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

WRIT APPEAL NO. 225 OF 2011 (With Batch) (Dt.18.01.2012)

BOARD OF SECONDARY EDUCATION, ORISSA. ……Appellant

.Vrs.

MANAGING COMMITTEE, HEMACHANDRA SIMANTA SANSKRIT BIDYAPITHA, BALASORE & ORS. …….Opp.Parties

EDUCATION – Students admitted in the respondent-institutions without recognition are not eligible to appear in the examination conducted by the Board – Courts need not grant relief on humanitarian grounds contrary to law – Respondent-institutions admitted students basing on the circular issued by the Government is contrary to the statutory provisions contained in the Orissa Education Act, 1969 – Held, learned single Judge is erred in directing the Board to declare the results of the students who appeared Madhyama Examination from the respondent-institutions. (Para 12,13)

Case laws Referred to:-

1.(2006)5 SCC 515 : (National Board of Examinations-V-G.Anand Ramamurthy & Ors)
2.AIR 2010 SC 2221 : (Rajasthan Pradesh-V-S.Sardarshahar & Anr.-V-Union of India & Ors.)
3.AIR 2007 SC 458 : (Minor Sunil Oraon Thr.Guardian & Ors.-V-C.B.S.R. & Ors.)
4.AIR 1963 SC 1227 : (T.V.V. Narasimham & Ors.-V-State of Orissa)
5.(1991) 3 SCC 87 : (State of Tamil Nadu & Ors.-V-St.Joseph Teachers Training Institute & Anr.)
6.AIR 1975 SC 1409 : (Pasupuleti Venkateswarlu-V-Motor & General Traders)
7.1940 FCR 84 -(AIR 1941 FC 5) : (Lachmeshwar Prasad Shukul-V-Keshwal Lal Chaudhuri)

For Appellant - M/s. J.Pattanaik, Sr. Advocate, B.Dash, P.K.Mohanty, S.Das (In all the appeals)
For Respondents - M/s. J.Rath, Sr.Advocate, M.K.Khuntia for R-I) Miss A Jena (for R2 to 5)

V. GOPALA GOWDA, C.J. Since these appeals, which arise out of different writ applications involve similar question of law, they were taken up together for analogous hearing and are being disposed of by this common judgment.

2. These appeals have been filed by the Board of Secondary Education, Orissa, Cuttack questioning the correctness of the order dated 19.1.2011 passed by the learned Single Judge in W.P.(C) No.2983 of 2010 and other connected similar writ petitions whereby the learned Single Judge has allowed the same and directed the appellant herein to declare the results of the students of the respondent-institutions, who appeared in the Madhyama Examination, 2010 pursuant to the interim order passed by the learned Single Judge in the writ petitions.

3. The aforesaid direction of the learned Single Judge is under challenge by the appellant-Board of Secondary Education, Orissa urging various legal contentions, namely, the students who have been admitted in the respondent-institutions are neither regular candidates nor ex-regular candidates or quasi-regular candidates or private candidates under the "Regulations of Prathama and Madhyama Examination, 2003 and onwards". Further strong reliance has been placed upon Regulation 12(a) thereof, which provides for Compartmental candidates that a candidate who fails in examination for not having secured the required pass mark in one or more subjects but who secures 300 marks or more in the aggregate will have the option to clear his deficiency by appearing at the examination to a maximum of three consecutive examinations immediately following the one in which he/she failed.

4. It is further contended that learned Single Judge ought to have seen that the respondent-institutions in which the students have been admitted are un-recognized Schools as per the provision contained in Section 6 of the Orissa Education Act, 1969 (hereinafter called as "Act, 1969") as none of the respondent-institutions had obtained recognition, though permission has been granted to open the institutions in anticipation of recognition on fulfilling the required criteria as mentioned in the above provision of the Act. Therefore, the Committee constituted by the State Government has not granted recognition to them as they have not fulfilled the eligibility criteria. Hence, the students of the said institutions are not entitled to get the reliefs sought for in the writ petitions filed before this Court.

5. It is also contended that the correspondence course is not applicable to Madhyama Examination, but the permission granted by the Government

till 2008 in exercise of its power under Section 34 of the Orissa Secondary Education Act, 1953 (in short, "Act, 1953") allowing the students of the respondent-institutions to appear in the examination, is contrary to the circular instructions which was issued pursuant to the order dated 7.4.2008 passed by this Court in W.P.(C) No.3399 of 2008 wherein the State Government was directed not to allow the students of un-permitted and unrecognized High Schools as well as the students of Prathama and Madhyama of Sanskrit Schools/Tols to appear through correspondence course which was intimated by the Government to the Board vide Govt. Letter No.13862 dated 8.7.2008 and the Board also circulated the same vide its Notification No.723 dated 16.10.08. In spite of the said notification, the authorities of the respondent-institutions did not take any step as per the notification to enable their students to appear in the Madhyama Examination conducted in 2009-10.

6. It is further contended that the learned Single Judge has not noticed the well-established legal principles laid down by the Apex Court holding that ineligible students are not entitled to appear in the examination and has passed the impugned order and in absence of such consideration, exercise of the judicial review power is not only contrary to the statutory provisions of the Act, 1969 but also violative of the Regulations of Prathama and Madhyama Examination framed by the Board in exercise of its statutory power under the provisions of the Act, 1969.

7. Mr. J. Pattnaik, learned Senior Advocate appearing on behalf of the appellant in support of his contentions places strong reliance upon the decisions of the Hon'ble Supreme Court reported in (2006) 5 SCC 515, ***National Board of Examinations V. G. Anand Ramamurthy and others***; AIR 2010 SC 2221, ***Rajasthan Pradesh V. S. Sardarshahar and another v. Union of India and others,*** at paragraphs 18, 19 and 20 whereof the apex Court, with reference to earlier decision in ***Minor Sunil Oraon Thr. Guardian and others V. C.B.S.R. and others*** reported in AIR 2007 SC 458 and also another decision in the case of ***T.V.V. Narasimham and others V. State of Orissa*** reported in AIR 1963 SC 1227 and in ***State of Tamil Nadu and others V. St. Joseph Teachers Training Institute and another*** reported in (1991) 3 SCC 87, has clearly laid down the law that students of un-recognised institutions are not entitled to appear in any public examination held by the Government and it is not permissible for the Court to grant relief on humanitarian grounds contrary to law to the person who claim to have passed any examination from such institutions. In support of the said submission, he has also placed reliance on another decision of the Supreme Court in the case of ***Minor Sunil Oraon Thr. Guardian and***

others V. C.B.S.E. and others reported in AIR 2007 SC 458, wherein the Apex Court in paragraph 22 has held that the Apex Court has persistently deprecated the practice of admitting the students without having requisite recognition and affiliation. Therefore, the interim order passed by the learned Single Judge permitting the students of the respondent-institutions to take examination and subsequently the judgment rendered allowing the writ petitions giving direction, referred to supra, to the Controller of the appellant-Board is contrary to law laid down by the Apex Court referred to supra. Thus, Mr. Pattnaik contended that the impugned orders are liable to be set aside and the writ petitions are liable to be dismissed.

8. Mr. J. Rath, learned Senior Advocate and Mr. M.K. Khuntia, learned counsel appearing for the respondent no.1-institutions in all the Appeals have sought to justify the orders of the learned Single Judge contending that the learned Single Judge in all the writ petitions, vide order dated 19.1.2011, permitted the students of the respondent-institutions to take examination and the said order was not challenged by the Appellant-Board and that has been given effect to by allowing the writ petitions giving directions to declare the results of the examination in which the students of the respondent-institutions have appeared. Mr. Khuntia, learned counsel appearing for respondent no.1 has placed strong reliance on an un-reported decision of this Court in Writ Appeal No.457 of 2010 (***Utkal University and another V. Jayashree Dash and others***) disposed of on 22.3.2011 wherein this Court has referred to the decision of the Supreme Court in the case of ***Pasupuleti Venkateswarlu V. Motor and General Traders*** reported in AIR 1975 SC 1409 wherein the apex Court with reference to ***Lachmeshwar Prasad Shukul V. Keshwar Lal Chaudhuri***, 1940 FCR 84 = (AIR 1941 FC 5) has held that the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against to mould the relief to be granted in a case on appeal. Mr. Rath, learned Sr. Advocate also places reliance on an unreported decision of this Court in ***Board of Secondary Education, Orissa V. Managing Committee of Ekalavya Model Residential High School, Rengalbeda, Mayurbhanj and ors.*** (W.A. No.197 of 2010 disposed of on 27.9.2010) also submitted that Regulations 6(a) & 6(d) are attracted to the facts of the present case for the reason that the respondent- institutions are not recognized is an undisputed fact and then the students have studied the Madhyama course in the respondent-institutions to which permission was accorded in anticipation of recognition. As the admission of the students in Madhyama course was given by the respondent-institutions and the said course was completed, interim orders were passed allowing the students of the respondent-institutions to appear in the Examination which were complied with and

thereafter the writ petitions have been allowed for which the appellant cannot challenge the same now. Instead of complying the same, Writ Appeals have been filed which, if allowed, will cause great injustice to the students who are not responsible in getting admission in Madhyama course in the respondent-institutions in whose favour, the permission was granted under the provision of Act, 1969. Therefore, he prayed for dismissal of the Writ Appeals.

9. On the rival contentions the points that would arise for consideration by this Court are as follows :

(i) Whether the students admitted in the respondent-

institutions without recognition are eligible to appear in the examination which will be conducted by the Board?

(ii) Whether the students who admitted in the respondent-institutions in whose favour permission is granted can be treated as private candidates as defined under Regulation 6(d)?

(iii) Whether unreported decisions shall be applied in the facts and circumstances?

(iv) What order?

10. The aforesaid points are to be answered against the respondent-institutions and in favour of the appellant for the following reasons.

It is an undisputed fact that, in all these appeals, none of the respondent-institutions has got recognition as required under Section 6 of the Act, 1969, after fulfilling the requirements as provided under the said Section. No doubt the permission was granted in favour of the respondent-institutions in anticipation of considering their applications for grant of recognition subject to fulfillment of the criteria as enumerated in Section 6 of the Act, 1969. Fact remains that the required conditions as provided under Section 6 of the Act, 1969 were not complied with by the respondent-institutions as a result of which recognition was not accorded to them. The students have been admitted in the unrecognized respondent-institutions and they have approached this Court seeking for a direction to the Board to permit them to appear in the examination as they have completed their Madhyama course and are eligible for appearing in the Madhyama examination which was conducted by the Board. Since the respondent-institutions are unrecognized institutions, they have no right to admit the

students in their institutions. In this regard reliance is placed upon a judgment of the Supreme Court in the case of ***Rajasthan Pradesh Vs. Sardarshahar v. Union of India (supra)***, the relevant paragraphs of which are extracted hereunder:

> "18. This Court has persistently deprecated the practice of an educational institution admitting the students and to allow them to appear in the examinations without having requisite recognition and affiliation. This kind of infraction of law has been treated as of very high magnitude and of serious nature. Students of a unrecognized institution cannot legally be entitled to appear in any examination conducted by any government, university or board. (Vide Minor Sunil Oraon Thr. Guardian & Ors. v. C.B.S.E. & Ors. AIR 2007 SC 458) (2006 AIR SCW 5862).
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> 19. Similarly, recognition must be there with the school to make it subject to the provisions of the Act. Recognition signifies an admission or an acknowledgement of something existing before. To recognize is to take cognizance of a fact. It implies an overt act on the part of the person taking such cognizance. (Vide T.V.V. Narasimham & Ors. V. State of Orissa, AIR 1963 SC 1227)
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> 20. In State of Tamil Nadu & Ors. v. St. Joseph Teachers Training Institute & Anr. (1991) 3 SCC 87, this Court held that students of un-recognized institutions are not entitled to appear in any public examination held by the government and it is not permissible for the Court to grant relief on humanitarian grounds contrary to law to the person who claim to have passed any examination from such institutions.
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> In view of the above, it is evident that any institution which is not recognized cannot impart an education and students thereof cannot appear in the examination held by the Government, University or Board."

So also reliance has been placed on another decision of the Supreme Court in the case of ***Minor Sunil Oraon Thr. Guardian & Ors. v. C.B.S.E. & Ors.,*** AIR 2007 SC 458 and the observation made in paragraph 22 of the said decision is applicable to the fact situation of the case on Board.

11. Learned Single Judge has passed the impugned order on the basis of the Govt. letter dated 31.7.2008 addressed to the Director, Secondary Education, Orissa, Bhubaneswar intimating that the un-permitted/un-

recognized High Schools whose applications are said to be pending shall be asked not to enroll students henceforth from the academic session 2009 onwards till they receive permission from the prescribed authority in due process and the said circular instruction has been issued in exercise of Section 34 of the Act, 1953. In Clause (iv) & (v) of the said circular instruction-letter of the Govt., it has also been intimated as follows:-

> "(iv) The Inspector of Schools shall ensure that the students already enrolled in such un-permitted High Schools in Class-VIII and IX during the academic year 2007-2008 shall be shifted to the nearby recognized aided or Govt. High Schools.
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> (v) The Un-recognized High Schools whose applications are said to be pending till temporary/permanent recognition is granted by the H.P.C., will enroll their students if they like under correspondence Course of the Board of Secondary Education, Orissa during current academic year in order to facilitate their students to appear in annual H.S.C. Examination, 2009."

This may not have application to the facts of the present case. Such circular instruction is contrary to the statutory provisions contained in the Act, 1969 and it was not tenable on the part of the Government to issue such circular instruction to the Director, Secondary Education, Orissa. In fact, Section 34 of the Act, 1953 enables the State Government to issue circular instructions, if any difficulty arises in giving effect to the provisions of the said Act. But, such circular instruction cannot be traceable to Section 34, even assuming that Section 34 does not indicate the difficulty that may arise before the Government for implementation of the Act, 1953. If the said circular instructions cannot supersede the statutory provisions of the Act, 1969, the educational institutions, who have applied for grant of recognition but do not fulfill the terms and conditions as provided under Section 6 of the Act, 1969 which prescribes about the procedure and the terms and conditions for grant of recognition, shall not be entitled to admit students. Therefore, the second point must be answered against the respondent-institutions and in favour of the appellant.

12. Learned Single Judge has erred in applying the said circular instructions without noticing the fact that the circular instruction issued under Section 34 of the Act, 1953 without indicating the difficulty that had arisen before the Government for implementation of the said Act, the said circular instruction cannot be applied to supersede the statutory provisions of Act, 1969. This important aspect of the matter has not been noticed by the

learned Single Judge while exercising the jurisdictional power by directing the Board to declare the results of the students who appeared in the Madhyama Examination from the respondent-institutions. The learned Single Judge has further permitted the students to appear in the future examination to be conducted by the Board of Secondary Education, Orissa, which is totally impermissible in law.

13. The contentions raised by Mr. Rath, learned Senior Advocate and Mr. Khuntia, learned counsel appearing on behalf of respondent-institutions that the students can be treated as private candidates as they have right to appear in examinations is also not tenable and hence the same cannot be accepted. As the students had been admitted by the un-re-cognised institutions, even the appellant permits the respondents cannot be allotted the status of the recognized institutions although their students have passed the Prathama examination. As a matter of fact, the respondent-institutions, in respect of which permission was accorded by the competent authority in anticipation of fulfillment of certain conditions as provided under Section 6 of the Act, 1969, have not fulfilled the said conditions. The respondent-institutions could have approached this Court even before four years. For that reason, the submission in this regard is rejected. Reliance placed upon an unreported decision of this Court in this regard cannot be applied to the fact situation of the present case for the reason that the interim order passed was contrary to the decisions of the Supreme Court referred to supra.

14. Writ Appeal is a continuation of the writ petition and the appellant-Board in the present Writ Appeals has made out a case as the learned Single Judge has passed the interim order as well as the final order without properly examining the provisions of law and the decisions referred to supra but placing of strong reliance upon the circular instruction of the Govt. dated 31.7.2008, which is wholly inapplicable to the fact situations. Therefore, the impugned orders are vitiated in law and the same cannot be allowed to sustain. Hence, the appellant-Board of Secondary Education, Orissa must succeed in these Appeals.

15. Accordingly, the Writ Appeals are allowed and the impugned orders are hereby set aside. Consequently, the Writ Petitions are dismissed.

Appeals allowed.

2012 (II) ILR - CUT- 375

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

W.P. (C) NO. 1871 OF 2012 (Dt.14.02.2012)

SRICHARAN PRATAP @ KANISHKA ……Petitioner.

.Vrs.

UNION OF INDIA & ORS. …….Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Public Interest Litigation – Petitioner claims to be a famous Odiya novel writer and publisher of books – He has challenged the nomination of the Odiya novel book "Achinha Basabhumi" written by the author Smt. Kalpana Kumari Devi to receive "Sahitya Academy Award" for the year, 2011.

Government of India for the purpose of selection of books has constituted an Academy and formulated "Annual Sahitya Academy Awards Rules" suggesting guidelines for impartial selection of the outstanding books of an Indian Author – Ultimately a three member jury duly selected by the president of the Academy shall nominate a book worthy to receive the above award – In this case for nomination of the book in question for getting Sahitya Academy Award, 2011 a team of eminent stalwarts in the field of literature have been formed and they have selected the book in question to be the best book.

Held, no justification that any public interest at large will be affected if the book in question will get the award – Writ petition in the nature of PIL is devoid of any merit which is liable to be dismissed.

(Para 11 to 16)

For Petitioner - M/s. Prasanna Ku. Mishra & S.K.Dash.
For Opp.Parties - Mr. B.M.Pattnaik, Sr. Adv. (for O.P.4 to 5)
Mr. S.D.Das, Sr. Adv. (for O.P.7)
Mr. Jagannath Pattnaik, Sr. Adv.
M/s. B.Mohanty, T.K.Pattnaik, S.Patnaik, A.Patnaik, R.P.Ray & B.S.Rajguru (for O.P.No.8)

V. GOPALA GOWDA, C.J. This writ petition in the shape of Public Interest Litigation has been filed by the petitioner, who is claiming to be a famous Odiya Novel writer and also the Proprietor of a Odiya Book

Pubication unit namely, 'Pine Books', challenging the nomination of the Odiya Novel Book "Achinha Basabhumi" written by the author Smt. Kalpana Kumari Devi-O.P. No.8, to receive the 'Sahitya Academi Award for the year 2011' and further praying for issuance of a writ of certiorari quashing the entire process of selection and nomination of the said Book for receiving the Sahitya Academy Award, which is going to be presented on 14.02.2012 by the Kendriya Sahitya Academy.

2. The case of the petitioner in brief is that the Government of India in its Ministry of Tourism and Culture has made provision for giving Award namely, "Sahitya Academy Award" in the field of Literature each year. As per the Scheme, the Government of India has decided to give the said award to the most outstanding books of literature published in any of the major Indian languages recognized by the Academy. The Government of India for the purpose of selection of the books has constituted an Academy, namely, National Academy of Letters. Further, for the selection of that book, the Government of India has also formulated the 'Annual Sahitya Akademi Awards Rules' (hereinafter called 'the Rules') suggesting different guidelines for selection of the outstanding books to get the said award. As per the Rules, there shall be an award every year for the most outstanding book of an Indian author published in any of the languages recognized by the Akademi during the three years prior to the year, immediately preceeding the year of the Award. As per the Rules, a book which is to be included for selection must be an outstanding contribution to the language and literature to which it belongs and should be a creative or a critical work, but must not be the other categories of book as specified therein. It is stated that for selecting the books in each State an Executive Body and an Advisory Committee have been formed consisting of eminent writers of the respective states. As per the Rules, each Language Advisory Board member shall be nominated by the President of the Akademi. For the purpose of selection of the book, a ground list shall be prepared which is to be circulated to all the members of the Language Advisory Board including the Convenor and out of the books included in the ground list, the Language Advisory Board shall nominate two books each and ultimately the three member Jury (duly selected by the President of the Akademi) shall nominate a book impartially to receive the said Award.

