joint entrance examination conducted by the Orissa JEE-2011, which was held in the month of June, 2011.

23. Coming to the three decisions relied upon by all the petitioners, as has been cited above, the same relates to the necessity of holding a common entrance examination, which has no application to the facts of the present case.

24. Applying the principles of law discussed above to the facts of the present case, no impropriety or illegality can be said to have been committed by the AICTE in prescribing the eligibility criteria for admission to technical courses like Engineering and Professional Courses like MBA and MCA. Therefore, the action of the Orissa JEE-2011, in implementing the same for the academic session 2011-12 cannot be faulted. Moreover, the prescribed eligibility norms are very much realistic and attainable. However, as the AICTE has refixed the eligibility criteria for admission to Under-Graduate Courses in Engineering and Technology and reduced the same from 50% to 45% for general category candidates and from 45% to 40% for reserved category, for the academic year 2011-2012, the Orissa JEE-2011 is directed to extend the benefits of such revised norms to the candidates who have appeared in the joint entrance examination, pursuant to interim order of this Court dated 22.3.2011, passed in W.P.(C) No.6939 of 2011. It is made clear that Orissa JEE-2011 must ensure that no admission is given to any candidate who do not fulfill the minimum eligibility criteria, irrespective of

the class or category he/she belongs to.

With the above observations/directions, all the writ petitions are dismissed.

Writ petitions dismissed.

2011 (II) ILR- CUT- 515

B.K.NAYAK, J.

W.P.(C) NO.10154 OF 2011 (Decided on 26.7.2011)

KUMAR CHANDRA MISHRA & ORS. .....Petitioners.

.Vrs.

RAJKISHORE MOHANTY & ORS. ..... .Opp.Parties.

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

Amendment of valuation of the plaint – Petition rejected – Order challenged.

In the present case plaintiffs filed suit in the year 1993 – Defendants, in their written statement challenged the valuation of the suit – Long after the evidence of the suit was closed plaintiff sought to amend the valuation by raising it from Rs.5,500/- to Rs.55,000/- which would evidently take away the suit out of the pecuniary jurisdiction of the trial Court – Defendants have already foregone their right to contest the issue of valuation of the suit – Held, enhancement of the valuation of the suit is not necessary to decide the real question in controversy between the parties in the suit.

For Petitioners -Mr.S.N.Mishra
For Opp.Parties -Mr. Amiya Ku.Mishra

Heard learned counsel for the parties. Perused the impugned order.

Order dated 8.3.2011 passed by the learned Civil Judge (Jr.Division), Kendrapara in T.S No.29 of 2002 rejecting the petition filed by the plaintiffs for amendment of the plaint has been assailed in this writ petition.

Plaintiffs valued the suit at Rs. 5,500/-. The defendants though challenged the valuation in their written statement, the plaintiffs did not take early steps for enhancing the valuation by way of amendment. The suit proceeded to trial and at the stage of argument the plaintiffs filed a petition for amendment of the plaint for raising the valuation of the suit in the year 2002. Apart from taking objection to the said amendment the defendants also filed a memo to the effect that they did not want to raise and contest the issue of valuation. Accordingly, the Trial Court vide order dated 10.12.2002 rejected the amendment petition filed by the plaintiffs and also directed for treating the memo filed by the defendants as part of their pleadings. That

order has become final. Subsequent thereto the plaintiffs filed an application under Order 23 rule 1, CPC for withdrawal of the suit with liberty to file a fresh suit and the said petition was rejected on 13.11.2003. A revision carried against that order also met with the same fate. The order was also subsequently challenged by the plaintiffs before this Court in WP(C) No. 10156 of 2004. The writ petition was withdrawn on the submission that the plaintiff-petitioners would file amendment petition before the Trial Court. While allowing withdrawal of the writ petition this Court observed that the amendment petition to be filed by the plaintiffs shall be dealt with in accordance with law. Thereafter, the present amendment petition was filed before the Trial Court for enhancing the valuation of the suit from Rs. 5,500/- to Rs. 55,000/- on the assertion that the defendants have challenged the original valuation made in the plaint. The amendment has been refused by the impugned order on the ground that if allowed it would change the nature and character of the suit and that in the meantime after closure of trial the suit is posted for argument.