3. The case of the petitioner is that the book/novel in question i.e. "Achinha Basabhumi" written by the author-O.P.No.8 has been finally selected by the Jury of the State to get the said Award for the year 2011. The ground of attack of the petitioner is that as per Rule 1(1), the selected

book for receiving the Award for a particular book must be a first publication in any language during the three years prior to the year, immediately preceeding the year of the Award. Therefore, for 2011 Award, the book must have been published during the year from 2007 to 2009. However, in the instant case, the Book in question has been published at the last part of the year 2010, but the year of publication was manipulated by the Publisher, namely "Kahani/Akshra Publisher" and with the help of the Convenor of the Language Advisory Committee, showing the said Book published in the year 2009, the same was placed in the Committee for selection to get the Award. It is alleged that the same was done in active participation of the Publisher, the writer and the Convenor of the Language Advisory Committee and by that process several other Books which really worth consideration for receiving the Award have been kept away from the zone of consideration. Placing reliance upon a copy of the monthly Magazine, namely, 'Jugashree Jganari', learned counsel for the petitioner submits that the writer of the Book in question i.e. O.P. No.8 in an interview had herself given the statement in the month of February, 2010 that for the last around 20 years she had given up writing due to the family burden on her and now she is writing a Novel. From the said statement it is clear that since the year 1986 none of the writings of O.P.No.8-Kalpala Kumari Devi was published, therefore, publication of the present Novel/book in question in the year 2009 appears to be a clear case of manipulation. It is stated that the book in question "Achinha Basabhumi" is also not an outstanding book within the definition of the Rules rather in the said book offending words have been used against the father of the Constitution of India Dr. B.R. Ambedkar as well as there has been use of outraging words against the Caste name of down trodden people which has resulted in picking out serious controversy amongst the people of Odisha. At page 236 of the Book it is written as if Dr. Ambedkar has committed a mistake in drafting the Constitution. Apart from use of such offending language against the father of the Constitution, at several places vulgar languages have been used which will project a very bad picture of the Odiya literature through out the Country. However, despite all theses things, the Jury members have nominated the Book in question to receive the Sahitya Akademi Award for the year 2011 notifying the date of presenting the Award on 14.02.2012 at New Delhi during Festival of Letters organized by Sahitya Akademi. It is submitted by the learned counsel for the petitioner that in nominating the Book in question, there is clear violation of the Rules and the Book is not worth consideration whatsoever to get the one of the prestigious award like the 'Sahitya Akademi Award" for the year 2011. Therefore, it is prayed that the nomination of the Book in question "Achinha Basabhumi" may be quashed.

4. Mr. Jagannath Patnaik, learned Sr. Counsel appearing on behalf of the author of the Book in question-O.P. No.8 invited our attention to the preliminary counter affidavit filed on behalf of O.P.No.8 opposing the averments as well as the prayer made by the petitioner in the writ petition. Learned Sr. Counsel Mr. Patnaik questioning the maintainability of the writ petition in the nature of Public Interest Litigation submits that the petitioner, who is admitting himself to be a famous Odiya Novel writer and also the Proprietor of a Odiya Book Pubication unit namely, 'Pine Books' cannot file this writ petition in the guise of Public Interest Litigation challenging the nomination of the Book of another author and published by other Publisher. Further neither any public interest is affected nor any injury to the public is caused. Denying the allegations made in the averments of the writ petition it is submitted that, the nomination was made by three members Jury after following due procedure prescribed under the Rules governing the field, therefore, there is no infirmity in the selection of O.P. No.8's book "Achinha Basabhumi" for National Sahitya Akademi Award. The nomination was done after due deliberation between the Jury appointed by the Akademi. Further the recommendation was made known to public after it was jointly signed by the three members Jury. It is stated that the allegation of the petitioner that the Novel "Ahinha Basabhumi" was not published in the year 2009 and it was published in the year 2010 is not only false but also not based on any record. Placing reliance upon the documents under Annexure-A/8 and B/8 series, it is stated that the Book in question was published in the year 2009 and it was also sold in different book fairs in the different part of the State in the year 2009. In this regard learned Sr. Counsel produced the cash memo from the publisher of the Book showing that the book in question has been sold in the year 2009. Further, placing reliance upon the payment receipts of the book binder and relevant part of the cash book of the year 2009, it is submitted that the book was very much published in the year 2009. Traversing the interpretation of the petitioner regarding the statement of the author-O.P.No.8 published in "Jugashree Juganari" Magazine, it is stated that the interviewer asked the question to the O.P.No.8 about the non-publication of her writings for a long periods since the year 1986 and in answer the O.P.No.8 stated that she had given up writing for last 20 years in between due to his family burden and she also mentioned therein that she had again started writing novel. Therefore, the O.P.No.8 clearly stated that for last 20 years from 1986 she had given up writing of novel that means the author started writing novel from 2006, however, mis-interpreting the interview answers published in the said magazine, the petitioner has wrongly made the averments in the writ petition. With regard to the petitioner's allegation that at page 236 of the Book the author offended the father of the Constitution of India Dr. B.R. Ambedkar, it is stated that the said allegation is

totally false and the petitioner mis-quoted and intentionally translated wrongly and produced the same in the averments. It is stated by the O.P.No.8 that out of total 568 pages of the noval, petitioner has only referred to one page particularly page 236 to blame the O.P. No.8 by half hazardly translating the sentences. The actual sentence used in page 236 is a dialogue of a character and that can never be accepted as a view point of the deponent. In view of the above, learned Sr. Counsel Mr. Patnaik on behalf of opposite party No.8 submits that the writ petitioner has filed this writ petition in the guise of Private Interest Litigation but not Public Interest Litigation with some ulterior motive to vandalize the nomination of the Award in favour of O.P. No.8 without any basis. Therefore, it is prayed that the writ petition is liable to be rejected being devoid of any merit and further the interim order passed earlier may be vacated so that the O.P. No.8 can get the award on 14.2.2012.

5. Mr. B. M. Patnaik, learned Sr. Counsel appearing on behalf of the Language Advisory Board (Odiya) Sahitya Akademi – O.P. No.4 and Dr. Bibhuti Pattanaik, Convenor (Odiya) Sahitya Akademi-O.P.No.5 supporting the counter statement made on behalf of the opposite party No.8, submitted that the writ petition is not maintainable. Traversing the allegation made at para 4.13 of the writ petition, Mr. B.M. Patnaik placed reliance upon a English Paper publication in "The Telegraph" wherein the jury member Chandrasekhar Rath said "At times, many factors for the selection of a work for an award remain unknown to the public. But, since the Akademi has entrusted us with the responsibility, we carried out the job to the best of our ability".

6. Mr. S.D. Das, learned Sr. Counsel on behalf Sahitya Akademi-O.P. No.7, opposing the writ petition filed by the petitioner submits that the Akademi is an autonomous organization under the Ministry of Culture, Government of India and is working continuously to promote Indian Literature in all its recognized 24 Indian Languages. The selection of book was entirely made by a three member jury committee consisting of eminent Odiya scholars and the final decision has been taken by the Executive Board of the Akademy on the basis of the report of the Jury. Therefore, it is submitted that there is no scope or chance that the Book in question has been selected for the said Award is unworthy one or the selection is in violation of the Rules. Therefore, it is submitted that the writ petition is liable to be dismissed.

7. We have heard the learned counsel for the respective parties at length on merit of the writ petition as well as on the Misc. Case filed by O.P. No.8

for vacating the interim order dated 02.02.2012 and perused the record. On 02.02.2012, as we had not heard the relevant opposite parties, pending consideration of the Misc. Case we passed the interim order.

8. However, with reference to the aforesaid rival legal contentions urged on behalf of the parties, the questions arise for consideration in this writ petition are (i) as to whether this writ petition in the nature of Public Interest Litigation is maintainable ? (ii) as to whether the petitioner is entitled for the relief as sought for in the writ petition ? (iii) what order ?

All the aforesaid points are required to be answered against the petitioner and in favour of opposite parties for the following reasons.

9. First of all this Public Interest Litigation petition filed by the petitioner, who is admitting himself to be a famous author of Odiya language and so also a Publisher of Books, challenging nomination of another author of the Book in question to the Sahitya Akademi Award, 2011 and making allegation against another Publisher. Further, Rule 8 of the Orissa High Court Public Interest Litigation Rules, 2010, has not been complied with by the petitioner. Rule 8 of the said Rules reads as under :

> "8. Before filing a PIL, the petitioner must send a representation to the authorities concerned for taking remedial action, akin to what is postulated in Section 80 CPC. Details of such representation and reply, if any, from the authority concerned along with copies thereof must be filed with the petition. However, in urgent cases where making of representation and waiting for response would cause irreparable injury or damage, petition can be filed straightway by giving prior notice of filing to the authorities concerned and/or their counsel, if any."

10. It is the well settled preposition of law that Public Interest Litigation is not in the nature of adversary litigation. The purpose of P.I.L. is to promote the public interest which mandates that violation of legal or constitutional rights of a large number of persons, poor, down-trodden, ignorant, socially or economically disadvantaged should not go un-redressed. The Court can take cognizance in P.I.L. when there are complaints which shocks the judicial conscience. P.I.L. is pro bono public and should not smack of any ulterior motive and no person has a right to achieve any ulterior purpose through such litigations.

In S.P. Gupta & Ors. Vs. President of India & Ors., AIR 1982 SC 149, the Apex Court has warned by saying that the Court must be careful that the

members of the public who approach the Court are acting bona fide and not in personal garb of private profit or political motivation or other oblique considerations. "The Court must not allow its process to be abused". Similar view has been taken in Kazi Lhendup Dorji Vs. Central Bureau of Investigation & Ors., 1994 (Supp) 2 SCC 116.

In Giani Devender Singh Sant Sepoy Sikh Vs. Union of India & Ors., AIR 1995 SC 1847, the Supreme Court has held that the High Court, while entertaining a P.I.L must indicate how the public interest was involved in the case.

In BALCO Employees' Union (Regd.) Vs. Union of India & Ors., AIR 2002 SC 350, the Supreme Court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the Court must take care that the forum be not abused by any person for personal gain. The Court observed as under:–

> "There is, in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation as a tendency to be counter productive. PIL is not a pill or a panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who, on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There have been in recent times, increasingly abuse of PIL."

The Hon'ble Supreme Court in the case of R&M Trust Vs. Koramangala Residents Vigilance Group & Ors, AIR 2005 SC 894 held as under :

"……Courts should be very very slow in entertaining petitions involving public interest: in very rare cases where the public at large stand to suffer…."

In M/s. Holicow Pictures Pvt. Ltd. Vs. Prem Chandra Mishra & Ors, AIR 2008 SC 913, the Hon'ble Supreme Court held as under :

> "……Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the

armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta....."

11. In the instant case, for nomination of the Book in question to get the Sahitya Akademi Award, 2011 a team of eminent stalwarts in the field of literature have been formed and they have selected/nominated the Book in question written by the author Smt. Kalpana Kumari Devi to be the best Book. One of the Jury Member has clearly stated "At times, many factors for the selection of a work for an award remain unknown to the public. But, since the Akademi has entrusted us with the responsibility, we carried out the job to the best of our ability". Further, it is stated by the Secretary of the National Sahitya Akademi in his letter dated 8 February, 2012, a copy of which has been produced by Mr. S.D. Das, learned Sr. Counsel for our perusal, that Akademi is an autonomous organization under the Ministry of Culture, Government of India and is working continuously to promote Indian Literature in all its recognized 24 Indian Languages. The selection of book was entirely made by a three member jury committee consisting of eminent Odiya scholars and the final decision has been taken by the Executive Board of the Akademy on the basis of the report of the Jury. Therefore, it appears that to select/nominate a Book to get the said Award not only the eminent Jury Members but also the Executive Board is also examining in every respect as to whether the Book is worthy to get the award or not. We do not find any basis that in the instant any public injury or public interest at large will be affected if the Book will get the Award.

12. Much reliance is placed by the petitioner upon the various statements of the author and Jury Members in monthly magazine under Annexure-3 and newspaper clippings under Annexures-4 and 5, which are disputed by the opposite parties contending that the all the allegations and interpretation made by the petitioner in the writ petition are false and have been mis-interpreted and having no basis. All the allegations and counter allegations are disputed questions of facts, which cannot be gone into by this Court. It is the well settled legal preposition of law laid down by the Supreme Court in catena of decisions that if there are disputed questions of facts the writ court in exercising the writ jurisdiction cannot go into that.

13. It is further the well settled principles laid down by the Supreme Court in a catena of decisions that undoubtedly, the Court does not have expertise in all subjects, therefore, it has to be slow in disturbing the decision taken by the Committee of experts, working in the field, have day to day experience,

and which has acquired special skill and special knowledge in the subject and the field.

14. In this regard a Constitution Bench of the Supreme Court, in the case of The University of Mysore & Anr. Vs. C.D. Govindarao & Anr., AIR 1965 SC 491, held that in academic matters where the decision under challenge has been taken by the Committee of Experts, "normally the Court should be slow to interfere with the opinion expressed by the experts".

15. In the instant case, as per the Rules, different Experts Bodies and Committees have been formed by the National Sahitya Akademi to select the works of different authors. After the selection/nomination of the Book by the eminent experts of the Jury Committee, who are the eminent Odiya scholars in the field of literature, again the Executive Board of the National Sahitya Akademi has taken the final decision in the matter and found suitable that the Novel "Achinha Basabhumi" written by the author-O.P.No.8 is worthy to get the Award for the year 2011.

16. In view of the above, this writ petition at the instance of the petitioner, who is also an author and Publishers of Books, alleging that the public interest will suffer in the present case is not correct. Considering the entire fact situation of the case and the decisions referred to and reasons stated supra, we are of the considered view that the instant writ petition in the nature of Public Interest Litigation is devoid of any merit and liable to be dismissed and accordingly dismissed. The interim order passed by this Court on 02.02.2012 stands vacated.

Misc. Case No.2118 of 2012 is accordingly allowed.

As today is the date of award giving ceremony, Mr. S.D. Das, learned Sr. Counsel for the Academy-O.P.No.7 is directed to communicate the order to O.P.No.7 immediately.

Writ petition dismissed.

2012 (II) ILR - CUT- 384

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

W.P. (C) NO. 12690 OF 2011 (Dt.16.01.2012)

AKHIL BHARATIYA PARYABARAN EWAM GRAMIN VIKAS SASTAN .....Petitioner.

.Vrs.

COMMISSIONER, BHUBANESWAR MUNICIPAL CORPORATION &ORS. .....Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.14.

Municipal Corporation Bhubaneswar awarded work of maintenance and operation of toilet in the market complex by way of nomination instead of open tender process.

Ordinarily contracts of all government authorities who are instrumentalities of the state should hold public auction or invite tenders after advertising the same in the news papers having wide circulation so that all eligible persons will participate in the bid to achieve maximum price and to maintain transparency – Held, the impugned letter entering in to contract with O.P.3 is quashed.

(Para 13,16)

Case laws Referred to:-

1.2006(13) SCC 382 : (Nagar Nigam Meerut-V-Al-Faheem Meat Exports(P) Ltd. & Ors.)

2.AIR 1985 SC 1147 : (Ram & Shyam Company-V- State of Haryana & Ors.)

3.(1987)2 SCR 223 : (Sachidananda Pandey-V- State of West Bengal)

4.AIR 1999 SC 1281 : (Babu Verghese & Ors.-V-Bar Council of Kerala & Ors.)

5.1936 PC 253 : (King Emperor-V- Nazir Ahmed)

6.AIR 1979 SC 49 : (Smt. S.R.Venkataraman-V- Union of India & Anr.)

7.(1914) AC 808 P.813 : (Shearer-V-Shields)

8.(1950)1 KB 636 : (Piling-V-Abergele Urban District Council)

9.(1890)24 QBD 371 P.375 : (Richard Westbrook-V-The Vestry of

St.Pancras)
10.(1924)1 Ch.483 : (Sedler-V- Sheffield Corporation)

For Petitioner - M/s. Bibekananda Mohanti, S.K.Mishra, A.K.Sahoo, A.Mukherjee, C.R.Dash, G.Bera & G.P.Verma.

For Opp.Parties - M/s. G.Mukherjee, P.Mukherjee, A.C.Panda, S.S.Mohanty, S.S.Mishra (O.P.No.1) R.K.Mohapatra, Govt. Advocate (O.P.No.2) M/s. P.K.Mishra & A.K.Panda(for O.P.3,4) Mr. J.Patnaik & A.C.Swain (for O.P.5)

V.GOPALA GOWDA, C.J. This writ petition has been filed by a non-Governmental Organization, i.e., M/s. Akhil Bharatiya Paryabaran Ewam Gramin Sansthan incorporated in the year 1983 in Patna. The said organization operates with the prime objective of conversion of bucket latrines into sanitary toilets aimed at emancipation of scavengers from the centuries old demeaning task of carrying night soil manually and instead of the said demeaning practices to get constructed and maintain community toilet on "pay and use" basis to eradicate the unhygienic practice of open defecation. The petitioner society has taken up various projects on solid waste management, public mobilization and mass awareness programme, housekeeping job of offices, hospitals.

2. O.P. No.3, Samadhan Seva Samiti is an organization supposedly involved in similar activities with its head office in Patna (Bihar).

3. The present petitioner has filed the instant writ petition challenging the decision of the Municipal Corporation of Bhubaneswar to award the work of maintenance and operation of the toilet in the market complex at Unit IV, Bhubaneswar under the jurisdiction of the Opposite Party No.1 by way of nomination instead of the accepted practice of allocating work on the basis of an open tender process. The impugned decision was taken by the opposite party no.1 by way of letter dated 14th January, 2011. It had on various occasions communicated with the opposite party no.1 expressing the interest in participating in the work related to the construction, operation and maintenance of toilet complexes in the municipal jurisdiction of opposite party no.1.

4. It is the case of the petitioner that opposite party no.1 in complete violation of all known principles of law has proceeded to award the contract of maintaining the toilet complex in the abovementioned address without

calling for tenders from all organizations that are involved in the work of providing sanitation and hygiene services in the State of Orissa as well as all over the country. Without any tender process, award of work by the O.P.No.1, is a colourable exercise of power. He has referred to a case bearing No.CWJC No.6334 of 2011 (Dharmendra Kumar Paswan v. State of Bihar) of the Patna High Court relating to the dispute. It is stated that the awarding contract in favour of O.P.3 is in violation of the procedure laid down by the apex Court in catena of decisions. Reliance is placed upon one such decision in the case ***of Nagar Nigam Meerut v. Al-Faheem Meat Exports (P) Ltd. &Ors.,*** reported in 2006(13) SCC 382. In the said decision it has been mentioned that the law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality with all relevant details and the exercise of discretion by the executive should always be transparent when dealing with questions of government contracts as there is an element of public property and public good involved in the same. Reliance is also placed upon the decisions of the apex Court in Ram and Shyam Company v. State of Haryana and others, AIR 1985 SC 1147 and also in the case of ***Sachidananda Pandey v. State of West Bengal*** (1987) 2 SCR 223. Therefore, the petitioner has prayed to quash the decision of the Municipal Corporation of Bhubaneswar vide letter dated 14th January, 2011 to award the contract for operation and maintenance of the Toilet complex at Unit IV Market Complex Bhubaneswar to O.P. No.3 by way of nomination and further prayed for a direction to be issued to O.P. No.1 to award the said contract by way of open tender/public auction to organizations having requisite experience. The petitioner has also filed additional affidavit in support of its stand that the selection process for allotment of work by the Municipal bodies should be regularized and it is not its case that the work should be handed over to it.

5. The Corporation has filed counter-affidavit, justifying its action enclosing certain documents. Opposing the writ petition, it has been stated in paragraph 5 that previously the maintenance work was allotted by mutual negotiation and the discretion of the government. No tender was advertised or called upon for the maintenance and construction of the public toilet in BMC area. Further it is also humbly submitted that the present allotment of the work in favour of O.P.No.3 is an interim arrangement that has been taken up due to the faulty work of Sulabha International and also due to non furnishing of account to the opposite party No.1-Corporation. The Corporation in order to incur some profit out of the public toilet, presently on

a temporary basis and on an interim arrangement till the tender process is finalized, appointed the opposite party no.3 to work on the maintenance and construction of the dilapidated public toilet for unhampered sanitary services to the public in the market complex. The proposal of the opposite party no.3 was innovative in as much as it relieved the Municipal Corporation of the burden of appointing contractors and maintenance of infrastructure. Further maintenance of sanitation is a primary obligation of the Corporation and as there was a delay in getting a sanction from the Government, the Corporation was left with no other option but to make some interim arrangement pending approval of the Government who is the real owner of the land on which the public utility services is situated. It is only after the approval and sanction by the Government in the G.A. Department for a long term lease of the land in question, the Corporation can make a long term arrangement for utilization and maintenance of the public utility services. It may not be out of place to state here that the Corporation as on 20.3.2010 had sought for the necessary permission and approval of the Government but till date, necessary permissions are awaited. As the maintenance of the public utility services could not longer be awaited, the Corporation had no other option but to make an arrangement for a period of one year with the opposite party no.3 to run and operate the toilet in the market complex at Unit IV. It is further stated that prior to the present arrangement, Sulabha International was entrusted with the responsibility of maintaining and running such services but the Corporation found that neither Sulabh International was maintaining the facilities in proper condition nor was it accountable to the Corporation in any manner. As a result of such negligence on the part of Sulabh International, the Corporation besides incurring huge overheads of electricity and water supply, was left with an infrastructure which was in dilapidated and in sorry state of condition. On the face of incurring expenses of further infrastructure, the Corporation, found the proposal of the Opposite party no.3 to be very attractive which did not entail any further investment and on the contrary, assured steady return to it. In the absence of any other alternative proposals, the proposal of the Opposite party no.3, appeared to be the most reasonable to the Corporation and the same is being adopted on a trial basis. If successful, it would work as a pointer for the Corporation to earn revenue by creation of such infrastructure through public private participation. Therefore, it is pleaded that the writ petition is misconceived as it seeks to assail the arrangement made with the opposite party no.3. It is further stated that an agreement was erroneously executed for a period of 30 years but in fact the period of arrangement is for a period of one year only which has been subsequently clarified.

6. Opposite Parties 3 & 4 have filed detailed statement of counter traversing the petition averments and contended that the impugned letter need not be interfered with by granting the relief as prayed for in the writ petition and also sought to justify the action of the Corporation in granting permission to effect renovation to the building for the proper functioning of the toilet in the market complex by operating and maintaining the same in the public interest and there was also various other averments with reference to the agreement and different clauses in the agreement between the parties. It is stated that the Corporation has entered into agreement with O.P. No.3 to maintain Sulabh Souchalaya for 30 years and per month it will give Rs.4,000/- to the BMC as an advance and for one year Rs.48,000/- is to be deposited. After completion of one year, it has to again deposit Rs.48,000/- in advance. Thereafter this agreement will be effective for another one year. Further it is stated that O.P.No.3 is the first organization which came forward and proposed to undertake the maintenance of the toilet at Unit-IV Market Complex Souchalaya with the payment of Rs.4,000/- to the BMC per month. Therefore, the various allegations made in the writ petition are all untenable in law. Further O.P. No.3 placed strong reliance upon its letter dated 11.9.2009 sending proposal to the BMC for maintenance of public toilets without payment of anything by BMC, which is accepted by the Commissioner as good proposal and awarded the contract to it. Further reliance is placed upon the legal opinion dated 5.1.2011 given by Kali Prasad Nanda, Advocate who has given the opinion for the purpose of awarding the contract in favour of O.P.No.3.

7. The petitioner has filed rejoinder to the counter statement filed by the Corporation. Annexures A/2 and A/3 addressed by the Executive Engineer-II of the Corporation to the O.P.No.3 are relied on by both the O.P.No.3 and the Corporation.

8. The impleading application, Misc.Case No.13679 of 2011 was filed by the intervenor application-Sulabh International on 30.8.2011 narrating certain facts particularly at paragraph-8 that it is a registered society under the Societies Registration Act, 1860 and was established in the year 1970. It has been functioning as a service provider with the object of liberating and rehabilitating scavengers from the demeaning practice of cleaning night soil, to restore their human rights and dignity of their lives and to bring them to the main stream of the society. Apart from this, the organization also has the objective of providing sanitation, health, hygiene, imparting vocational training and to create socio economic empowerment of the weaker sections of the society specially and not limiting its work to the manual scavengers only. From 1974 Sulabh has got converted 1,75,000 dry latrines into “twin pit

pour flush compost toilet". The organization has been recognized for the stellar work done by it in the field of low cost sanitation. The work done by the organization has attracted the attention of the domestic and international media including the New York Times, Washington News, Le Monde (French Magazine), BBC, CNN among others. The work done by the organization has been recognized by various bodies both national and international by showering accolades and awards to both the organization and its Founder which include the Padma Bhusan (1991); International St. Francis Prize for the Environment (1992); the Economic and Social Council of United Nations has granted Special Consultative Status to Sulabh in recognition of its outstanding service; St. Francis Award 'Cantile of All Creatures' Assissi, Italy; The Stockholm International Water Prize (2009). The work of the organization has gone beyond boundaries of the country and it has successfully implemented the programme of public toilets with biogas plant in Kabul Afghanistan. The organization has trained 15 countries of Africa such as Uganda, Ethiopia, etc. The organization has started operation in Cambodia and its neighbouring countries. Therefore, the prayer to allow the petition by impleading the intervenor as one of the opposite parties in the present writ petition, was allowed as the Corporation has made certain allegations against this intervening applicant. Mr. J.Patnaik, learned senior counsel referred to the above averments made at paragraph-8 in the statement of counter of O.P. No.1, with reference to the baseless and reckless allegations against the impleading applicant and submitted that it is necessary and proper party to this proceeding and further requested this Court to expunge the allegations made in the counter statement against this intervening applicant.

9. With reference to the above said rival legal contentions, following points would arise for consideration :

(i) whether the award of contract in favour of the opposite party no.3 is legal and valid ?

(ii) whether the award of contract is liable to be quashed?

(iii) what order ?

10. The aforesaid points are required to answered together as they are interrelated in favour of the petitioner by assigning the following reasons. It is very pertinent to extract some provisions of Chapter XIV of the Orissa Municipal Corporation Act, 2003 (hereinafter called as 'the OMC Act').

Section 273 provides for Disposal of property and interest therein. It is indicated that subject to the provisions of section 277, the Commissioner may dispose of by sale or exchange of any Corporation movable property.

Section 276 provides for Power of Corporation to determine whether work shall be executed by contract.

Section 277 provides for General provision regarding contracts.

Section 278 provides for mode of making contract. It is indicated therein that every contract, entered into by the Commissioner on behalf of the Corporation, shall be in such manner and in such form as would bind him if it were made on his own behalf and may in like manner be varied or discharged.

Section 279 provides for invitation of tenders and

Section 284 provides framing of rules for tender.

11. The Corporation made rules as to the manner of opening of tenders and as to expenses. Mr. B.K.Mohanti, learned senior counsel on behalf of the petitioner has placed reliance on rule 12. It is submitted that while awarding contract in favour of O.P.No.3 to maintain, operate the Unit-IV Market Complex Souchalaya for the public use, the aforesaid procedure in the above statutory provisions of the OMC Act has not been followed. Mr. Mohanti has rightly placed reliance on the judgment of the apex court in Babu Verghese and others v. Bar Council of Kerala and others, AIR 1999 SC 1281. Paragraph 31 & 32 thereof are relevant which is as under :

> "31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor, (1875) 1 Ch D 426 which was followed by Lord Roche in Nazir Ahmad v. King Emperor, 63 Ind App 372 : AIR 1936 PC 253 who stated as under :
>
> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."
>
> 32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 SCR 1098 : AIR 1954 SC 322 and again in Deep Chand v. State of Rajasthan, (1962) 1 SCR 662 : AIR 1961 SC 1527. These cases were considered by a Three Judge Bench of this Court in State of Uttar Pradesh v. Singhara Singh, AIR 1964 SC 358 : (1964) 1 SCWR 57 and the rule

> laid down in Nazir Ahmad's case (supra) was again upheld. The rule has since been applied to the exercise of jurisdiction by Courts and has also been recognized as a salutary principle of administrative law."

12. Mr. Mohanti has also placed reliance on a decision of Privy Council in the case of ***King Emperor v. Nazir Ahmed*** 1936 PC 253 which is also referred in the case of Babu Verghese (supra). In the instant case, undisputedly the procedure contemplated under sections 276 to 279 of Chapter XIV of the OMC Act have been blatantly violated by the Corporation while entrusting the contract in favour of O.P.No.3 as this fact is established in view of the counter statement filed by the Corporation wherein in paragraph-5 it has been specifically admitted by it that no tender was advertised or called upon for the maintenance and construction of the public toilet in BMC area. Therefore, the ward of contract even though agreement has been executed, the same is in utter statutory violation of the above referred provisions of the OMC Act and also the decision of apex Court (supra). Reliance is placed upon the judgment of the Supreme Court which are extracted above, viz., Dharmendra Paswan, Sachidananda Pandey, Nagar Nigam Meerut (supra). In the case of Sachidananda Pandey, the apex Court has laid down the legal principle to the following effect.

> "40. On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established : State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

13. The law is this clear that ordinarily by contracts all the government authorities who are the instrumentalities of the State should hold public auction or invite tenders after advertising the same in the newspapers having wide circulation so that all eligible persons will participate in the bid to achieve maximum price and there is transparency and further it is the

essential requirement of the democracy where the people are supreme and all official act must be actuated public interest.

14. In view of the statement of law laid down by the apex Court in the case referred to supra upon which the learned senior counsel for the petitioner has rightly placed reliance, the action of the Corporation in awarding the contract in favour of O.P. No.3 maintain Unit IV Market Complex Souchalaya for a period of 30 years with an offer of Rs.4,000/- per month and Rs.48,000/- per year, is in violation of Article 14 of the Constitution of India as the Corporation has entered into the contract with O.P.3 without following the mandatory procedure laid down under the statutory provisions of the OMC Act (supra). Despite the Supreme Court decisions in this regard and the statutory provisions which provides for inviting tenders in relation to the contract, the Corporation has entered into the contract with O.P. No.3 for a period of 30 years later modified to one year without inviting tender, is a coulourable exercise of power, a clear case of legal malice as held by the apex Court in the case of ***Smt. S.R. Venkataraman v. Union of India and another, AIR 1979 SC 49***. Paragraphs 5 to 7 thereof are relevant, which are extracted hereunder :

> "5. We have made a mention of the plea of malice which the appellant had taken in her writ petition. Although she made an allegation of malice against V.D. Vyas under whom she served for a very short period and got an adverse report, there is nothing on the record to show that Vyas was able to influence the Central Government in making the order of premature retirement dated March 26, 1976. It is not therefore the lease of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order to her premature retirement so as to amount to malice in fact. Malice in law is, however, quite different. Viscount Haldane described it as follows in Shearer v. Shields, (1914) AC 808 at p. 813:-
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> "A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind, he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his is concerned, so far the state of his mind is concerned, he acts ignorantly, and in the sense innocently.

> Thus malice in is legal sense means malice such s may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.
>
> 6. It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C.J., in Piling v. Abergele Urban District Council, (1950) 1 KB 636 where a duty to determine a question is conferred on an authority which state their reasons for the decision, "and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter."
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> 7. The principle which is applicable in such cases has thus been stated by Lord Esher M.R. in The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras, (1890) 24 QBD 371 at p. 375:-
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> " If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

This view has been followed in Sedler v. Sheffield Corporation, (1924) 1 Ch 483."

15. For the aforesaid reasons, the award of contract in favour of O.P. No.3 and permitting it to renovate the Souchalaya in Unit IV Market Complex, Bhubaneswar, is illegal and, therefore, the same can not be allowed to sustain. The same is liable to be quashed by allowing this writ petition.

16. The impleading opposite party in its petition has prayed to expunge the allegations (supra) made by the O.P.No.1 against it. Considering the prayer, the allegations made against it are not supported with any material and therefore, the allegations made by the O.P.No.1 in its counter against the O.P.No.5 at paragraph-8 thereof are hereby expunged.

For the reasons stated supra, the writ petition succeeds. The impugned letter entering into the contract with O.P.No.3 is quashed. The Corporation is directed to follow the Article 14 and the statutory provisions referred to supra which are extracted from Chapter XIV of the OMC Rules for awarding the contract to any eligible service provider to maintain and operate Sulabha Souchalaya in the Unit IV Market Complex or any other places by the Bhubaneswar Municipal Corporation in its area.

Writ petition allowed.

2012 (II) ILR - CUT- 395

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

W.P.(C) NO.27200 OF 2011 (Dt.22.11.2011)

ROHIT KUMAR BEHERA ……..Petitioner.

.*Vrs.*

STATE OF ORISSA ……..Opp.Party.

CONSTITUTION OF INDIA, 1950 – ART.226.

Show cause notice – Challenged in Writ petition – Unless it is shown that the notice to show cause has been issued palpably without any authority of law, the same cannot be quashed in writ petition.

In this case it is no body's case that the show cause notice has been issued by an authority without having jurisdiction to issue such notice – Held, Writ petition disposed of giving liberty to the petitioner to file reply to the show cause notice.

(Para 21,25,26)

Case laws Referred to:-

1.AIR 1961 SC 1506 : (A.V.Venkateswaran,Collector & Customs, Bombay-V- Ramchand Sobhraj Wadhwani & Anr.)

2.AIR 1961 SC 372 : (Calcutta Discount Co.Ltd.-V-Income Tax Officer, Companies District 1, Calcutta & Anr.)

3.AIR 1987 SC 943 : (State of Uttar Pradesh-V-Brahm Datt Sharma & Anr.)

For Petitioner - M/s. M.S.Panda & M.Panda.
For Opp.Party - Mr. D.Panda
Addl. Govt. Advocate.

B.N. MAHAPATRA, J. This writ petition has been filed for quashing/setting aside initiation of *suo motu* proceedings No.4/2011 and the show cause notice with statement of charges dated 20.09.2011 (Annexure-4) issued by the Competent Authority on the ground that the *suo motu* proceedings is an outcome of non-application of mind, improper consideration of ground reality and without authority/jurisdiction.

2. Petitioner's case in a nutshell is that the petitioner was appointed as a Notary, Angul bearing Registration No.ON-09/2002 by the State Government

and was duly authorized to practise as a Notary under the provision of Notaries Act, 1952 (for short, "Act, 1952") and the Notaries Rules, 1956 (for short, "Rules, 1956") for a period of 5 years which is renewable from time to time. While discharging his duty as Notary, the petitioner on 22.01.2011 had authenticated two notarial affidavits of marriage and a deed of agreement between Mamata Kumari Singh and Rajkishore Naik declaring therein that they have married to each other. The said Mamata and Rajkishore were also present when both the affidavits and agreement were presented before the petitioner by one Sambhunath Behera, Advocate of Angul Bar Association. Learned Advocate Sambhunath Behera also submitted the birth certificate of Mamata and Rajkishore. After verifying the contents of the said affidavits and agreement and both of them having identified by Advocate Sambhunath Behera, the petitioner authenticated the above affidavits and agreement in presence of two witnesses, who claimed to be the well wishers of both Mamata and Rajkishore.

3. While the situation remains thus, the mother of Mamata Kumari Singh filed a complaint case bearing ICC No. 54 of 2011 before the learned S.D.J.M., Angul protesting the said marriage on the ground that her daughter Mamata is a minor and has been kidnapped by accused-Rajkishore Naik. The learned S.D.J.M., Angul directed the Police to register the complaint as an F.I.R. and take up investigation. In course of investigation, the accused Rajkishore Naik was arrested by the Police where-after BLAPL No. 14855 of 2011 was filed before this Court for his release. This Court on 19.08.2011, while directing release of the accused kept the bail application pending and directed the learned Addl. Government Advocate to obtain instruction from the Law Department as to whether the Notaries have authority to allow the notarial affidavit evidencing solemnization of marriage even in case of minor girls without verifying the records regarding their age and whether any action can be taken against such Notaries. This Court also directed the Law Secretary to issue notices to the petitioner and one K.R. Mishra, Notary, Talcher to find out as to whether they have verified the record regarding the age of the victim in G.R. Case No.386 of 2011 pending in the Court of learned S.D.J.M., Angul before allowing Notarial affidavits of marriage between Rajkishore Naik and Mamata Kumari Singh and submit the report within 3 days. Pursuant to the order dated 19.08.2011 of this Court, the Deputy Secretary, Law Department, Government of Orissa vide their Notice dated 27.08.2011 (Annexure-2) directed the petitioner to appear before the Principal Secretary-cum-Competent Authority, Law Department on 07.09.2011 along with relevant records and documents in order to appraise as to whether the petitioner had verified any materials regarding age of victim-Mamata Kumari Singh in G.R. Case No.386 of 2011 before allowing

the Notarial Affidavit of Marriage between Rajkishore and Mamata. In response to the above notice (under Annexure-2), the petitioner appeared before the Competent Authority on 07.09.2011 and submitted his explanation. Thereafter, show cause notice dated 20.09.2011 along with statement of charges under Rule 13(4-A) of the Rules, 1956 was issued in pursuance of the orders of the State Government dated 08.09.2011. The State Government has initiated a *suo motu* proceedings against the petitioner for authenticating two marriage affidavits evidencing solemnization of marriage without verifying the records regarding the age of the girl which constitute gross misconduct/unbecoming on the part of the Notary. The petitioner has been further noticed to show cause within 14 days from the date of receipt of the same as to why action as prescribed under law shall not be taken against him for the aforesaid misconduct. Hence, the present writ petition.

4. Mr. M.S. Panda, learned counsel appearing for the petitioner submits that initiation of the *suo motu* proceeding is illegal, whimsical, arbitrary and reflects non-application of mind. The petitioner has been duly appointed as a Notary since 2002 and he is governed by the Act, 1952. Under Section 8 of the said Act, the function of a Notary is to verify, authenticate, certify or to attest the execution of any instrument, administer oath or take affidavit from any person and to prepare, attest or authenticate any instrument intended to take effect in any country or place outside India in such form and language as may confirm to the law of the place where such deed is entitled to operate. Hence, a Notary is a Special Officer appointed by the State Government who is authorized to administer oath and verify from the Deponent the facts/statements contained in the affidavit. As per Rule 11(8) of the Notaries Rules, 1956 a Notary may draw, attest or certify documents under his official seal including conveyance of properties and prepare will or other testamentary documents and prepare and take affidavits for various purposes for his notarial acts. Rule 13 of the said Rules deals with inquiry into the allegations of professional or other misconduct of a Notary either *suo motu* or on the basis of a complaint received in Form-XIII.