A counter affidavit has been filed on behalf of the defendants-opposite parties in which, inter alia, it is contended that since the time of previous amendment regarding valuation of the suit the defendants have already agreed not to contest the issue of valuation by filing a memo which has been treated as part of their pleadings by the Trial Court and that order has become final. It is, therefore, contended that no prejudice will be caused to the plaintiffs if the amendment of valuation is not allowed.

The learned counsel for the plaintiff-petitioners contends that even if the jurisdiction of the Trial Court would be ousted in the event the amendment is allowed, that by itself is not a ground to refuse the amendment in view of the fact that the defendants have challenged the valuation made by the plaintiffs in the plaint and therefore the plaintiffs were compelled to file the petition for amendment of valuation. The learned counsel for the defendant-opposite parties contends that since the defendants have already agreed not to contest the issue of valuation as originally fixed by the plaintiffs, the amendment for enhancement of valuation would not be necessary for deciding the real controversy between the parties. It is also submitted by him that the defendants undertake not to raise the issue of valuation.

There is no dispute that merely because by allowing the amendment of valuation the jurisdiction of the Trial Court would be ousted, that by itself is not a ground to refuse the amendment where such amendment is absolutely necessary for deciding the real question in controversy between the parties.

In the instant case, in the suit of the year 1993 the plaintiffs had sufficient opportunity to amend the valuation of the suit as soon as they received the copy of written statement of the defendants in which the valuation put forth by the plaintiffs had been challenged. Long after evidence of the suit was closed and the suit was posted for hearing the plaintiffs have sought to amend the valuation by raising it from Rs. 5,500/- to Rs. 55,000/- which would evidently take away the suit out of the pecuniary jurisdiction of the Trial Court. However, considering the fact that the defendants have already foregone their right to contest the issue of valuation of the suit and have also undertaken in their counter affidavit not to contest such issue, in my opinion, enhancement of the evaluation of the suit is not at all necessary to decide the real question in controversy between the parties in the suit. The impugned order therefore needs no interference.

In the circumstances, there is no merit in this writ petition which is accordingly dismissed. It is made clear that the issue of valuation of the suit shall not be contested by the parties.

In view of dismissal of the writ petition all the misc. cases stand dismissed.

Writ petition dismissed.

2011 (II) ILR- CUT- 518

S.K.MISHRA, J.

M.C.NO.590 OF 2010 (Arising out of R.F.A.No.298 of 2010)
(Decided on 13.05.2011)

COLLECTOR OF ANGUL & ORS. ..... Appellants.

.Vrs.

RADHASHYAM BATRA & ORS. . .....Respondents.

LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – S. 5.

Condonation of delay – Delay is 10 years and 233 days – Application filed by State – When substantial justice and technical consideration pitted against each other cause of substantial justice deservers to be preferred – In the present case delay is due to official process – Held, this being a meritorious matter needs liberal approach – Delay condoned subject to payment of cost of Rs.5,000/- to be paid to the respondent No.1.

Case laws Referred to:-

1.AIR 1932 Privy Council 165 : (Nagendra Nath Dey & Anr.-V-Suresh Chandra Dey & Ors.)
2.AIR 1941 Privy Council P.6 : (General Accident Fire & Life Assurance Corporation Ltd.-V-Janmahomed Abdul Rahim)
3.AIR 1981 SC 733 : (Ajit Singh Thakur Singh & Anr.-V-State of Gujarat)
4.1999 AIHC 502 : (Rukumiddin & Anr.-V-Rajashekhara)
5.1999 AIHC 2945 : (Special Land Acquisition Collector-V-Baidhar Bhutia & Ors.
6.AIR 1998 sc 2276 : (P.K.Ramachandran-V-State of Kerala)
7.AIR 1987 SC 1353 : (Collector Land Acquisition, Anantnag-V-Mst. Katiji)
8.AIR 1988 SC 897 : (G.Ramegowda-V-Special Land Acquisition Officer)
9. AIR 1996 SC 1984 : (State of M.P.-V-S.S. Akolkar)
10.(2009)13 SCC 192 : (State of Karnataka-V-Y.Moideen Kunhi).

For Appellant - M/s. Udgata
For Respondent - M/s. Trilochan Rath A.S.C.

Heard learned Addl. Standing Counsel and learned counsel for the opposite parties.

This is an application under Section 5 of the Limitation Act, 1963 to condone the delay occasioned in filing the appeal.

It is not disputed that there is a delay of 10 years and 233 days in filing the appeal. The State of Orissa, therefore, has filed this petition to condone the delay. The State pleads that in pursuance of the impugned judgment and decree passed by the learned Civil Judge (Senior Division), Angul, the plaintiff filed Execution Case No.8 of 2001. The concerned Government Pleader filed petitions before the executing court denying the liability of the court but the said petitions were dismissed. The learned Government Pleader, Angul vide letter no.30 dated 08.09.2008 advised the Collector, Angul to prefer an appeal against the impugned judgment and decree. On receiving the opinion of the Government Pleader, the case records were processed in various Sections of the Collectorate. Similarly records were obtained from the record room both at Angul and Dhenkanal Civil Courts. A certified copy of the impugned judgment was collected and a proposal of the appeal was routed in different departments for taking a final decision in the matter. Finally the Government in Law Department vide letter no.8136 dated 30.07.2010 has communicated the decision of the Government to the Advocate General, Orissa, Cuttack for preferring appeal against the impugned judgment and decree passed in Money Suit No.10 of 1992 of the court of Civil Judge (Senior Division), Angul. After receipt of sanction order from the Government in the office of the Advocate Genera, Orissa, Cuttack, the same was placed before the learned Advocate General on 23.08.2010. Immediately thereafter, the learned Advocate General entrusted the matter to the Addl. Government Advocate for preparation of grounds of appeal. On 01.11.2010 the appeal has been filed.

It is submitted that there is no intentional delay and laches on the part of the Government functionaries in preferring the appeal, and therefore, the delay in filing the same be condoned.

The opposite parties have filed their counter affidavit, *inter alia,* denying all the averments made in the petition for condonation of delay. They further stated that Section 5 of the Limitation Act makes no distinction between the State and the citizen and envisages the explanation of delay to

the satisfaction of the Court. A reading of the petition clearly indicates that there is no such explanation by the State referable to the period, prior to expiry of limitation, and thereafter, for as long as eight long years. Claiming that the right has accrued in favour of the respondents-opposite parties, they objected to the petition for condonation of delay.

In course of hearing, the learned Addl. Standing Counsel argued that the suit filed before the Civil Judge (Senior Division) Angul was barred under Section 26 of the Sick Industrial Companies (Special Provision) Act, 1985, and as such, the judgment and the decree are nullity. It is further submitted that if at all the plaintiff has any claim the same can only be entertained before the Board of Industrial and Financial Reconstruction (BIFR) in a case No.1 of 1987 and not in a Money Suit before the Civil Court. On the face of it, there appears to be a strong case in favour of the appellants. It also appears to the court that such submission is meritorious one, which requires careful consideration by the court.

Learned counsel for the opposite parties, on the other hand, vehemently objected to the condone petition and relied upon the cases of **Nagendra Nath Dey and another vs. Suresh Chandra Dey and others**, AIR 1932 Privy Council 165, **General Accident Fire & Life Assurance Corporation Ltd. Vs. Janmahomed Abdul Rahim,** AIR 1941 Privy Council page-6, **Ajit Singh Thakur Singh and another vs. State of Gujarat,** AIR 1981 SC 733, **Rukumiddin and another vs. Rajashekhara,** 1999 A I H C 502, **Special Land Acquisition Collector vs. Baidhar Bhutia and others,** 1999 A I H C 2945 and **P. K.Ramachandran Vs. State of Kerala,** AIR 1998 Supreme Court 2276.