5. Mr.M.S.Panda further submitted that any act or duty committed/done in contravention of the provisions laid down under Section 8 of the Act, 1952 read with Rule 11 of the Rules, 1956 shall tantamount to professional or other misconduct. In the instant case, initiation of suo motu proceeding by the opposite party under Annexure-4 without any contravention of the relevant provisions of the Act and Rules by the petitioner is bad in law and as such, the same is without jurisdiction and authority. The act of the petitioner and duty in authenticating the said two marriage affidavits is squarely covered within the

scope and ambit of the Act and the Rules. The petitioner at no stage while discharging his duties has contravened the aforesaid provisions. The petitioner has just authenticated the fact of marriage stated in the two affidavits. Those two affidavits were drafted by an Advocate upon instructions received from the boy and the girl. In order to verify their marriageable age, the petitioner relied upon the birth certificates and the statements of the parties under oath. The duty of the petitioner to authenticate a marriage affidavit is within his scope and capacity as a Notary and the same cannot be termed as illegal as the document authenticated by him is an affidavit stating therein that the declaration of facts of their marriage by both the parties and such affidavit cannot be termed as a Marriage Certificate issued under the provisions of the Hindu Marriage Act or Special Marriage Act wherein only a Marriage Officer is empowered to issue a Marriage Certificate. Hence, the petitioner has not in any way exceeded his limit and authority nor contravened any provisions of the Notaries Act and Rules. Therefore, Section 13 of the Act, 1952 has no application to the facts and circumstances of the present case. Mr. Panda further submitted that the proceedings initiated are not a suo *motu* proceedings and the same is an outcome of the order dated 19.08.2011 passed by this Court in BLAPL No.14855 of 2011. When the matter is subjudice, initiation of a *suo motu* proceeding without awaiting the final order of this Court, is illegal and an act of overstepping the authority by the opposite party which is *mala fide* and arbitrary.

6. The petitioner verified the birth certificate of Mamata Kumari Singh and Raj Kishore Naik, who were present before him and signed the affidavits after being satisfied that both the parties had attained their majority. The petitioner also inquired from the parties regarding the contents of the Affidavits to which they clarified that they knew the contents of these documents which were prepared by their Advocate according to their instructions. It was ascertained from the parties that on 22.01.2011 before coming to the petitioner both of them got married to each other in the temple of “Maa Budhi Thakurani” at Angul in presence of their well-wishers with due observance of Hindu rituals and Customs. The petitioner also tallied the documents with the Birth Certificates produced before him and found that the parties had attained their majority and were capable of swearing the Affidavits and executing the agreement. After verifying the necessary documents as well as the statements made in the affidavits and agreements and those being duly identified by an Advocate, the petitioner authenticated both the documents and made necessary entries in his Register.

7. As some Notaries had adopted a self innovated format by issuing authenticated certificate of Marriage purported to be in pursuance of Rules

11(1) and 16 of the Rules, 1956, the Law Department on 18.03.2009 had issued a letter vide Letter No.III-1-7/07 3921/L directing all the Notaries across the State not to issue Marriage Certificate which is not a function of the Notary under Section 8(1) of the Act, 1952. In this context, a Division Bench of this Court on 21.04.2009 while disposing of a writ petition bearing W.P.(C) No.19719 of 2008 had observed that a Notary does not have competence under the statute to issue marriage certificate but on the basis of the declaration made by the parties declaring themselves as husband and wife, the verification subsequently made by the Notary is very well within the jurisdiction and competence of the Notary as the verification made is in accordance with law.

8. It is submitted that in view of the above observation of this Court, the petitioner has not committed any illegality by authenticating two affidavits as the verification was caused on the basis of the declaration made by the parties and such verification is within the jurisdiction and competence of the petitioner for which he cannot be victimized. Concluding his argument, Mr. Panda, submitted that initiation of *suo motu* proceedings and issuance of show cause notice under Annexure-4 is illegal, unauthorized, whimsical, mala fide and not in consonance with the Act, 1952 and the same is liable to be quashed.

9. Mr. D. Panda, learned Additional Government Advocate appearing on behalf of the State-opposite party submitted that since the show cause notice is under challenge in the present writ petition, the writ petition is not maintainable being premature.

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

(i) Whether the relief sought for in this writ petition is premature?

(ii) Whether the notice to show cause with statement of charges issued pursuant to initiation of a *suo motu* proceedings against the petitioner are liable to be quashed?

(iii) What order?

11. Since all the aforesaid questions are interlinked, they are dealt with together.

12. The facts which are not in dispute are as follows:

Admittedly, the petitioner while discharging his duties as a Notary had authenticated two notarial affidavits of marriage and a deed of agreement executed between Mamata and Rajkishore Naik to the effect that they had married to each other. Subsequently, the mother of Mamata filed a complaint case bearing I.C.C. No.54 of 2011 before the learned S.D.J.M., Angul, protesting the said marriage on the ground that her daughter Mamta was a minor at the relevant time and was kidnapped by the accused Rajkishore Naik. The learned S.D.J.M. directed the Police to register the complaint as an FIR and take up investigation. In course of investigation, accused Rajkishore Naik was arrested by the Police and BLAPL No.14855 of 2011 was filed before this Court for his release. This Court on 19.08.2011 while directing release of the accused, kept the bail application pending and the learned Addl. Government Advocate was directed to obtain instructions from the Law Department as to whether the Notaries have authority to allow Notarial Affidavits evidencing solemnization of marriage even in case of minor girls without verifying the records regarding their age and whether any action can be taken against such Notaries. This Court also directed the Law Secretary to issue notice to the petitioner and one Kumuda Ranjan Mishra, Notary Talcher to find out as to whether they have verified any materials regarding age of the victim in G.R. Case No.386 of 2011 of the Court of learned S.D.J.M., Angul before allowing Notarial Affidavits of marriage between Rajkishore Naik and the victim Mamata Singh.

13. The Deputy Secretary, Law Department vide their notice dated 27.08.2011 (Annexure-2) directed the petitioner to appear before the Principal Secretary-cum-Competent Authority, Law Department in his Secretarial Office Chamber on 07.09.2011 along with the relevant records and documents in order to appraise as to whether the petitioner had verified any materials regarding the age of the victim-Mamata Kumari Singh before allowing the Notarial Affidavit of Marriage between Raj Kishore Naik and Mamata Kumari Singh. In response to the said notice under Annexure-2, the petitioner appeared before the Competent authority on 07.09.2011 and submitted his explanation. The relevant paragraphs of the said explanation under Annexure-3 are quoted below:

> "2. That after a thorough examination of both the documents, I ascertained that both of them got married to each other in the temple of "Maa Budhi Thakurani" at Angul in presence of their well wishers prior to swearing the affidavit and executing the agreement.
>
> 3. That on being properly identified by the learned Advocate Sri Sambha @ Sambhunath Behera of Angul Bar Association having Enrollment No.O/1679/02 of State Bar Council, Cuttack, both parties

appeared before me personally and Mamata Kumari Singh sworn an affidavit whereas said Mamata Kumari Singh and Raj Kishore Naik both executed an Agreement.

4. That said learned Advocate Sri Sambhunath Behera also submitted the Birth Certificates of both parties along with the affidavit and agreement for my verification and execution.

5. That on scrutiny of both the Birth Certificates, I am fully satisfied that both parties attained their majority. Thereafter, I asked both parties regarding the contents of both the documents to which they clarified that they know the contents of those documents which are prepared by their learned Advocate Sri Sambunath Behera according to their instruction and also they stated the contents of those documents.

6. That I also tally the documents with that of the Birth Certificates and found the parties attained their majority and are quite capable of swearing affidavit and executing agreement.

7. That I am also fully satisfied that the parties are executing their respective documents while in good state of mind and on their own volition without any force or motivation from any corner. So, I put my seal and signature on both the documents and made necessary entries in my register.

14. Subsequently, the Competent Authority issued notice of show cause along with statement of charges as provided under Rule 13(4-A) of the Rules, 1956. The said show cause notice reads thus:

"NOTICE TO SHOW CAUSE

with

Statement of Charges

(Under Rule 13(4-A), Notaries Rules, 1956,)

No.9076/L dt. 20.09.2011

Whereas in pursuance of the Orders of Government of Orissa dt. 08.09.2011, the State Government have initiated a suo-motu proceeding against Sri Rohit Kumar Behera, Notary, Angul, Regd. No.ON 09/2002 on the following Charges:

That on 22.01.2011, two affidavits were purported to have been sworn before you in your capacity as Notary evidencing solemnization of marriage between Mamata Singh and Rajkishore Naik, without verifying the records regarding their age and showing the girl as major which constitute gross misconduct/unbecoming on the part of a Notary as well.

Now, therefore, you Sri Rohit Kumar Behera, Notary, Angul are hereby noticed to show cause within 14 days from the date of receipt of this notice as to why action as prescribed under law shall not be taken against you for your aforesaid misconduct failing which the matter shall be disposed of in your absence according to law.

Sd/-
Competent Authority"

15. The above said show cause notice is under challenge. Section 8 of the Act, 1952 prescribes "Functions of the Notaries". Rule 11(8) prescribes the transaction of business of Notary.

16. In exercise of such function, a Notary *inter alia* may do the following acts by virtue of his office, namely:-

(a) verify, authenticate, certify or attest the execution of any instrument;

xx xx xx

(e) administer oath to, or to take affidavit from, any person;

17. Sub-rule (8) of Rule 11 of the Notaries Rules, 1956 provides that

"8. The notary may—

(1) draw, attest or certify documents under his official seal including conveyance of properties;

(2) note and certify the general transactions relating to negotiable instruments;

(3) prepare a Will or other testamentary documents; and

(4) prepare and take affidavits for various purposes for his notarial acts."

18. The functions and transactions of business by Notary as envisaged in Section 8 of the Act, 1952 and Rules, 1956 respectively cannot be done in a routine manner without application of mind; otherwise the very purpose of enacting Section 8 of the Act, 1952 and Rule 11(8) of the Rules, 1956 would

be frustrated because sanctity is attached to the certificate of the Notary. Thus, Section 8 of the Act, 1952 and Rule 11(8) of the Rules, 1956 cast an obligation on Notary to apply his mind while discharging his notarial functions and transactions of business.

19. Notaries are appointed for authentication of certificates/documents. Documents duly notarized by the Notaries are accepted to be genuine documents in absence of any other material. Certificates duly authenticated by the Notaries are presented before different authorities for various purposes. It is very much necessary that before authenticating any document by putting his signature and Notarial seal, the Notary should ensure that the document is a genuine one. Sometimes, it is found that power given to a Notary is misused. Therefore, it is necessary to regulate the work of the Notaries.

20. Rule 13 of the Rules, 1956 provides for "Inquiry into the allegations of professional or other misconduct of a Notary". According to the said provision, an inquiry into the misconduct of a Notary may be initiated either *suo motu* by appropriate Government or on a complaint received in Form-XIII. Admittedly, in the present case, no complaint has been received by the appropriate Government in form-XIII from any person. The inquiry has been initiated *suo motu* by the appropriate Government and the petitioner has been served with the notice along with statement of charges to show cause within fourteen days from the date of issuance of the notice as to why action as specified under law shall not be taken against him for the alleged misconduct.

21. Law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice can not be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution.

22. In ***A.V. Venkateswaran, Collector & Customs, Bombay vs. Ramchand Sobhraj Wadhwani & Anr.***, AIR 1961 SC 1506 the Constitution Bench of the Hon'ble Supreme Court laid down that where there is a complete lack of jurisdiction in any officer or authority who takes the action impugned, the writ jurisdiction should be exercised.

23. The Constitution Bench of the Hon'ble Supreme Court in ***Calcutta Discount Co. Ltd. Vs. Income Tax Officer, Companies District 1, Calcutta & Anr.***, AIR 1961 SC 372, observed as under :-

> "It is well settled, however, that though the writ of prohibition or certiorari will not be issued against an executive authority, the High

> Courts have power to issue, in a fit case, an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences."

24. In ***State of Uttar Pradesh Vs. Brahm Datt Sharma & Anr.,*** AIR 1987 SC 943, the Hon'ble Supreme Court observed as under:-

> "When a show cause notice is issued to a Government servant under a statutory provision calling upon him to show cause ordinarily the Government Servant must place his case before the Authority concerned by showing cause and the Court should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law."
>
> (Underlined for emphasis)

25. In the case at hand, it is nobody's case that the show cause notice has been issued by an authority without having jurisdiction to issue such notice. Moreover, the stand taken by the petitioner in this writ petition is almost similar to the stand taken in his reply letter dated 07.09.2011 (Annexure-3) submitted before the Principal Secretary to Government, Department of Law pursuant to letter dated 27.08.2011 (Annexure-2) which are disputed questions of fact and cannot be gone into by this Court in exercise of power under Articles 226 and 227 of the Constitution.

26. In view of the above, this writ petition is disposed of giving liberty to the petitioner to file his reply to the notice of show cause under Annexure-4 within two weeks from the date of receipt of a copy of this judgment. If such reply is filed by the petitioner, the same shall be considered and disposed of by the Competent Authority by strictly following the procedure prescribed under Rule 13 of the Rules, 1956.

27. With the aforesaid observations and directions, the writ petition is disposed of. No order as to costs.

Writ petition disposed of.

2012 (II) ILR - CUT- 405

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

W.P.(C) NO. 30097 OF 2011 (Dt.22.02.2012)

PARESH NATH DAS .....Petitioner.

.Vrs.

MUNICIPAL COUNCIL,
SAMBALPUR MUNICIPALITY & ANR. .....Opp.Parties.

TENDER- Tender finalised on negotiation and work order issued in favour of the petitioner – Subsequent cancellation of tender – Petitioner not violated any terms and conditions of the tender call notice – Impugned order of cancellation of tender is quashed – Direction issued to the Opp.Party to proceed with the work order issued in favour of the petitioner as the same is valid in law.

(Para 6 to 10)

For Petitioner - M/s. Bijay Ku. Dash, M.P.Debnath, A.B.Mishra, J.Dash, A. Sethy.
For Opp.Parties - M/s. B.P.Das, A. Ekka & J.S.Moharana (for O.P.1 & 2)

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer for quashing the order dated 04.10.2011 (Annexure-1) issued by opposite party No.2-Executive Officer, Sambalpur Municipality by which allotment of sanitation work awarded in favour of the petitioner in fifteen Wards of Sambapur Municipal Council, Sambalpur vide office letter dated 27.07.2011 (Annexure-4) has been cancelled on the ground that such order is violative of the terms and conditions mentioned in the tender call notice floated under Annexure-2.

2. Petitioner's case in a nutshell is that on 18.06.2011, the tender call notice was published in the daily Odia Newspaper "The Sambad", which was cancelled due to unavoidable reasons. Another tender call Notice was published on 04.07.2011 (Annexure-2) inviting quotations from the intending firms for executing the cleaning work in fifteen Wards of Sambalpur Municipal Council. The petitioner is one of the tenderers to the Tender Call Notice dated 04.07.2011 (Annexure-2). In compliance to the tender call notice floated under Annexure-2, the petitioner submitted all the required papers after complying with the terms and conditions as mentioned in the

said tender call notice. The bids of the petitioner along with others, who participated in the tender, were considered. After opening of the bid it was found that the petitioner was the 2nd lowest (L-2) and another firm "DISA" became L-1. Since DISA (L-1) could not comply with the terms and conditions of the tender call notice, the petitioner was called upon to match with the price quoted by 'DISA'. After negotiation, petitioner had agreed to execute the work at the rate quoted by DISA(L-1) and the tender was finalized in favour of the petitioner. After observing all the formalities the work order dated 27.07.2011 was issued in favour of the petitioner. Pursuant to the work order issued under Annexure-4, the petitioner started the sanitary work as per the work order. While the matter stood thus, letter dated 04.10.2011 (Annexure-1) was issued to the petitioner cancelling the work order issued in his favour. Hence, the present writ petition.

3. Mr. B.K. Dash, learned counsel appearing on behalf of the petitioner submits that after issuance of the work order under Annexure-4, the petitioner keeping in view the urgency with regard to the sanitation work in respect of fifteen Wards of Sambalpur Municipal Council and as per the instruction of the Municipal Council and its Executive Officer, immediately started sanitation work on war footing and spent huge amount towards Labour charges, Sanitation equipments and other miscellaneous expenses. It is submitted that more than Rs.17 lakhs has been spent for sanitation work in respect of 15 Wards of Sambalpur Municipal Council as per the work order. On 23.08.2011, opposite party No.2 was intimated about the huge expenditure incurred by the petitioner for the work which was already started on 15.08.2011. On account of extraneous reasons the Executive Officer of the Municipal Council did not co-operate with the petitioner and some political persons of the locality at the behest of some of the councilors demanded money for their personal comfort for which from time to time the said fact has also been intimated to the opposite parties, which yielded no result. Without any reason and without giving an opportunity of being heard to the petitioner, all of a sudden, a letter dated 04.10.2011 cancelling the work order was issued to the petitioner, which is illegal, arbitrary and against the principles of natural justice.

4. Mr. B.P. Das, learned counsel appearing for opposite party Nos.1 and 2 submits that the opposite parties have cancelled the work order vide office order No.7109 dated 04.10.2011 due to exorbitant rate quoted by the petitioner in course of negotiation and step for cancellation of work order was duly approved by the council of Sambalpur Municipality. Prior to publication of Tender Call Notice dated 04.07.2011, another agency namely, BISWA was executing the sanitation works and after completion of its

contract, Sambalpur Municipality floated the tender in question on 04.07.2011 inviting sealed quotations from the intending and registered Firms/NGO's/Organizations and contractors for executing the cleaning works in respect of 15 Wards of Sambalpur Municipality which includes road sweeping, cleaning, drain cleaning, lifting, bush cutting, spraying disinfectants, lifting of garbage to identified collection points of Municipal Council. It is submitted that pursuant to the work order, no agreement has been executed in respect of the work order dated 27.07.2011. Due to vehement objection of some of the Councilors of Sambalpur Municipal Council, the work order was not given effect to. On 26.08.2011, the learned Collector and District Magistrate interfered in the matter and directed opposite party no.2 to cancel the earlier tender and to go for a fresh tender fixing the ceiling price per Ward. The Collector, Sambalpur in exercise of power under Section 399 of the Orissa Municipal Act, 1950 directed the Executive Officer to undertake the work of cleaning of the Wards by hiring labours, vehicles, trolleys and purchasing necessary equipments in this regard. On the strength of the Collector's order now the Municipality Authority is doing all sanitation works. However, due to inadequate number of staff, the Municipal Authority has admittedly failed to provide cent percent sanitation work. On the basis of the direction of the Collector, Sambalpur dated 26.08.2011, the work order issued in favour of the petitioner was cancelled by the Executive Officer in his order No.7109 dated 04.10.2011 (Annexure-1). Subsequently, vide order dated 28705 dated 20.10.2011, Government of Orissa, Housing and Urban Development Department has also cancelled the tender process due to exorbitant rate quoted by the petitioner and direction was given to go for re-tender for privatization of sanitation works. A detailed price chart has been made in respect of each ward for cleaning, sweeping and lifting of garbage, but the same has not been given effect to due to the interim order dated 01.12.2011 passed in this case. Proposed rate was placed before the Council of Sambalpur Municipality for its approval before publication of tender call notice afresh. The Council in its C.R. No.3 dated 29.10.2011 has approved the rate for each Ward and Rs.1,60,000/- has been fixed per month in respect of each Ward and also permission has been accorded for privatization of sanitation works of Sambalpur Municipality. Thus, Sambalpur Municipality has decided to go for fresh tender for privatization of sanitation works in respect of 15 Wards. It is stated that there are 29 Wards under Sambalpur Municipality and sanitation works are being done by Sambalpur Municipality with the help of its staff in respect of 14 Wards and for the rest 15 Wards, tender was floated for privatization due to inadequate staff. It is further submitted that the petitioner has never started the work in question as per the work order. Therefore, the contentions raised by the petitioner in the writ petition in this

regard are not correct. Prior to cancellation of the work order, adequate opportunity of being heard was given to the petitioner for negotiation and there is official record to this effect. Hence, there is no question of *mala fide* intention on the part of the Executive Officer as alleged by the petitioner.