Section 5 of the Limitation Act reads as follows:-

" **Extension of prescribed period in certain cases.**- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

From the very word used by the Indian Parliament in Section 5, it is well understood that it is a beneficial peace of legislation aimed at providing relief of condonation of delay to persons, who were prevented by sufficient cause, from preferring the appeal in time. The powers of the court under Section 5 of the said Act are unfettered. Whether there was sufficient cause or not is always a question of fact. Secondly, it is observed that the State should given the benefit of the provision which is available to an individual

citizen. If the State Government shows that there was sufficient cause in preferring the appeal, the said petition should be considered in his own merit without giving any preference to either side.

In the case of **Collector Land Acquisition, Anantnag Vs. Mst. Katiji**, AIR 1987 SC 1353, the Supreme Court has laid down the guidelines for considering the applications under Section 5 of the Limitation Act. The Hon'ble Supreme Court has laid down that legislature has conferred the power to condone the delay by enacting Section 5 of the Indian Limitation Act, 1963 in enabling the court to do substantial justice to the parties by disposing the matters on merit. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the court to apply the law in a meaningful manner, which subserves the ends of justice that being the life purpose for the existence of the institution of the courts. The Hon'ble Supreme Court further observed that it has been making a justifiably liberal approach in matters instituted before it, but observed that the message does not appear to have percolated down to all other courts in a hierarchy. Any such a liberal approach is adopted on the principle as it is realized that:

"1. ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. refusal to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, in order to delay condoned, the highest that can happen is that a cause would be decided on merit after hearing the parties.

3. "every day's delay must be explained" does not mean that a pedantic approach should be made. Why not in every hour's delay, every second's delay ? The doctrine must be applied in a rational commonsense pragmatic manner.

4. when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in justice being justice done because of non-deliberate delay.

5. there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. it must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

The Hon'ble Supreme Court further observed that it was a 'State' which was seeking condonation not a private party was altogether irrelevant. The doctrine of equality before law that demands that all litigants, including the State as a litigant, are accorded, the same treatment and the law is administered in an even handed manner.

The Hon'ble Supreme Court in **G. Ramegowda vs. Special Land Acquisition Officer**, AIR 1988 SC 897 has held that the law of limitation is, no doubt, the same for a private citizen as for Governmental authorities. Government, like any other litigant, must take responsibility for acts or omissions of its officers. But a somewhat a different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and when the officers were clearly at cross purposes with it. Therefore, in assessing what, in a particular case, constitutes 'sufficient cause' for the purpose of Section 5, It might be somewhat unrealistic to exclude from consideration that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Implicit in the very nature of governmental functioning is procedural delay incidental to the decision making process Due recognition of these limitations on Government functioning, of course, within a reasonable limit is necessary. It would be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. The Hon'ble Supreme Court further held that the delay in that case has occasioned by the conduct of the Government, which was perilously close to is such inaction as might, perhaps, have justified rejection of its prayer for condonation. But in the interest of keeping the stream of justice pure and clean, the awards under the appeal should not be permitted to assume finality without an examination of their merits.

In **State of M.P. Vs. S.S. Akolkar**, AIR 1996 SC 1984 the Hon'ble Supreme Court has held that delay in official business requires broach and approach from public justice perspective.

The Hon'ble Supreme Court in **State of Karnataka vs. Y.Moideen Kunhi,** (2009) 13 SCC 192 dealing with similar matter has held that the expression "sufficient cause" as appearing Section 5, Limitation Act must receive a liberal construction so as to advance substantial justice. Ultimately, the Court has to protect the public justice. The same cannot be rendered ineffective by skilful management of delay in the process of making challenge to the order which prima facie does not appear to be legally sustainable.