5. On the rival contentions advanced by the parties, the only question that falls for consideration by this Court is as to whether in the facts and circumstances of the case the opposite party-Municipality is justified in cancelling the work order issued in favour of the petitioner after negotiation.

6. Undisputed facts are that out of 29 Wards of Sambalpur Municipality, the Municipality intended to carry out the cleaning work in respect of 15 Wards through private parties. Accordingly, the Municipality floated tender call notice under Annexure-2, pursuant to which the petitioner along with another firm namely M/s. DISA participated in the said tender process. On opening of the bids, the petitioner was found to be the second lowest (L-2) whereas DISA has become L-1. Since DISA could not fulfill the terms and conditions, the petitioner was called upon for negotiation. In the negotiation since the petitioner, who was the second lowest bidder, agreed to execute the work in question at the rates quoted by DISA, the work order was issued in favour of the petitioner under Annexure-4. In the said order, the petitioner was informed that his rate of negotiation was accepted and he was requested to start the sanitation work within seven days from the date of receipt of the letter as per the detailed terms and conditions referred to in the tender call notice No.4421 dated 04.07.2011 (Annexure-2). Under the circumstances, the question arises as to whether opposite party-Municipality is competent to cancel the tender granted in favour of the petitioner.

7. It is not the case of opposite party-Municipality that the petitioner has violated any terms and conditions of the tender floated under Annexure-2. The only reason given by the opposite parties to cancel the work order is that the petitioner has quoted exorbitant rate. This plea for cancellation of the work order is not available to the opposite party particularly when the bids were invited in open tender and on negotiation, the petitioner agreed to execute the work at the rate quoted by DISA (L-1). The other reason given in the counter affidavit is that pursuant to the order of the Collector, the Executive Officer has cancelled the work order. But perusal of cancellation order dated 04.10.2011 (Annexure-1) does not show that the Executive Officer has cancelled the work order on the instruction of the Collector, Sambalpur. The other illegality that would have been noticed that when the Collector had not awarded the work order in favour of the petitioner in emergency situation as provided under Section 399 of the Orissa Municipal

Act, he (the Collector) could not have cancelled the work awarded in favour of the petitioner, who has been selected as L2 in an open tender, thereafter on negotiation, he had agreed to execute the works as per the rates quoted by DISA (L-1). The cancellation order passed under Annexure-1 also does not show that grave prejudice has been caused to public interest for which the Collector issued direction to the Executive Officer for cancellation of the work order issued in favour of the petitioner. For this reason, the order of cancellation under Annexure-1 is bad in law and liable to be quashed.

8. It is further noticed that in the order dated 20.10.2011 (Annexure-F/2) issued by the Housing and Urban Development Department it is stated that in exercise of power under sub-section (1), clause (d) of Section 398 of the Orissa Municipal Act, 1950, the State Government cancelled the tender/quotation called for by Sambalpur Municipality in their letter No.4421 dated 04.07.2011 and also the subsequent work assignment order issued vide letter No.6232 dated 27.07.2011. But prior to passing of the order of cancellation under Annexure-F/2, the impugned order of cancellation under Annexure-1 was passed by the Executive Officer of the Municipality. Annexure-2 further reveals that for awarding sanitation work through private agency direction has been given to go for fresh tender. The said order passed under Annexure-F/2 in exercise of power under sub-section (1) clause (d) of Section 398 of the Orissa Municipal Act, 1950 also does not indicate that how the work order awarded in favour of the petitioner was prejudicial to the interest of the Municipality as the same has been settled/finalized in favour of the petitioner through open tender after the petitioner matched the rate quoted by DISA (L-1). It is also admitted by opposite parties in their counter that due to inadequate number of staff, the Municipal authorities have failed to provide cent percent sanitation work in Sambalpur Municipality. Further the Housing & Urban Development Department of the State Government represented by its Deputy Secretary could not have cancelled the agreement executed in favour of the petitioner as it was already cancelled by the Executive Officer of the Municipality. Therefore, the question of cancelling the agreement for second time by the Department did not arise at all.

9. For the foregoing reasons, we don't find any valid and cogent reason to cancel the work order awarded in favour of the petitioner under Annexure-4. Therefore, cancellation of the work order under Annexure-1/Annexure-F/2 is hereby quashed by issuing a writ of certiorari.

10. Since the order of cancellation passed under Annexure-1 by the Executive Officer, Sambalpur Municipality (opposite party No.2) and the

order passed by the Deputy Secretary to the Government in Housing and Urban Development Department are not valid in law, for the reasons stated above, we direct opposite party-Sambalpur Municipal Council to forthwith proceed with the work order issued under Annexure-4 in favour of the petitioner, as the same is valid in law.

11. With the above observation/direction, the writ petition is allowed.

Writ petition allowed.

2012 (II) ILR - CUT- 411

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

W.P.(C) NO.22357 OF 2011 (Dt.27.03.2012)

JAGADISH PRASAD NAIK & ANR. …….Petitioners.

.Vrs.

STATE OF ORISSA & ANR. …….Opp.Parties

ORISSA DEVELOPMENT AUTHORITIES ACT, 1982 (ACT NO.14 OF 1982) S.3.

Constitution of Bhubaneswar Development Authority (B.D.A.) for the master plan area of Bhubaneswar, Khurda & Jatni – Notification Dt.24.03.2003 including Kalarahanga Gram Panchayat in B.D.A. – Construction of building by petitioners within Kalarahanga Gram Panchayat with permission of the Panchayat – BDA issued notice for removal of such construction – Order challenged – Notification Dt-24-03.2003 including Kalarahanga G.P. areas in B.D.A. is illegal without creating any Development Authority in respect of the area so included as required U/s 3(3) of the Act. – O.D.A Act not being a law under Article 243-ZD, inclusion of Kalarahanga Gram Panchayat in to B.D.A. is not permissible – O.D.A. Act not applicable to Gram Panchayat areas – Notice issued by B.D.A. for removal of construction is illegal – Notification Dt.24.03.2003 is quashed and orders impugned are set aside.

(Para -12,13)

Case laws Referred to:-

1.(2010)12 SCC 1 : (Bhanumati-V- State of Uttar Pradesh)
2.AIR 1962 SC 1044 : (Calcutta Gas Co.-V- State of West Bengal)
3.(2007)8 SCC 705 : (Chairman, Indore Vikas Pradhikaran-V-Pure Industrial Coke & Chemicals Ltd.)

For Petitioners - M/s. S.P.Singh, B.P.Mohanty, N.Paikray, R.P.Kar, A.N.Ray, K.K.Sahoo, P.K.Mishra.

For Opp.Party 1 - Mr. J.P.Pattnaik, Addl.Govt.Advocate

For Opp.Party 2 - M/s. D.Mohapatra, M.Mohapatra, G.R.Mahapatra, M.Mohapatra & Miss L.X.Nanda.
For Intervenors - M/s. B.Baugh & S.Rath.

B.P.DAS, J. The petitioners in this writ petition challenge the order dated 8.8.2011 passed in Appeal Case No.17/2011 (Annexure-1) upholding the order dated 25.4.2011 passed in U.A.P.No.339/2010 (Annexure-2) by the Authorities under the Orissa Development Authority Act, 1982 (in short, "the Act"), wherein the construction undertaken by the petitioners over plot nos.195(P), 196(P) and 299 of Khata No.412 of Mouza-Kalarahanga, Bhubaneswar, has been directed to be removed within fifteen days from the date of service of the order and in case of failure to do so, the said development would be removed by the Bhubaneswar Development Authority (in short, "B.D.A.").

2. According to the petitioners, plot nos.195(P), 196(P) and 299 of khata no.412 in Mouza-Kalaraganga, Bhubaneswar, belong to petitioner no.2 and in order to construct multi-storied residential buildings over the said plots, petitioner no.2 prepared a building plan and got the technical approval from the Kalarahanga Gram Panchayat vide letter dated 4.2.2003 (Annexure-7). The said approved building plan was re-checked and technically approved by the Junior Engineer, Bhubaneswar Panchayat Samiti and was re-validated for a further period of five years from the date of conversion of the schedule land by order dated 5.8.2006, vide Annexure-8. Initially the said plots were agricultural land and the competent authority under Section 8(A) of the Orissa Land Reforms Act, 1960 (in short, O.L.R.Act) allowed conversion of the land from agriculture to homestead (Gharabari) with effect from 27th March, 2007 and the premium was accordingly paid by petitioner no.2. When the construction was going on, petitioner no.2 entered into an agreement on 3.8.2009 with petitioner no.1 for development of the said plots and also executed an irrevocable power of attorney for effective execution of the construction project over the same. When the construction was at the advance stage, on 16th July, 2010 the petitioners received a notice dated 12.7.2010 (Annexure-13) issued by the Joint Town Planner-1 of B.D.A. asking them to show cause within seven days as to why penal action would not be taken against them for undertaking the construction of S+8 storied building without permission under Section 16 of the O.D.A. Act. On 16th July, 2010 the petitioners also received another show cause notice dated 14.7.2010 (Annexure-15) issued under Section 91(1) of the O.D.A. Act in U.A.P. No.339/2010 as to why order shall not be passed directing removal of the roof level construction of S+3, S+4, S+1 storied and a plinth level

construction of apartment building constructed unauthorisedly in violation of the approved plan and rules and regulations.

On 16th July, 2010, the petitioners received an order dated 14th July, 2010 passed under Section 92(1) of the O.D.A. Act (Annexure-14) that the development undertaken by them was without permission, approval and sanction as required under Section 15 of the O.D.A. Act and petitioner no.1 was directed to discontinue and stop the development from the date of service of the order under a written intimation.

3. The petitioners challenging the aforesaid notice and the orders approached this Court in W.P.(C) No.12104/2010, which was disposed of on 5th October, 2010 after hearing both the parties and considering the counter affidavit filed by the B.D.A., with a direction to the petitioners to approach the B.D.A. by filing a show cause reply taking all the points that were taken before this Court and till conclusion of the proceedings by the B.D.A., status quo as on the date of such order in respect of the property was directed to be maintained and no coercive action was to be taken against the petitioners. According to the petitioners, they have submitted their reply to the show cause notice taking various stands including the stand that though the Gazette Notification dated 24.3.2003 is purported to have been issued by the Housing & Urban Development Department in exercise of powers conferred under Sub-Section (2) of Section 3 of the O.D.A. Act, 1982 to include the additional areas of the revenue villages mentioned in the Notification in the Bhubaneswar Development area created with effect from the 1st day of September, 1983, the said Notification may be taken to have been issued in exercise of powers under Section 3(2) of the O.D.A. Act for the reason that the power to exclude or include is provided under Section 3(2) of the O.D.A. Act. The O.S.D.(O.D.A.Act) by order dated 5.4.2011 (Annexure-A/2 to the counter of the B.D.A.) rejected the show cause reply of the petitioners holding that the construction undertaken by them without approval from the competent authority over plot nos.195(P), 196(P) and 299 of khata no.412 of mouza-Kalarahanga was unauthorized and liable to be removed. Ultimately, they issued the order of demolition directing the petitioners to remove/demolish the constructions within fifteen days from the date of receipt of the order, failing which action under Section 91(1) of the O.D.A. Act, 1982, would be taken by the Enforcement Squad of B.D.A.

The petitioners against the order dated 5.4.2011 filed an appeal being U.A.P.Appeal No.17/2011 under Section 91(2) of the O.D.A. Act and as the appellate authority did not take any step for disposal of the Appeal, the petitioners filed a writ petition before this Court bearing W.P.(C)

No.13169/2011, which was disposed of on 11.5.2011 directing the petitioners to appear before the appellate authority on 17th May, 2011 and on their appearance, the appellate authority would fix a date of hearing and conclude the appeal by 15th June, 2011 and till that date the construction would not be demolished. Ultimately, the appeal was disposed of on 8th August, 2011 and the appellate authority upheld the orders dated 5th April, 2011 and 25th April, 2011, which are under challenge in the present proceeding.

4. The petitioners advanced three propositions in challenging the impugned orders.

No.1- With the introduction of Part-IX in the Constitution by the Constitution (Seventy Third) Amendment Act, 1992 with effect from 24.4.1993 and consequent amendment of the Orissa Gram Panchayat Act, 1964, the provisions of O.D.A.Act, 1982 are not applicable to the areas/territories under the jurisdiction of a Gram Panchayat.

No.2- The O.D.A. Act, 1982 has no application to agricultural land and therefore, any order or notification under the provisions of the said Act bringing agricultural land within the purview of the O.D.A. Act or including the said land in the Development areas declared under the O.D.A. Act is illegal.

No.3- Without prejudice to proposition Nos.(1) & (2), the petitioners advanced their argument that inclusion of an area within the development area by a notification in exercise of powers under the O.D.A. Act ipso facto or per se shall not give authority, power and/or jurisdiction to a Development Authority unless there is a notification under the provisions of the O.D.A. Act constituting the Development Authority specifically for the area so included in the existing Development Area.

5. Counter affidavit has been filed by O.P.2-B.D.A. in objecting to the points raised by the petitioners. But no counter affidavit has been filed by the State.

6. Before going to deal with the propositions, as set forth herein above, let us go through the orders impugned in this proceeding. On perusal of the impugned orders, we found that two main grounds have been taken before the appellate authority that the B.D.A. has no jurisdiction to insist for permission, when the permission was granted by the Sarpanch of Kalarahanga Gram Panchayat and the Sarapanch has the authority to issue approval of the construction of the building when the area in question is

alleged to have been covered under the jurisdiction of the B.D.A. These are the two vital questions out of five points raised before the appellate authority.

In answering these two questions, the appellate authority held as follows :-

> "……It reveals from the records available and presented before this court that the mouza Kalarahanga was included under the jurisdiction of Bhubaneswar Development Authority vide Gazette Notification dt.24.3.2003. Hence as per the Orissa Development Authorities Act, 1982, no construction should be made without approval of the Bhubaneswar Development Authority with effect from 24.3.2003. It also reveals from appeal petition that the appellants have produced approval of building plan over the plot in question obtained on 4.2.2003 revalidating the previous plan conditionally subject to change of Kisam to Gharabadi before starting construction. Hence, it fairly can be assessed that till the year 2006 no such construction has been started so also the appellant are failed to justify their grounds on the basis of the letter of Sarpanch as to whether the scheduled land has been converted to homestead land. The law is well settled that permission for construction of building can only be given by the Competent Authority after the land is converted to homestead land. But in the instant case the Sarpanch who has no authority to sit over the issue has issued two letters in favour of the appellants granting approval for construction of building prior to change the kisam of land which is not permissible in any law. Further letter dt.5.8.2006 of the concerned Sarpanch has no legs to stand after issuance of Gazette Notification dt.24.3.2003.
>
> So far the point No.2 is concerned, the appellants are under obligation to obtain permission from the Bhubaneswar Development Authority for construction of building in view of Gazette Notification dt.24.3.2003 in as much as construction was started after the year 2006. The claim of the learned advocate for the appellants is that the appellants have obtained the permission from Grampanchayat concerned as per the Orissa Grampanchayat Act, 1964, which is not sustainable in eyes of law, when Bhubaneswar Development Authority is the appropriate authority to issue such approval after 24.3.2003. Hence the appellants are under obligation to obtain approval of Bhubaneswar Development Authority before starting the construction….."

The fact that Kalarahanga Gram Panchayat was included in the B.D.A. at a later stage by virtue of the Notification dated 24.3.2003 is not disputed.

Taking into consideration the factual matrix of the case revolving round the appeal, it would be proper to deal with proposition Nos.1 & 3 first.

Proposition no.1- The Constitution of India has been amended to insert Part-IX providing for "The Panchayats" by the Constitution (Seventy Third) Amendment Act, 1992 with effect from 24.4.1993. The Hon'ble Supreme Court in the case of **Bhanumati vrs. State of Uttar Pradesh,** (2010) 12 SCC 1, considered the provisions of the said amendment and called it an "epoch-making" and "a turning point in the history of local self-governance with sweeping consequences in view of decentralization, grass-root democracy, people's participation, gender equality and social justice". It was further held that the changes introduced by the Seventy-third Amendment of the Constitution have given Panchayati Raj institutions a constitutional status as a result of which it has become permanent in the Indian political system as a third Government and further held that the composition of the Panchayat, its function, its election and various other aspects of its administration are now provided in great detail under the Constitution with provisions enabling the State Legislature to enact laws to implement the constitutional mandate. Thus, formation of panchayat and its functioning is now a vital part of the constitutional scheme under Part-IX of the Constitution.

In view of such extension the O.D.A. Act to the Gram Panchayat without giving the Panchayats full liberty for formation of their own modalities giving permission for construction of building etc. is contrary to the scheme of the Constitution. Hence, this Act is not applicable and provisions of such cannot be extended and applied to the territories of Gram Panchayat.

Further comparing the Entries in the XIth Schedule read with Article 243-G and Entries of Lists II and III of the 7th Schedule to the Constitution, it was submitted that many of the Entries have been overlapped. Learned counsel for the petitioners relies upon the principle of harmonious construction for interpretation of such overlapping Entries as laid down by the Hon'ble Supreme Court in the case of **Calcutta Gas Co. vrs. State of West Bengal,** AIR 1962 SC 1044 : 1962 Supp. (3) SCR 1. In that case, Calcutta Gas Co. was appointed as Manager of Oriental Gas Co. under an agreement. Subsequently, the Oriental Gas Co. was taken over by the West Bengal Government under the provisions of a law enacted by the Legislature of the State of West Bengal, namely, Oriental Gas Company Act, 1960,

(W.B.Act 15 of 1960). The validity of such Act was challenged by the Calcutta Gas Co., inter alia, on the ground that the said Act was beyond the legislative competence of the State Legislature as the legislative field was already covered by the Parliamentary legislation, namely, Industries (Development and Regulation) Act, 1951 enacted under Entries 7 and 52 of List I and Entry 24 of List II was subject of Entries 7 and 52. The Hon'ble Supreme Court held that the impugned Act was validly enacted under Entry 25 of List II, which stood carved out of Entry 24 of List II.

On the analogy of the aforesaid case, learned counsel for the petitioner submitted that overlapping Entries of XIth Schedule stood carved out of the respective Entries of the Lists II and III of the 7th Schedule and, therefore, any law or any provision thereof made by the State Legislature in its plenary power to legislate under Article 246 in respect of fields of legislation covered by the Entries in Lists II & III of 7th Schedule insofar as they are in derogation of or in deviation of or are contrary to any law or any provision thereof made by the State Legislature in respect of the Entries in XIth Schedule read with Article 243-G, would be ineffective and inconsequential in its application to areas/territories of Gram Panchayat.

In view of the decision rendered in Calcutta Gas (supra), we are of the view that there is substantial force in the proposition advanced by the learned counsel for the petitioners ; the reason being various Entries in Lists II & III of the 7th Schedule to the Constitution must be given a restricted scope so as not to cover the fields of legislation under Article 243-G read with Entries of Schedule XI to the Constitution. In other words, any law enacted by the State Legislature of a State in its plenary legislative power insofar as it trenches upon the "powers, authority and responsibilities of Panchayats" would be ineffective and inapplicable.

In the case at hand, apart from Part-IX of the Constitution, Chapter-VI of the said Gram Panchayat Act provides for powers, duties and functions of Gram Panchayats. Therefore, O.D.A. Act, 1982 can have no application to Gram Panchayat areas at all as that would amount to taking away the power, duties, functions and authority of the Gram Panchayat by the Development Authority.

Further the provisions of Part-IX of the Constitution and more particularly, Articles 243-ZD and 243-W of Part IXA providing for the constitution of a committee to be known as "District Planning committee" for consolidating the plans prepared by the Panchayats in terms of Article 243-G and the Municipalities in terms of Article 243-W, there can be no second

opinion that the entire field being covered, no legislation including the Act would be made applicable to Grama Panchayat territories. Clause-2 of Article 243-ZD enables the Legislature of a State to make laws in respect of the composition and functions of the said District Planning committee. Clause-3 of the said Article provides for matters to be taken into consideration while preparing a Draft Development Plan. Similarly Article 243-ZE makes provision for Metropolitan Planning committee. Under the scheme of this provision, the development plan would be final only after it is accepted by the State Government. Therefore, the entire subject matter of the O.D.A. Act is covered by the provisions of Articles 243-ZD, 243-ZE and 243-G read with XIth Schedule and O.D.A. Act not being a law under Article 243-ZD cannot be made applicable to Gram Panchayat areas/territories.

We would have ended here declaring inclusion of Kalarahanga Gram Panchayat into B.D.A. is not permissible under Article 243-ZD but we are inclined to examine the third proposition advanced by the petitioners though it has now become academic.

Proposition No.3- It is submitted that the notification dated 24.3.2003 is purported to have been issued in exercise of powers conferred by Sub-Section (3) of Section 1 of the O.D.A. Act, 1982 to modify the existing "Bhubaneswar Development Authority area" by including the additional areas of the revenue villages mentioned therein and the power in respect of which is provided under Sub-Section (2) of Section 3 of the O.D.A. Act. Drawing our attention to the provision of Sub-Section (3) of Section 1 of the O.D.A. Act, Mr.S.P.Singh, learned counsel for the petitioners, submitted that under the scheme of the provisions of the Act, it is mandatory that after bringing an area under the purview of the Act, by a separate notification the area has to be declared to be a development area "for the purpose of proper development of such area" and a name has to be assigned to such area. Since the development area/areas of the development authority so constituted under Sections 3(3) and (5) is fixed and limited, the authority cannot have jurisdiction and power over any area/areas beyond the area/areas notified as development area/areas under the notifications under Sections 1(3) and 3(1) of the O.D.A. Act. Therefore, the newly included area/areas under Section 3(2) of the O.D.A. Act is/are beyond the jurisdiction and power of the Development Authority constituted for a particular development area/areas and by a separate notification, a Development Authority has to be constituted for such a development area/areas which has/have been declared as such by inclusion under Section 3(2) or otherwise. According to Mr.Singh, in the present case, no Development Authority has been constituted for the villages newly included by the

Notification dated 24.3.2003 and therefore, the B.D.A. having been constituted for the Bhubaneswar Development area "comprised in the Master Plan areas of Bhubaneswar, Khurda and Jatni" has no authority or power or jurisdiction to deal with the Kalarhanga Panchayat areas included in the Bhubaneswar Development area by the Notification dated 24.3.2003 under Section 3(2) of the O.D.A. Act.

7. Learned counsel for the petitioners placed reliance on the decision of **Chairman, Indore Vikas Pradhikaran vrs. Pure Industrial Coke & Chemicals Ltd.,** (2007) 8 SCC 705, fact of which was that on or about 13.2.1974 the State Government had issued a notification under Sub-Section (1) of Section 13 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam (No.23 of 1973) (in short, the M.P.Act) constituting Indore Planning Area consisting of only 37 villages, the limits whereof were defined in the schedule appended thereto. The villages, namely, Bicholi and Kanadia, with which the case was concerned, were not included therein. It is indicated that Section 13(1) empowers the State Government to constitute planning areas for the purpose of the said Act and define the limits thereof. Sub-Section (2) of Section 13 empowers the State Government by notification, inter alia, to alter the limits of the planning area so as to include therein or exclude therefrom such areas, as may be specified in the notification, to amalgamate two or more planning areas so as to constitute one planning area, to divide any planning area into two more planning areas, and to declare that the whole or part thereof. The State of Madhya Pradesh in terms of Section 38 of the said M.P.Act issued a notification establishing the Authority, namely, "Indore Vikas Pradhikaran". The State Government delegated its power under Sections 13 and 47-A of the Act in favour of the District Planning Committee who in exercise of the said delegated power by a Notification dated 13.11.2000 amended the planning area by adding 115 villages therein which included the said villages, namely, Bicholi and Kanadia. In Paragraph-101 of the aforesaid judgment, the apex Court held thus :-

> "101. Admittedly, the villages in question had been included by the State in its notification issued on 28.10.2005. Prior thereto, the said villages having not been included within the area of operation of the appellate authority, any action taken either by way of its intention to frame a town planning scheme or otherwise shall be wholly illegal and without jurisdiction. It would render its act in relation to the said villages a nullity."

Referring to this judgment, learned counsel for the petitioners submitted that as per the scheme of the O.D.A. Act, the State Government

has to enforce the said Act in the area/areas with effect from an appointed date by a notification under Sub-Section (3) of Section 1. This has the effect of fixing the area/areas where the O.D.A. Act has been enforced and the date on and from which the Act would apply. Thereafter, the Government is empowered to declare such an area/areas, i.e., the area/areas fixed under Section 1(3) Notification to be a development area and assign a name to it under Sub-Section (1) of Section 3. Section 3(2) enables the State Government to exclude from or include in any development area any other area by notification. According to the learned counsel for the petitioners, these provisions are mandatory as is evident from the use of word "shall". Therefore, under the scheme of the provisions of the Act, it is mandatory that after bringing an area under the purview of the Act, by a separate notification, the area has to be declared to be a development area "for the purpose of proper development of such area" and a name has to be assigned to such area. Thereafter, an Authority has to be constituted for the said named development area or areas.

The sum and substance of the argument of the learned counsel for the petitioners is that the Notification of the Government dated 24.3.2003 is totally defective and in contravention of the provisions of the O.D.A. Act. Hence, the same is illegal and could not have included Kalarahanga Gram Panchayat, under which jurisdiction the petitioners were making construction after obtaining permission from the Panchayat.

8. Mr.D.Mohapatra, learned counsel for the B.D.A., relied upon the provision of Sections 1(3) and 3(2) of the O.D.A. Act read with Rule-3 of the O.D.A. Rules, 1983. According to him, the argument advanced by the learned counsel for the petitioners that constitution of the authority comprises of the members from the urban areas is fallacious. But the O.D.A. Act provided to constitute the authority in the manner prescribed under the Act itself. Even otherwise non-inclusion of the members from the Panchayat is of no consequence in view of the fact that the Act deals with the areas in the form "mouza". Mr. Mohapatra also took the example of Kalinga Nagar Development Authority area, vide Notification No.33044 dated 28.7.1992, which does not cover any urban local bodies. The Government constituted the Kalinga Nagar Development Authority consisting of members which does not include members either from the urban local bodies or panchayats.

To sum up, the argument of Mr.D.Mohapatra is that permission has not been obtained in the present case as required under the O.D.A. Act and in such cases, proceedings under Section 91 of the O.D.A. Act is maintainable, for which order of demolition can be passed. It is further

argued by Mr.Mohapatra that as the Notification impugned does not cover the entire Panchayats and already includes some villages from the Kalarahanga Gram Panchayat, representation of the Gram Panchayat is not necessary. In other words, the representation of the Gram Panchayat would have been necessitated, had the entire Gram Panchayat been brought within the purview of the B.D.A.

9. The stand taken by the learned Additional Government Advocate for the State is similar to the argument advanced by Mr.D.Mohapatra, learned counsel for the B.D.A. From the argument of Mr.B.Baugh, learned counsel for the intervenors, it can be summarised that the intervenors have certain claim over the portion of the land, which has been treated as a road by the petitioners and the same is also the subject matter of the civil suit, which we shall deal with.

10. In order to examine the contentions of the parties, we may first refer to Notification No.37675 dated 31.8.1983, which is extracted hereunder :-

> "In exercise of the powers conferred by Sub-Section (3) of Section 1 of the Orissa Development Authorities Act, 1982 (Orissa Act 14 of 1982), the State Government do hereby appoint the 1st day of September, 1983 to be the date on which the said Act shall come into force in the areas comprised in the Master Plan areas of Bhubaneswar, Khurda and Jatni to which the provisions of Orissa Town Planning and Improvement Trust Act, 1956 (Orissa Act 10 of 1957) were extended in the notification of the Government of Orissa in the erstwhile Health (L.S.G.) and Urban Development Department No.603-L.S.G. dated the 18th January, 1964, No.761-U.D., dated the 11th January, 1968, No.26841-U.D., dated 23rd August, 1978, No.19602-U.D., dated the 30th July, 1975, No.8379-U.D., dated the 8th March, 1978 and No.21425-U.D., dated the 11th August, 1972."

Notification No.37626 dated 31.8.1983, which is also relevant, is extracted hereunder :-

> "In exercise of the powers conferred by Sub-Section (1) of Section 3 of the Orissa Development Authorities Act, 1982 (Orissa Act 14 of 1982) the State Government do hereby declare that the areas in which the said Act has been enforced by notification of the Government of Orissa in Housing and Urban Development No.37675-H.U.D. dated the 31st August, 1983, shall be a Development Area for the purposes of the said Act and shall be assigned the name "The

Bhubaneswar Development Area with effect from the 1st day of September, 1983."

So the B.D.A. was constituted statutorily for a limited area of operation over the Master Plan area of Bhubaneswar, Khurda and Jatni. There is a specific provision in Section 3(1) of the Act that upon enforcement of this Act in any area/areas under Sub-Section (3) of Section 1 of the Act, the State Government shall for the purpose of proper development of such area or areas, by notification, declare such area or areas to be a development area for the purposes of this Act and shall assign a name to such area.

So the conclusion would be that the jurisdiction of such Authority would be limited to the area, for which it has been constituted under the provisions of the Act. Admittedly, in the present case, no Development Authority has been constituted for villages newly included by Notification dated 24.3.2003.

Mr.D.Mohapatra, learned counsel for the B.D.A., further argued that a cumulative reading of Sub-Section (2) of Section 3 of the O.D.A. Act read with Rule-3 of the O.D.A. Rules would reveal that the Government has authority to include and exclude such area/areas (not necessarily Panchayat) within and from the B.D.A. jurisdiction in exercise of power conferred under Section 3(2) of O.D.A. Act and the B.D.A. shall have the authority in respect of the included areas with effect from the date of its publication in the gazette.

11. Let us have a look at the scheme of the O.D.A. Act. Sub-Section 5(h) of Section-3 of the O.D.A. Act reads as follows :-

"3. Declaration of development areas and constitution of Development Authority.

xxx xxx xxx.

(5) The "Authority" shall consist of the following members, namely,

Xxx xxx xxx

(h) The Chairman of urban local bodies comprised within the development area, member, *ex officio*."

From this provision, it is crystal clear that if any urban or local area is brought within a development area, the Chairman of the Urban Local Bodies comprised within the development area shall be the member of the Authority. Rightly, it has been done as per the Notification dated 31.8.1983, by which the Development Authority was constituted for Bhubaneswar development area comprising of the area of Khurda Notified Area Council and Jatni Notified Area Council including their Chairmen as members of the Authority.

The argument of Mr.D.Mohapatra, learned counsel for the B.D.A., that as the entire Panchayat has not been included within the B.D.A. area, some mouzas/villages have been included with reference to the original Notification and the inclusion or exclusion is part of the original Notification, there is no requirement of giving the name of the Authority in respect of the newly included area. The newly included area forms a part of the area of the original Authority, for which there is no requirement of inclusion of Sarapanch of the Gram Panchayat as a Member of the Authority.

We are unable to accept the argument of Mr. Mohapatra because acceptance of his view would lead to a wrong interpretation of the provision. The reason being the scheme of Sub-Section 5(h) of Section 3 of the O.D.A. Act clearly provides that the Chairman of the Urban Local Bodies should represent the Authority. So the representation of the urban local bodies in the Authority is a must. There is no provision under the O.D.A. Act for inclusion of a representative of the Gram Panchayat in the “Authority” under Sub-Section (5) of Section 3 of the Act, which provides for inclusion of the Chairman of “Urban local bodies comprised within the development area”, as specified in Section 2(xi) of the Act. Under Section 2(xli) of the O.D.A. Act, “urban local body” means a municipal council or a notified area council constituted under the Orissa Municipal Act, 1950. Plain and simple this Act is meant for the urban area development. From the Act itself, it is clear that the O.D.A.Act cannot be extended to the rural areas covered by the Panchayat Samiti.

12. In this regard we may also refer to Section 15(1)(i) of the O.D.A. Act, which provides that after the constitution of an Authority for any development area under Sub-Section (2) of Section-3, no person including a department of the Central or a State Government or a local authority or a body corporate constituted under any law shall within the development area subdivide any land for utilizing, selling, leasing out or otherwise disposing it of unless he, after obtaining written permission from the Authority, lays down and makes a street or streets giving access and right of way to all the plots into which he intends to subdivide the land so as to connect them with an existing public or

private street and also provides amenities, if any, specified by the development plan in operation or regulations pertaining to planning or building standards made in this behalf;

Section 15 starting with a non-obstante clause would apply only "after the constitution of an authority" for the newly included area under Section 3(2) of the Act. Here the case is that as no authority has been constituted after the notification dated 24.3.2003, Section 15 is not applicable in the present case.

In other words, every time if any other area is included in the development area as provided in Sub-Section (2) of Section-3 of the O.D.A. Act in the existing development area of the Authority, it is the requirement of the Act to constitute an Authority to exercise its jurisdiction under the Act in respect of the area so included. So far as the argument of the learned counsel for the petitioners to the extent that the O.D.A. Act is not applicable to the Gram Panchyat areas, its needs no further elaboration, as we have already answered it in the foregoing paragraphs.

The B.D.A. having been constituted for the area comprising Master Plan area of Bhubaneswar, Khurda and Jatni has no authority or power or jurisdiction to include the villages of Kalarahanga Gram Panchayat by Notification dated 24.3.2003 under Section 3(2) of the Act without creating any Development Authority. So the Notification dated 24.3.2003 is also contrary to the provisions of Sub-Section (1) of Section 3 of the O.D.A. Act.

In view of our above finding, proposition no.2 does not require any examination.

13. Resultantly, the Notification dated 24.3.2003 including the area of Kalarahanga Gram Panchayat is contrary to the constitutional provision made in Article 243 and as the O.D.A. Act is not being a law under Article 243-ZD, we quash the said Notification dated 24.3.2003 and set aside the order dated 8.8.2011 passed in Appeal Case No.17/2011 (Annexure-1) and the order dated 25.4.2011 passed in U.A.P.No.339/2010 (Annexure-2) by the Authorities under the Orissa Development Authority Act, 1982. We hold that there was no illegality attached to the permission granted by the Kalarahanga Gram Panchayat to construct the building. The O.Ps. are given three months' time to take appropriate steps in terms of Clause-2 of Article 243-ZD.

In view of the aforesaid finding, the other points raised by the petitioners require no answer.

14. The contention of the intervenors is that the land utilized by the petitioners as a road belongs to the intervenors but not to the petitioners. As it is stated, the parties are in litigating terms in a civil proceeding being C.S.No.687/2011 pending in the Court of Civil Judge (Sr.Divn.), Bhubaneswar, we are not inclined to express any opinion on the aforesaid contention but the same shall be guided by the decision in C.S.No.687/2011.

Writ petition allowed.

2012 (II) ILR - CUT- 426

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

W.P.(C) NO. 13706 OF 2010 (Dt.26.06.2012)

SUBHENDU KUMAR MOHANTY .....Petitioner

.Vrs.

ORISSA POWER GENERATION CORPN. LTD. & ORS. .....Opp.Parties

SERVICE LAW – Departmental Proceeding – Allegation that the petitioner being the president of the Officers Association influenced officers to go on one day casual leave causing huge loss to the Corporation – Dismissal from service – Punishment confirmed in appeal – Hence the writ petition.

No evidence from the management that willing executives were prevented from performing their duties – So question of instigating other executives can not stand – Moreover similarly situated employees charge-sheeted have been dealt with leniently – Held, punishment imposed is shockingly disproportionate to the charges framed which also shocks the conscience of this Court – Order of dismissal is set aside – Direction issued to the Opp.Parties to re-instate the petitioner and thereafter take a decision for imposing any lessor punishment other than dismissal, removal or compulsory retirement.

(para-12,13)

Case laws Referred to:-

1.(2002)3 SCC 667 : (Baldev Singh-V- State)
2.(1989)2 SCC 574 : (S.Rangarajan-V- P.Jagjivan Ram)
3.(2005)8 SCC 46 : (Obettee (P) Ltd.-V- Mohd. Shafiq Khan)
4.1995(6)SCC 749 : (B.C.Chaturvedi-V- Union of India)

For Petitioner - M/s. J.Sengupta, D.K.Panda, G.Sinha, A.Mishra.
For Opp.Parties - M/s. D.P.Nanda, R.K.Kanungo, S.Rath & B.P.Panda.

B.P. DAS, J. The petitioner, who was working as Sr. Assistant Manager (Mechanical) in Orissa Power Generation Corporation Ltd. (in short, "O.P.G.C.L."), has filed this writ petitioner challenging the order dated 25.3.2008 passed by the Managing Director, O.P.G.C.L., O.P.3 imposing

upon him the major penalty of dismissal from service and the order passed by the Board of Director rejecting his appeal, which was communicated by letter dated 6.6.2009 of the Senior General Manager (P & A), confirming the findings of the disciplinary authority on the ground that there is serious violation of principles of natural justice and denial of opportunity to defend himself against the charges.

2. The case of the petitioner is that he joined the O.P.G.C.L. as Senior Assistant Manager in the year 1993. The O.P.G.C.L. is a Company registered under the Companies Act, 1956 and the State Government has pervasive control over it with regard to finance and management. He was also selected as President of the Officers'/Executives' Association of the Corporation during the year 2006-07 and again re-elected to the said Office for the year 2007-08. According to the petitioner, the said Association raised three demands, such as, salary revision of the officers/executives with effect from 1.4.2000, promotion of the executives and expansion of IB Thermal Power Station and pressed for implementation of the said demands through several representations to the Management of the Corporation from time to time since 2001. When the demands remained unfulfilled, the Association called a general body meeting to consider the matter including the matter in which the Association could register its protest against the non-responsive attitude of the Management to its demands. In the meeting several options were considered and an unanimous decision was taken that as a token step the Officers would remain on causal leave for one day, i.e., on 30.3.2007 to register their protest. The said decision was communicated to the Management on 15.3.2007 with copies to the concerned authorities.

In pursuance of the unanimous decision, 127 members of the executive cadre individually submitted their casual leave applications through the Association and the petitioner being the President of the Association forwarded the same including his own to the Director (Operation), IB Thermal Power Station on 27.3.2007. But no response from the side of the Management was received. On the other hand, the Senior General Manager (P & A) in his letter dated 29.3.2007 informed the Officers that if they went on casual leave, they might face the consequences under the Essential Services (Maintenance) Act, 1988 and be proceeded against for the misconduct. Such a threat was not acceptable to the Association and the members decided to avail casual leave on 30.3.2007.