Thus, applying the aforesaid principle, this Court comes to the conclusion that this is a meritorious matter, which requires a closer scrutiny of the appellate court and because of the ratio laid down, the appeal could not be filed in time. This Court is of the opinion that the petition for condonation of delay deserves to be allowed.

Accordingly, the application is allowed. The delay is condoned, subject to payment of cost of Rs.5,000/- (Rupees five thousand only) within a month to the respondent no.1.

Application allowed.

2011 (II) ILR- CUT- 524

B.K.MISRA, J.

CRA. NO.258 OF 2007 (Decided on 18.8.2011)

BHOLANATH SETHY @ BULU … …Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – Ss.137, 138.

Object of Cross-examination – Both Section 137, 138 Evidence Act conjointly speaks of the above object – Object of Cross-examination is to test the credibility of the witness, to test truthfulness of facts which he had stated in examination in chief to put defence version in the mouth of witnesses and to know facts which the witness did not depose – Object of Cross-examination is to weaken, to qualify or destroy the case by means of his opponent and establish party's own case by means of his opponent witness.

In this case learned trial Court did not take in to consideration the settled position of law and believed the evidence of the prosecutrix which she deposed in her examination in chief but did not take into consideration what she deposed in her Cross-examination – Held, the evidence on record do not inspire confidence to warrant conviction of the appellant U/s.376 (2) (g) I.P.C. which is set aside.

(Para 8,13)

Case laws Referred to:-

1.Vol.57 (1984) Cuttack Law Times 505 : (Gunanidhi Sundara-V-State of Orissa)

2006 (2) Crimes 13 : (Syed Dastageer-V-State of A.P.)

For Appellant - M/s. Susamarani Sahoo & Associates.
For Respondent - Addl. Govt. Advocate

B.K. MISRA, J. The appellant, who has been convicted under Section 376 (2)(g) of the Indian Penal Code (for short the 'I.P.C.') and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2000/- in default to further undergo rigorous imprisonment for six months in S.T. Case No.27/16 of 2006 by the Ad hoc Additional Sessions

Judge (Fast Track Court No.II), Keonjhar being aggrieved has preferred this appeal.

2. The case of the prosecution is that the victim (prosecutrix) (P.W.2), who happens to be the first wife of the informant Pradeep Kumar Pradhan, (P.W.1) on 29.9.2005 around 5 P.M. had gone to a well at 'BEDANALA' to fetch water and while she was returning, the present appellant along with one Duan Giri raped her. Information was lodged by P.W.1 in writing before the O.I.C., Nayakote Police Station vide Ext.1. On receipt of the said information, Police took up investigation of the case and on completion of the investigation charge sheet against the present appellant and Duan Giri under Section 376 (2)(g) of the I.P.C was placed. I may mention here that though both the accused persons were convicted by the learned trial court under Section 376 (2)(g) of the I.P.C. but the present appellant only has preferred this appeal.

3. The plea of the appellant was of complete denial of the allegations. It is his further plea that since he had landed property dispute with Pradeep (P.W.1), therefore he has been falsely implicated in this case.

4. The prosecution in order to bring home the guilt of the accused persons examined nine witnesses in all and of them P.W.1 is the informant. P.W.2 is the prosecutrix. P.Ws.3 to 5 are the three eye-witnesses to the occurrence. P.W.6 is a "Panch" witness to testify about the extra judicial confession made by the appellant as well as accused Duan Giri before the villagers to have raped P.W.2. P.W.7 is the Police Havildar who speaks of the seizure of the glass vials containing pubic hairs of the prosecutrix as well as of the accused persons. He also speaks about the seizure of the full pant of the present appellant besides seizure of five numbers of X-ray plates of the prosecutrix. P.W.8 is the I.O. and P.W.9 is the medical officer who had examined the victim.

The accused persons declined to examine any witness in his defence.

5. The learned Trial Court on analyzing the evidence as laid by the prosecution came to the conclusion that the prosecution has well established its case against the accused persons and accordingly while convicting the appellant as well as the other accused passed the impugned sentences, which is under challenge by the present appellant in this appeal.