According to the petitioner, there was no overt act committed by the members of the Association on 30.3.2007 inside or outside the plant. Though the members of the Association remained absent from their duties

and availed casual leave. Thereafter, the Management without addressing the long pending grievances of the officers/executives chose to initiate disciplinary proceedings against the President and some Executive Body Members of the Association alleging misconduct selectively. The petitioner was served with a charge sheet containing 8 heads of charges of misconduct as per clauses-4,6,4,19,4,20,4,25,4.26, 9 & 12 of the O.P.G.C.L. Conduct Rules, 1998. Then the petitioner filed his written statement of defence to the aforesaid charges after which the Senior General Manager (P & A) appointed one G.Behera as the Enquiry Officer to conduct the enquiry into the charges without communicating the same to the petitioner.

3. The gravity of the charges leveled against the petitioner was that being the President of the Association, he influenced/forced the members to go on one day casual leave, which ultimately caused huge loss to the Corporation and such act was prejudicial to the interest of the Corporation. Thereafter the Enquiry Officer found the petitioner guilty of charge nos.1,2,4,5,6,7 & 8 and not guilty of charge no.3 and submitted his report, vide Annexure-2. On 21.1.2008 the Manager (Admn.) issued the second show cause notice to the appellant informing him that the Management had concurred with the findings recorded by the Enquiry Officer and proposed to inflict upon the appellant the major penalty of dismissal from service. The petitioner in his letter dated 4.2.2008 requested the Management to supply him the order sheets maintained by the Enquiry Officer in the enquiry proceedings, which were not supplied to him along with copies of orders showing approval of the competent authority in the matter of framing of charges and issuance of the show cause notice. According to the petitioner, the record of the proceeding comprising 72 pages contained the order sheets in respect of only four sittings. Though the petitioner had been seriously prejudiced in his defence on account of non-supply of all the documents pertaining to the enquiry, he had to submit a provisional reply to the notice. After much persuasion, the Management supplied hand written order sheets maintained for different dates comprising of eight pages to him. Those order sheets do not bear signatures of the parties or their representatives. The petitioner then submitted his additional show cause reply to the Management on 26.2.2008. While he believed that the facts and circumstances stated by him in his replies to the second show cause notice and the grounds taken by him therein would receive proper consideration, he was shocked to receive the impugned order of dismissal dated 25.3.2008 passed by the Managing Director.

4. According to the petitioner, the impugned order of dismissal dated 25.3.2008 is bad in law for the following reasons:-

I) The specific charges framed against the petitioner are invalid in the eye of law because the same have not been framed by the disciplinary authority, namely, the Managing Director as clearly stipulated in Rule 6 (ii) of the Discipline and Proceeding Rules 1998.

II) The charge sheet has not been signed by the disciplinary authority but by one Senior General Manager (P & A), who is not the competent authority to frame the charges of misconduct.

III) The Enquiry Officer lacked jurisdiction to hold the enquiry, as he was appointed as Enquiry Officer by the Senior General Manager (P & A) because as per Rule 6 (ii) of the Discipline and Appeal Rules, the disciplinary authority alone was competent to appoint the Enquiry Officer.

IV) According to Rule 6 (xvii) of the Discipline and Appeal Rules, it was incumbent on the Enquiry Officer to hear the Presenting Officer and the charged employee or permit them to file written arguments after production of evidence from both the sides. But without giving any such opportunity to the petitioner and without complying with the aforesaid procedure, the Enquiry Officer closed the proceeding thereby denied reasonable opportunity to the petitioner to make his submissions, which amounted to violation of principle of natural justice.

V) The charges under head nos.1 and 4 to 8 are totally misconceived. The absence of the petitioner on 30.3.2007 was pursuant to the unanimous decision of the Association. There is no evidence to conclude that the petitioner acted in a collective manner in consortium with other Executives to bring the plant to a standstill and production to zero level and that the petitioner caused any financial loss to the industry and that he acted in a manner subversive of discipline and prejudicial to the interest of the industry.

5. According to the petitioner, the disciplinary authority has completely ignored the fact that for one day absence from duty on 30.3.2007, the salary of the Officers/Executives were withheld, for which the disciplinary authority was not justified to initiate disciplinary proceeding against the petitioner and last but not the least, the argument of the petitioner is that the infliction of the extreme punishment of dismissal is shockingly disproportionate as it leads to the only inference that it is an act of victimization to which the petitioner has been subjected only on account of his act of forwarding the causal leave applications pursuant to the unanimous decision taken by the Association, for which prayer has been made to quash the order dated 25.3.2008.

6. Counter affidavit has been filed by the opposite parties disputing the allegation of the petitioner that the action taken by them is illegal in the facts and circumstances of the case. They have also taken a stand that this Court is not the appellate forum before which the findings in a disciplinary enquiry can be examined in exercise of the jurisdiction under Article 226 of the Constitution of India. Law is well settled that under Article 227, this Court is to examine if any authority has exceeded its jurisdiction or failed to exercise its jurisdiction. Further this Court can also examine if the findings of the said authority is perverse or suffers from any error of law or misconception of law or for that matter if the authorities have violated the statutory procedure resulting in denial of natural justice to the delinquent employee. According to them, as per the record, there is nothing of this sort.

According to Mr. Nanda, learned counsel for the opposite parties, the petitioner has violated the rules as prescribed under the "O.P.G.C.L. Conduct Rules, 1998", which has been provided under Clause Nos.4,6, 4,19, 4.20, 4.25, 4.26, 9 and 12 of the O.P.G.C.L. Conduct Rules, 1998, for which the charge-sheet was framed against the petitioner. His response to the same having been found unsatisfactory, a disciplinary proceeding has been initiated and an independent enquiry officer was appointed to enquire into such charges. After due consideration of the pleadings, evidence, both oral and documentary, and on hearing arguments made by both the Management and the delinquent employee, the Enquiry Officer came to the finding that six charges out of seven stood proved. According to Mr. Nanda, it is unusual on the part of the Association to prefer to go on mass casual leave, as it led to total paralising of the system of production and the petitioner being the President of the Association is responsible and he should be more careful in indulging non-trade union activities.

7. Let us examine charge No.3, i.e., preventing the willing executives from performing their duties and the findings of the Enquiry Officer read as follows:-

> " From the circumstances and evidences as discussed as Charge No.2 that Sri S.K.Mohanty as a leader of the team had influenced and instigated the executives to go on mass casual leave and stay away from performing the duties. There is no credible evidence from the management side that the willing executives were prevented from performing their duties. On the other hand, the management witness during cross-examination by Sri S.K.Mohanty confirmed that there was no road blockage leading to the plant and

no FIR relating to obstruction of executive by anybody was lodged in regard to prevention/obstruction of any willing executives.

Hence, the charge is not proved and Sri S.K.Mohanty is not found guilty of the charge.

It is felt appropriate to deal with the charge No.8 before examining other charges."

As this charge has not been proved against the petitioner, that cuts the route of charge no.2, i.e., influencing and instigating other executives to go on mass casual leave on 30.3.2007. The allegation that there was prevention on the part of the petitioner being the President of the Association to the willing workers to work remained disproved. Then the question of instigating and forcing other Executives by the petitioner to go on casual leave cannot stand.

Be that as it may, it is not disputed that similarly situated employees have been charge-sheeted and have been dealt with leniently. The petitioner being the President of the Association has been imposed with the drastic punishment of dismissal from service.

8. So far as giving certain statements in the Press regarding the demands of the Executives is concerned, it cannot be construed as misconduct, as there is nothing on record to show that there is any restriction in service rule prohibiting the petitioner from going to Press and making public their demand. There is also nothing to show as to how it affected adversely the Management of the Company. So any punishment of the petitioner for going to Press will amount to infringement of fundamental right of freedom of his speech and expression guaranteed under Article 19(1)(a) of the Constitution.

In paragraph-15 of the decision **in Baldev Singh vrs. State**, reported in (2002)3 SCC 667, it is held that freedom of speech and expression guaranteed under Article 19(1)(a) which includes of fair criticism of law and executive actions, could not be infringed on the ground of remote or speculative ground. In the case of **S.Rangarajan vrs. P.Jagjivan Ram**, (1989)2 SCC 574, it is held that the commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

The expression of thought should be intrinsically dangerous to the public interest.

So a person going to Press on behalf of the Association cannot be denied on the flimsy ground that he was acting in a manner subversive to the disciplinary authority. The allegation that the demand of the Association was endorsed to many agencies, like Collector & S.P. of Jharsuguda District, Collector & S.P. of Khurda District, Press and Media, who are in no way concerned with the problems of the O.P.G.C. cannot be said to be an act or conduct subversive to the disciplinary authority. So this charge as well as charge no.8, i.e., participation in public media, making statement with derogative words to the interest of the Company, is also vague.

9. Apart from this, if we consider the report of the Enquiry Officer as a whole, charge no.3, i.e., preventing the willing Executives from performing their duties, being not proved, the major charge, i.e., charge no.2 has no locus to stand. As there is no iota of evidence to suggest that the petitioner has forced and instigated any Executive to remain absent on 30.3.2007 availing casual leave, the finding of guilt under charge no.2 is based on evidence, as charge no.3 has not been proved.

10. Considering the entire facts and circumstances of the case, we are the opinion that the decision of the apex Court in the case of Obettee (P) Ltd. vrs. Mohd. Shafiq Khan, (2005) 8 SCC 46, on which the O.Ps. rely is totally different. In this case, though other similarly situated employees were not exonerated, they were visited with lesser punishment, as stated. So the facts of the aforesaid case are not applicable to the present case. However, looking at the entire nature of the case, we are of the opinion that the petitioner being the President of the Association has become a victim of the circumstances and he is more sinned than the sin. His punishment is shockingly disproportionate to the charges framed against him.

In the light of the decision of the apex Court in ***B.C. Chaturvedi vrs. Union of India,*** 1995 (6) SCC 749, we are of the view that the punishment imposed by the disciplinary authority as confirmed by the appellate authority shocks the conscience of the Court. Accordingly, we set aside the order of dismissal dated 25.3.2008 passed by Managing Director, O.P.G.C.L., O.P.3, and the appellate order communicated by letter dated 6.6.2009 by the Senior General Manager (P & A) and direct the opposite parties to reinstate the petitioner immediately and thereafter take a decision for imposing any lesser punishment other than dismissal, removal or compulsory retirement within a period of two moths from today. The writ petition is accordingly allowed.

Writ petition allowed.

2012 (II) ILR - CUT- 433

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

W.P.(C) NO. 13239 OF 2003 (Dt.06.03.2012)

DURYODHAN LENKA …….Petitioner.

.Vrs.

CHAIRMAN, BOARD OF DIRECTORS,
KALINGA GRAMYA BANK & ORS. ……..Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311 (2).

Disciplinary Proceeding – Petitioner working as Field Officer in Kalinga Gramya Bank – Dismissal from service – Punishment confirmed by appellate authority – Earlier this Court quashed both the orders and the Bank approached the Apex Court– Apex Court set aside the order and directed this Court to decide the writ petition afresh.

Non supply of documents basing on which charges are framed – Petitioner failed to raise proper defence to the charges – In this case the Disciplinary authority communicated the enquiry report to the petitioner to submit his comments but with regard to the findings of the disciplinary authority along with the proposed punishment no second show cause notice has been issued to the petitioner – Held, non-service of second show cause notice to the petitioner in the proposed punishment is a clear violation of principles of natural justice and contrary to the procedure prescribed in the guidelines – Punishment imposed cannot be sustained – Held, the enquiry report as well as the order of punishment passed by the disciplinary authority and the appellate authority are liable to be quashed – Direction issued that the petitioner be reinstated in service – Matter remitted back for fresh enquiry from the stage of submission of written statement of defence of the petitioner. (para 10 to 14)

Case laws Referred to:-

1.(2007) 1 SCC 338 : (Government of A.P. & Ors.-V-A.Venkata Raidu)

2.(2012)(I) OLR 180 : (Manoj Kumar Kar-V-Board of Directors, Kalinga Gramya Bank)

3.(2009)II SCC 266 : (Chairman, Ganga Yamuna Gramin Bank & Ors.-V-Devi Sahai)

For Petitioner - Mr. Budhadev Routray, Sr. Advocate.
For Opp.Parties - Mr. Manoj Mishra, Sr.Advocate

B.K.NAYAK, J. The petitioner, who was working as Field Officer in the Kalinga Gramya Bank, Naharana Branch, previously known as Cuttack Gramya Bank, has filed this writ application challenging the order of punishment of dismissal from service dated 21.6.2003 (Annexure-18) and also the affirming appellate order dated 21.11.2003 vide Annexure-19 with a further prayer to direct reinstatement of his service with all consequential service benefits.

2. It may be mentioned here that earlier this writ application had been disposed of vide judgment dated 13.4.2009 quashing the original and appellate orders of punishment under Annexures-18 and 19 with direction to reinstate the petitioner in service with 50% back wages, giving a liberty to the opposite parties-management to go for denovo disciplinary enquiry. The opposite party-Bank challenged the said judgment by filing Civil Appeal No.397 of 2010 (arising out of SLP (C) No.21235 of 2009) before the apex Court. By order dated 15.01.2010 the Hon'ble apex Court set aside the earlier judgment of this Court and remitted the matter directing this Court to decide the writ application afresh on merits. This is how the writ petition was again heard.

3. The case of the petitioner, as per averments made in the writ application is that while working as an Officer in the Head Office of the Cuttack Gramya Bank, a departmental proceeding was initiated against him and he was served with statement of allegations and articles of charges under letter dated 22.03.2003 of the disciplinary authority (Annexure-9) with a direction to submit his written statement of defence within seven days. The charges were served through a Special Messenger while the petitioner was on leave. The charges against the petitioner read as follows :

> "I) Sri Lenka did not work as per instruction given to him by the General Manager. He was instructed to exclusively look after deposit mobilization and to submit a weekly progress report. He did not function sincerely and properly and defied higher Officer's instructions. Thus, he violated Regulation 17 of Cuttack Gramya Bank Officers and Employees Service Regulation 2000.
>
> II) Sri Lenka did not obtain prior sanction of his leave nor informed in advance about his absence of duty. He did not resume his duty in bank's exigencies during Annual Closing in spite of two Telegrams

and three letters served to him. Thereby Sri Lanka has intentionally not carried out higher Official's order in violation of Service Regulation 17 and 19 of Cuttack Gramya Bank Officers and Employees Service Regulation 2000.

III) Sri Lenka has remained on sudden leave without any prior information/sanction in the month of Feburary/March'03 during Annual Closing work despite repeated instructions to him through Telephone/Telegram and letters. Sri Lenka's above action is detrimental to the interest of the Bank, thereby violated Regulation 22 of Cuttack Gramya Bank Officers and Employees Service Regulation 2000.

IV) Sri Lenka had sanctioned and disbursed four Gold Loan accounts at Brahmapura Branch where the pledged ornaments were spurious in nature and could not be auctioned. These loan accounts had become NPA and the bank suffered nearly a loss of Rs.18,300/- plus unapplied interest."

4. On 23.03.2003 the petitioner extended his leave on medical ground and by his letter dated 26.3.2003 under Annexure-10 requested the disciplinary authority-opposite party no.2 to grant 15 days further time for filing written statement of defence. On 28.3.2003 the petitioner submitted his preliminary written statement (Annexure-11) stating therein that he had not received any paper/documents relating to the charges as a result of which he was not in a position to admit or deny the charges in categorical terms and therefore requested for supply of papers/documents on the basis of which the charges were framed. It was further indicated therein that in letter No.CAD/HO/1630/2002-03 dated 05.03.2003 the General Manager alleged that he (petitioner) was accountable for four numbers of Gold Loan Accounts which turned NPA and the petitioner was advised to ensure that the accounts were regularised by 31.3.2003. Surprisingly he has been charged for disbursement of gold loans keeping spurious gold. The petitioner in the said preliminary defence statement undertook to submit his written statement of defence after receipt of the papers/documents relating to the charges.

It is stated that without supplying the relevant papers/documents, vide notification dated 19.04.2003 an Enquiry Officer was appointed and the Enquiry Officer sent letter dated 22.04.2003 directing the petitioner to appear before him on 30.04.2003 at 11.00 A.M. vide Annexure-12 series. However, the aforesaid letter dated 22.4.2003 of the Enquiry Officer was received by the petitioner on 01.05.2003, i.e., one day after the date fixed for enquiry. On

receipt of the Enquiry Officer's letter the petitioner on 02.05.2003 sent a representation (Annexure-13) informing the Enquiry Officer that he received the letter on 01.05.2003 and, therefore could not appear before him on the date fixed, i.e., 30.04.2003. Again on 08.05.2003 the petitioner received letter dated 30.04.2003 of the Enquiry Officer wherein he had been directed to attend the enquiry on 05.05.2003. It was therefore not possible on the part of the petitioner to appear before the Enquiry Officer on 05.05.2003 which was accordingly intimated by the petitioner to the Enquiry Officer vide Annexure-14 series. Thereafter letter dated 09.06.2003 of the Inquiry Officer was received by the petitioner along with written brief and the proceedings dated 08.05.2003, 28.05.2003 and 30.04.2003 indicating that the petitioner deliberately did not attend the enquiry fixed to 30.04.2003, 05.05.2003, 08.05.2003 and 28.05.2003 for which the Enquiry Officer permitted the proceeding to continue ex-parte on 28.05.2003, on which date the Presenting Officer (in short 'the P.O.') submitted ten numbers of documents on behalf of the management marked ME-01 to ME-10 and proceeded with the case through self examination and accordingly the enquiry was completed on 28.05.2003 with a direction to submit written brief/statement, if any, by the P.O. and the petitioner within 12.06.2003 and that the P.O. submitted his written brief on 07.06.2003. The letter also indicated that xerox copies of the written brief submitted by the P.O. along with the ten numbers of documents submitted by him in the enquiry were sent to the petitioner, who was requested to submit his written brief/statement within 12.06.2003 positively failing which enquiry report would be submitted to the disciplinary authority as per rules. The said letter of the Enquiry Officer along with the enquiry proceedings dated 08.05.2003 and 28.05.2003 and 30.04.2003 have been annexed as Annexure-15. It is, however, averred that copies of ten numbers documents produced by the P.O. during enquiry as referred to in the letter of the Enquiry Officer dated 09.06.2003 were not sent along with the proceedings of the enquiry. It is stated that the said letter dated 09.06.2003 (Annexure-15) was received by the petitioner on 23.06.2003 as apparent from the postal acknowledgement for which it was practically impossible on the part of the petitioner to submit his written brief by 12.06.2003. However, as it appears on 12.06.2003 itself the Inquiry Officer submitted enquiry report to the disciplinary authority, who by his letter dated 13.06.2003 under Annexure-16 communicated the enquiry report to the petitioner with a direction to submit his comments within a week. The said letter of the disciplinary authority was received by the petitioner on 25.6.2003 and before that by his order dated 21.6.2003 the disciplinary authority dismissed the petitioner from service and the letter communicating such order of dismissal vide Annexure-18 was also received by the petitioner on 25.06.2003.

5. Challenging the order of dismissal from service the petitioner preferred an appeal before the appellate authority within the stipulated time, but the said appeal was dismissed and the order of disciplinary authority was confirmed vide order dated 22.11.2003 of the appellate authority under Annexure-19.

6. It is averred that being the General Secretary of Kalinga Gramya Bank Officers Association, the petitioner brought to the notice of the authority the genuine grievances of the Association members time and again in spite of caution by the Chairman-opposite party no.2 to the petitioner to refrain from Association activities for which due to personal bias and out of malafide motive the petitioner has been dismissed from service without giving him opportunity to file his written statement of defence and without supplying him the necessary documents and in utter violation of principles of natural justice. It is also stated and submitted that non-providing of reasonable opportunity to the petitioner to answer the charges and to defend himself is violative of Regulation 38 (1) (b) (v) (c) of the Kalinga Gramya Bank Officers and Employees Service Regulation (in short 'the Regulation'). It is also stated that non-providing to the petitioner reasonable opportunity of being heard in respect of the charges violated mandate of Article 311 (2) of the Constitution.