6. The learned counsel appearing for the appellant while assailing the order of conviction and sentences contended that the order of conviction and sentences so far as the present appellant is concerned cannot be sustained

in the eye of law for a moment as there is absolutely no credible evidence on record to hold that the present appellant along with the accused Duan committed the offence of gang rape and the alleged extra judicial confession should not have been relied upon in view of the evidence of P.W.2, the prosecutrix.

7. The learned counsel appearing for the State on the other hand contented that the order of conviction and the sentences imposed on the appellant calls for no interference as those are based on proper appreciation of evidence on record.

8. Upon hearing the learned counsel appearing for the appellant as well as the learned Additional Government Advocate for the State and on a close and critical analysis of the evidence on record, I find that the sole evidence of P.W.2, the prosecutrix should not have been relied upon by the learned trial court. It is the case of the prosecution that on 29.9.2005 around 5 P.M. the prosecutrix had gone to fetch water from a well at 'BEDANALA' and while she was returning, she was ravished by the present appellant as well as the accused Duan Giri. Admittedly, P.W.1, who happens to be the husband of the prosecutrix is a post occurrence witness. The most important evidence on record is that of P.W.2, the prosecutrix. Though P.W.2 in her examination in chief deposed that the present appellant along with the accused Duan Giri ravished her by taking her to a nearby field, but in her cross-examination she deposed that since there was darkness faces were not visible and she could not recognise the culprits who made her to sleep in the field and it is also her specific evidence that somebody might have slept over her which she could not know. The learned trial court while recording the evidence of P.W.2 has recorded the demeanour of this witness and held at one point of time that the witness was mentally imbalanced. This fact has also been categorically mentioned by the learned trial court in the last sentence of Para-6 of the judgment. But very unfortunately, the learned trial court placed reliance on the evidence of P.W.2 which she deposed in her examination in chief and did not take into consideration the evidence which was elicited from the mouth of P.W.2 in her examination by the defence. It is the settled position of law that the evidence of a witness i.e., which she deposes in his examination in chief as well as in his cross-examination are to be considered and the Court cannot overlook the evidence or overlook the matters which has been brought out in the cross-examination of a witness. It is the duty of the Court to consider the entire evidence of the witness brought on record. Damaging statements in cross-examination cannot be ignored. The veracity of the witness is to be tested with reference to answer given in cross-examination. Sections 137 and 138 of the Evidence Act conjointly speaks of the object of cross-examination. The object of cross-examination

is to test the credibility of the witness, to test truthfulness of facts which he had stated in examination-in-chief, to put defence version in the mouth of witnesses and to know facts which the witness did not depose. Further the object of cross-examination is to weaken, to qualify or destroy the case of opponent and establish party's own case by means of his opponent witnesses. (**Vol. 57 (1984) Cuttack Law Times 505** in the case of **Gunanidhi Sundara V. State of Orissa** and 2006 (2) Crimes 13 in the case of **Syed Dastageer V. State of Andhra Pradesh**.) But unfortunately in the instant case the learned Trial Court did not take into consideration this aspect of the settled position of law and believed the evidence of P.W.2, the prosecutrix which she deposed in her examination-in-chief but what she deposed in her cross-examination was not taken into consideration.

9. It is the evidence of P.W.1, the husband of P.W.2 that Binapani is mentally deranged though she is not fully mad, but she is lacking in manners and child care. Despite that he and Binapani had good conjugal life and Binapani had given birth to a daughter. P.W.1 deposed that he was informed by his aunt Karpura Pradhan that P.W.2 was lying near a 'Nala' and when he proceeded there found P.W.2 and accused Duan Giri washing themselves in the 'Nala' and accused Duan was then fully naked. P.W.1 also deposed that on seeing him Duan Giri told that the present appellant loved Binapani and so saying ran away from the 'Nala'. P.W.1 also deposed that when she asked, P.W.2 she reported that while she was returning after fetching water the present appellant along with Duan Giri dragged her near the canal and she was ravished by them one after the other. But P.W.1 in his cross-examination deposed that when he reached at the 'Nala' it was dark and Binapani did not disclose anything to him on her own accord. But this evidence of P.W.1 cannot be believed in view of the evidence of P.W.2, the prosecutrix who says that she cannot say if somebody might have slept on her and she could not recognise the persons in view of the darkness. P.W.1's evidence do not disclose the presence of the appellant near the 'Nala' when he arrived at the spot on hearing the incident.

10. P.Ws.3, 4 & 5 are the three vital witnesses for the prosecution. P.Ws.3 to 5 consistently deposed that they had seen accused Duan Giri having sexual intercourse with P.W.2. Their evidence simply shows that the present appellant was standing under a 'Jamun' (Black Berry) tree while they were going to attend the call of nature and when they asked him to go away and not to drench in rain the present appellant asked for umbrella and when chased thereafter they ran towards the paddy field and thereafter to their house. Thus P.Ws.3 to 5 never breath a word if the present appellant was there at the spot where P.W.2 was sexually assaulted by Duan Giri and their evidence do not show if the present appellant in any way abated in such

commission of rape by Duan Giri on the prosecutrix. P.Ws. 3 to 5 who are the relations of prosecutrix and P.W.1 the informant nowhere implicate the present appellant in committing gang rape on P.W.2 along with Duan Giri. The evidence of P.Ws. 3 and 4 that they had seen the present appellant standing under a 'Jamun' tree while they were going to attend the call of nature and asked for an umbrella cannot be believed as they did not disclose those facts before the I.O., P.W.8. P.W.8 the I.O. has deposed that Pratima Pradhan and Rajani Pradhan did not state before him that they had seen the present appellant standing under a 'Jamun' tree while they were going to attend the call of nature on the evening of the date of occurrence.

Now coming to the next point as to the extra-judicial confession made by the appellant before the village 'Panch', prosecution relied upon the evidence of P.W.6.

11. P.W.6 deposed that on the allegation of Pradeep that the accused persons had raped his wife a meeting was convened where the present appellant confessed to have raped P.W.2 and he has proved the 'Panch-Faisalanama' as Ext.2. P.W. 6 deposed that the prosecutrix was present in the meeting and she told about the incident but P.W.6 admitted that Ext.2 nowhere reflects about those facts and similarly what Bholanath (appellant) confessed, Ext.2 is silent. In view of the evidence of P.Ws.2 to 5 the extra judicial confession which has been pressed into service cannot at all be believed and accepted especially when they have not at all breathed a word about such village meeting to have been held where the present appellant admitted his guilt. P.W.8, the I.O. he deposed that he did not direct his investigation to ascertain if the victim was present in the Panchayat or not and he did not enquire as to who scribed the 'Panch-Faisalanama'. P.W.9 is the doctor and the doctor deposed that he did not find signs of any recent sexual intercourse but in view of the injury over the breast and 'glutial' region sexual intercourse cannot be ruled out. But this evidence of P.W.9 do not at all probablises the case of the prosecution so far as the present appellant is concerned.

12. The seizure of the full pant of the appellant which has been deposed to by P.Ws.7 & 8, the two Police Officers vide seizure list Ext.6 is of no help to the case of the prosecution, in view of the chemical examination report Ext.16 which shows that no blood and semen stains could be found on Ext. E i.e. the full pant seized from the present appellant.

13. In the instant case, the learned trial court failed to appreciate the evidence on record in its proper perspective and erred in arriving at a wrong conclusion which cannot be sustained in the eye of law for a moment. The

evidence on record do not at all inspire any confidence to warrant conviction of the present appellant under Section 376 (2)(g) of the I.P.C. Consequently, the impugned order of conviction and sentences so far as the present appellant is concerned are hereby set aside. The appellant having held not guilt under Section 376 (2)(g) of the I.P.C. is acquitted thereof and he be set at liberty forthwith if his detention in custody is not required in any other case.

Accordingly, the Criminal Appeal stands allowed.

Appeal allowed.