7. It is further submitted that Charge No.4 against the petitioner is not only based on no records as because the petitioner not only handed over the gold ornaments along with the accounts to his successors but also such accounts were duly verified by his successor who found that the gold were genuine which would be evident from the charge reports with regard to taking over the charge by his successor and, therefore, any subsequent detection about the spurious nature of gold ornaments cannot be attributed to the petitioner. It is also stated that keeping in view the nature of charges which are said to have been proved the extreme punishment of dismissal from service is highly disproportionate and excessive.

8. A counter affidavit has been filed by the opposite parties wherein it is stated that the domestic enquiry was conducted and the final order of punishment was passed in due observance of proper procedure laid down in the Regulation and there has been no violation of principle of nature justice. It is further stated that considering the gravity of the charges of misconduct, viz., gross financial irregularities, violation of delegated discretionary power and wilful disobedience of the orders of the authority, it cannot be said that the punishment is arbitrary or disproportionate. It is stated that though summons (notices) were sent to the petitioner by postal certificate of posting,

personal services (Peon Book), Registered/Speed Post and by reputed private Couriers also, the petitioner falsely stated to have not received the summons to attend the enquiry proceeding in time and that the disputed questions of fact relating to service of notices on the petitioner cannot be considered in the writ jurisdiction. It is also that letter dated 22.04.2003 was sent to the petitioner to his residence in Cuttack and to his Branch under certificate of posting, through Peon/Speed Post. While by post it was sent on 25.4.2003, the Peon went to his house with the said letter on 23.04.2003 and 24.04.2003 and reported that the petitioner was absent on those dates. It is stated that the different postal receipts and the Courier receipts would go to show that the petitioner managed to delay the service of postal letters and refused the letter sent through DTDC Courier. It is further stated that when special business target was given to the petitioner, in order to shirk his responsibility and to avoid the work entrusted to him, he deferred the work on one ground on the other and ultimately submitted leave application from 19.02.2003 and went on extending the leave on medical ground without any acceptable medical certificate only with a view to avoid the work which is nothing but wilful disobedience of the orders of the authority. The leave applied for by him was not granted by the authorities but refused. The petitioner having failed to perform the work entrusted to him, the management called for report and explanation from him and show cause was issued as to why disciplinary action shall not be initiated against him. Annexure-6 reveals that despite issue of reminder to submit the deposit mobilisation report and to discuss with the General Manager, the petitioner did not accomplish the same, but on the other hand, went on procrastinating on one pretext or another. It is stated that the involvement of the petitioner in the irregularities in the gold loan amounts came to the notice of the Bank much later and the spuriousness of the gold came to light when policy of auctioning the gold was adopted for recovering the loan amount. The allegation that documents relied upon by the management were not supplied to the petitioner has been refuted and it is stated that the documents were not sent to the petitioner under letter dated 09.06.2003. Lastly, it is submitted that the enquiry was conducted giving adequate opportunity to the petitioner and as per provision of Cuttack Gramya Bank (Officers and Employees) Service Regulations 2000 and that the Inquiry Officer, the disciplinary authority and the appellate authority have rightly found the petitioner guilty and accordingly imposed just punishment.

9. In the enquiry report forwarded to the petitioner under Annexure-16, the Enquiry Officer has stated that enquiry was conducted on 30.04.2003, 05.03.2003 (date is wrongly mentioned in place of 05.05.2003), 08.05.2003, 28.05.2003 and notices for holding the enquiry on the above four dates have

been served on the C.S.O. (petitioner) properly giving him sufficient time and opportunity to attend the enquiry. At the same time, it is stated that the notices sent through speed post or through registered post to the petitioner to attend the enquiry on different dates were received by him after the scheduled enquiry dates but however notices sent through courier fixing the dates of enquiry to 08.05.2003 and 28.05.2003 were refused by him. The Enquiry Officer has therefore, concluded that the petitioner in connivance with the postal authorities received the enquiry notices late deliberately in order to avoid the enquiry. This conclusion, in our view, is purely imaginary and based on conjecture rather than on any material. It has also been held by the Enquiry Officer that the petitioner acknowledged vide his letters dated 02.05.2003 and 08.05.2003 about late receipt of enquiry notices and, therefore, he was aware about the enquiry proceeding and, therefore, if he would have intended to attend the enquiry he could have easily and comfortably done so by communicating from his side. This reasoning of the Enquiry Officer is wholly fallacious because fixing of dates of enquiry of a proceeding is at the discretion of the Enquiry Officer and not at the option of the delinquent. Therefore, giving reasoning as aforesaid and coming to the conclusion on that basis that the petitioner was duly served with notices and given adequate opportunity to defend himself cannot be accepted. As against the contention of the learned counsel for the opposite parties that the petitioner managed with the postal staff to receive the notices sent by post belatedly, which we have already rejected, the learned counsel for the petitioner submits that the endorsements of refusal on the two envelops of notices sent through private courier, DTDC are also managed by the Bank authorities without actual delivery of the notices to the petitioner as the said courier service provider is the regular service provider of the Bank in question. On perusal of the copies of two envelops returned to the Bank by the courier filed under Annexure-B series and E to the counter affidavit, it is found that they do not bear the signature of any witness. We therefore hold that there was no due service of notice by the Enquiry Officer to the petitioner about the dates fixed for enquiry.

10. During the enquiry the Presenting Officer filed ten documents which were exhibited as ME-01 to ME-10 but did not examine any witness. On the basis of the exhibited documents the Enquiry Officer stated that the charges against the petitioner have been proved. The disciplinary authority passed the final order holding that sufficient opportunity was given to the C.S.O. in the departmental proceeding and that the charges levelled against him have been proved beyond reasonable doubt. It was further held by him that the charges involved serious financial irregularities committed by the petitioner in gold loan accounts by keeping spurious gold ornaments as pledge as a

result of which the bank sustained financial loss of Rs.18,300/- and further that the petitioner was careless, negligent and disobedient to official instructions and did not join his duty despite repeated reminders sent to him by the General Manager and Senior Manager and did not attend to his duties in mobilizing deposit and neglected in submitting weekly reports to the General Manager. The disciplinary authority also took into account the past misconduct of the petitioner stating that the petitioner was earlier charge-sheeted on 11.01.2000 and cautioned by the Board of Directors of the Bank and was also once earlier warned for his misconduct. The disciplinary authority therefore concluded that the bank has lost confidence on the petitioner and agreeing with the findings of the Enquiry Officer passed order dismissing the petitioner from service with immediate effect. In appeal filed by the petitioner, the appellate authority confirmed the order of dismissal passed by the disciplinary authority.

11. Apart from the fact that there was no due service of notice by the Enquiry Officer to the petitioner about the dates fixed for enquiry, undisputedly the petitioner after receipt of the charge-sheet, by his letter dated 26.03.2003 under Annexure-10 asked for fifteen days further time for filing his written statement of defence and by his letter dated 28.03.2003, Annexure-11 inter alia asked for supply of papers/documents basing on which the charges were framed in order to facilitate him to submit his written statement. Apparently, there was neither any reply to his aforesaid letters nor the documents on the basis of which charges were framed were supplied to him, which is nothing but violation of principle of natural justice. Non-supply of documents by the authorities definitely handicapped the petitioner in raising proper defence to the charges framed.

It has been held in the case of ***Government of A.P. and others v. A. Venkata Raidu;*** (2007) 1 SCC 338.

> "9. xxx xxx It is a settled principle of natural justice that if any material is sought to be used in an enquiry, then copies of that material should be supplied to the party against whom such enquiry is held."

12. In the ex-parte enquiry ten documents vide ME-01 to ME-10 were led into evidence by the management. It is to be seen as to how these documents were considered in proof of charges. ME-01, ME-04, ME-05 and ME-07 have been referred to by the Enquiry Officer in proof of Charge No.1. Similarly, ME-02, ME-06, ME-08, ME-09 and ME-10 were relied upon to prove Charge No.2. In support of Charge No.3, the Enquiry Officer has

stated that the PO submitted ME-02, ME-06, ME-08, ME-09 and ME-10. In proof of Charge No.4 only ME-03 was pressed into service. It is worthy to note that neither the Enquiry Officer nor the disciplinary authority, nor the appellate authority has referred to the contents of the aforesaid documents in ME-01 to ME-10 and appreciated the same, except stating that they prove the charges. On the direction of this Court the learned counsel for the opposite parties has produced the record of the disciplinary proceeding conducted against the petitioner. The documents except ME-02 and ME-03 are some letters and telegrams addressed to the petitioner by the authorities. ME-02 is the leave application of the petitioner along with Hospital outdoor ticket with prescription of some medicines. Except ME-03 the other documents have been relied upon in proof of Charge Nos.1 to 3, though the copies of those documents were never supplied to the petitioner in order to enable him to have his say on the documents. We are conscious of the legal position that in exercise of power of review the court cannot reappreciate the evidence like an appellate court. But in the instant case evidence having not been appreciated by the Enquiry Officer and the disciplinary authority it is felt necessary to look to the contents of ME-03. ME-03 is a copy of the letter dated 28.3.2003 purportedly sent to the General Manager in the Head Office of the Bank by the Manager, Cuttack Gramya Bank, Brahamapura Branch, in response to the head office letter No.CAD/HO/1564/02-03 dated 19.02.2003. In ME-03, it is indicated that four numbers of NPA gold loan accounts outstanding at the Brahamapura Branch office were sanctioned by the petitioner, who was the Ex-Manager of the Branch, and the said accounts are fictitious in nature and some of them are spurious, which has been reported to the head office. It is further clarified in the said letter that it was the prime duty of Sri Adwait Swain, Ex-Manager of the Branch in whose period the accounts were treated as NPA. It is further indicated in the said letter that as per the Branch observation both Mr. Lenka (petitioner) and Mr. Swain are to be equally accountable for the gold loan accounts. Lastly in the letter the four account numbers and the outstanding dues totally amounting to Rs.18,300/- has been indicated. Though ME-03 was sent in response to head office letter no. CAD/HO/1564/02-03 dated 19.02.2003, the said head office letter has not been led into evidence in the enquiry. Further even though it is indicated in the letter that an earlier report was sent to the head office about the fictitious nature of the gold loan account, the said report is also not forthcoming. There is no indication in the letter as to when the pledged gold ornaments were put to auction and which of them was found to be spurious so that no auction could be conducted in respect thereof. Evidently neither the Enquiry Officer nor the disciplinary authority has referred to the contents of ME-03 and given any finding whether the contents prove Charge No.4.

In similar circumstances in the decision reported in (2012) (I) OLR-180; ***Manoj Kumar Kar v. Board of Directors, Kalinga Gramya Bank,*** where the Enquiry Officer and disciplinary authority held the charge proved merely stating that they examined the document produced by the P.O., this Court held that no reasons having been assigned the finding suffer from total non-application of mind.

13. It is submitted by the learned counsel for the petitioner that although under his letter vide Annexure-16 the disciplinary authority merely communicated the enquiry report to the petitioner with a direction to submit his comments within a week, which was received late by the petitioner, but with regard to the findings of the disciplinary authority along with the proposed punishment no second show cause notice has been issued to the petitioner. Learned counsel for the opposite parties relying on the decision of the apex Court reported in (2009) II SCC 266; ***Chairman, Ganga Yamuna Gramin Bank and others v. Devi Sahai*** has submitted that issuance of second show cause notice is not necessary unless there is any specific provision to that effect in relevant rules or regulations. In the rejoinder affidavit filed by the learned counsel for the petitioner it is stated that no procedure for conducting disciplinary proceeding has been provided in the Regulations and, on the other hand, NABARD, which is the controlling authority of the Regional Rural Banks, issued guidelines to conduct the disciplinary proceeding and on the basis of the said guidelines, disciplinary proceedings are conducted by the present Bank. Clause-20 of NABARD guidelines which has been filed as Annexure-21 to the rejoinder affidavit clearly stipulates that having decided the punishment the disciplinary authority should issue a show cause notice to the official concerned and in that notice the official should be advised for the reasons on which the authority has come to the conclusion that the official is guilty and to show cause as to why the proposed penalty should not be imposed on him. It has also been brought to our notice that such second show cause notices have been issued to delinquents in other disciplinary proceedings by the disciplinary authorities of the Bank indicating the proposed punishment with advice to show cause and to appear before the disciplinary authority for personal hearing on the question of proposed penalty. In such circumstances, the decision cited by the learned counsel for the petitioner is not applicable to the facts and circumstances of this case. We, therefore, hold that non-service of the second show cause notice to the petitioner on the proposed punishment is a clear violation of principle of natural justice and also contrary to the procedure prescribed in the guidelines and, therefore, punishment imposed cannot be sustained. Some other decisions

have been cited by the opposite parties, which are not necessary to be adverted to as they are not relevant for our purpose.

14. In view of our findings in the foregoing paragraphs, we have no hesitation to hold that the enquiry report as well as the order of punishment passed by the disciplinary authority and the appellate authority under Annexures-18 and 19 are unsustainable and liable to be quashed and accordingly we quash the same and direct that the petitioner be reinstated in service. In view of our findings that there was clear violation of principles of natural justice, we remit the matter back for fresh enquiry from the stage of submission of written statement of defence of the petitioner. To cut short the delay, we direct that the petitioner shall appear personally before the disciplinary authority on 30.03.2012, on which date copies of ME-01 to ME-10 be supplied to the petitioner, and the disciplinary authority shall fix a date for de novo enquiry by the Enquiry Officer, or by appointing a fresh Enquiry Officer if the earlier Enquiry Officer is not available, and intimate the same to the petitioner. The petitioner shall furnish his written statement of defence before the date fixed by the disciplinary authority for fresh enquiry.

Considering the earlier submission of the learned counsel for the petitioner we direct that 50% of the back wages from the date of dismissal till the reinstatement shall be paid to the petitioner within a month from the date of reinstatement. The writ application is accordingly disposed of.

Writ petition disposed of.

2012 (II) ILR - CUT- 444

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

W.P.(C) NO. 3282 OF 2007 (With Batch) (Dt.15.05.2012)

SUBASH CHANDRA MISHRA & ORS. .....Petitioners

.*Vrs.*

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

REGULATIONS OF THE BOARD OF SECONDARY EDUCATION,ORISSA – REGULATION 17 (2) (i).

Appointment/Promotion to the post of Headmaster of High School – Eligibility – Regulation 17 guides the field which brought in to force w.e.f 29.04.1977 – Every institution to have a Headmaster, who must be a trained graduate and must have seven years of teaching experience as trained graduate teacher – No vested right accrued in favour of teachers promoted to the post of Headmaster without having seven years of teaching experience after training – Held, any appointment made subsequent to 29.04.1977 and contrary to the provisions of the above regulation would be void/invalid and would not confer any right on the appointee.

(Para 14)

Case laws Referred to:-

1.1993(I) OLR-303 : (Golakh Chandra Mohanty & Ors.-V-State of Orissa & Ors.)
2.1996(I) OLR-145 : (Priti Ranjan Pradhan & Ors.-V-State of Orissa & Ors.)
3. (1951)342 US 98 : (United States-V-Munderlich)
4.AIR 1967 SC 1301 : (Dr. Nim-V- Union of India)
5.(1927)277 US 32 : (Louisville Gas & E. Co.-V-Coleman)
6.AIR 1974 SC 2349 : (Union of India-V- Parameswaran Match Works)
7.AIR 1980 SC 271 : (dg Gouse & Co.-V-State of Kerala)
8.(1990)3 SCC 368 : (State of Bihar-V- Ramjee Prasad)
9.AIR 1994 SC 2750 : (Union of India & Anr.-V-Sidhir Kumar Jaiswal)
10.JT 2001(1) SC 473 : (Pabitra Mohan Das etc.-V-State of Orissa & Ors.)
11.(2006)8 SCC 662 : (Union of India-V-Madras Telephone SC & ST Social Welfare Association)
12.2008 AIR SCW 4294 : (State of West Bengal & Ors.-V-Kamal Sengupta & Anr.)

13.104(2007)CLT 737 : (M/s.Kalinga Mining Corpn. -V- Union of India & nine Ors.)
14.JT 2009(2) SC 256 : (Baburam-V- C.C.Jacob & Ors.)
15.JT1995(2) SC 351 : (R.K.Sabharwal-V- State of Punjab & Ors.)
16.AIR 1196 SC 188 : (S.R. Bhagwat & Ors.-V-State of Mysore)
17.(2011)6 SCC 570 : (J.S. Yadav-V-State of U.P.& Anr.)
18.AIR 1976 SC 1643 : (L.G. Golak Nath & Ors.-V-State of Punjab & Anr.)
19.AIR 2011 SC 1169 : (Jayadeep Mukharjee-V-State of West Bengal & Ors.)
20.AIR 2011 SC 2161 : (Shankar Cooperative Housing Society Ltd.-V-M.Prabhakar & Ors.)
21.1978(2)SLR 836 : (Ram Sarup-V-State of Haryana & Ors.)
22.(2003)12 SCC 53 : (State of Orissa & Ors.-V-Subhranta Ku.Mohanty & Arn.)
23.(2002)4 SCC 638 : (Director of Settlements,A.P. & Ors.-V-M.R. Apparao & Anr.)

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L. MOHAPATRA, J. Two Full Bench decisions of this Court regarding eligibility for promotion/appointment to the post of Headmaster of a High School could not resolve the dispute and the controversy existed resulting in a reference made to the Special Bench and in the opening paragraph of the judgment, the Special Bench made the following observation:-

> "Controversy regarding eligibility for promotion/appointment to the post of Headmaster of a High School has existed notwithstanding two Full Bench decisions of this Court and, therefore, the Special Bench has been constituted to resolve the controversy."

Unfortunately, notwithstanding the decision of the Special Bench confirmed by the Hon'ble Supreme Court, the controversy still exists and the present batch of cases only relate to that controversy.

2. The facts leading to filing of the batch of writ applications are as follows:-

Originally, Orissa Service Code held the field relating to appointments to various categories of posts in educational institutions. The Orissa Education Act, 1969 and the Orissa Secondary Education Act, 1953 were enacted subsequently and Regulations of Board of Secondary Education were made under the Secondary Act. The first controversy arose in relation to the question as to whether seven years teaching experience as Trained Graduate Teacher is necessary to make an Assistant Teacher eligible for promotion/appointment to the post of Headmaster of a High School for consideration by a Full Bench of this Court in the case of ***Golakh Chandra Mohanty and others Vrs. State of Orissa and others*** reported in ***1993(I) OLR-303.*** The Full Bench disposed of the writ application with the following conclusions:-

"26 (1) Seven years teaching experience as trained graduate teacher was necessary for an assistant teacher to be promoted to the post of Headmaster with the aid of Rule 8(2)(b) of the 1974 Rules in those cases where the appointments had been made on or after 29-4-1977, when the amended regulation 17(2)(I) of the Board's

Regulations had come into force. This applies both to aided and unaided schools. This applied both to aided and unaided schools.

(2) The promotions of incumbents made even after 29-4-1977 despite their not having had the requisite qualification (i.e. seven years teaching experience as trained graduate teacher) would not be reopened if the appointments have already been approved.

(3) Those cases of promotion relating to which approval orders have not been passed by today shall be decided keeping in view what we have stated above namely, that if the incumbents had acquired the requisite qualification before 3.6.1988, the promotions/appointments shall be approved.

(4) Those cases in which the requisite qualification had not been obtained before 3-6-1988 shall not be approved and the posts shall be treated as vacant on and from 3.6.1988 and shall be filled up by complying with the requirements of Rule 8(3) of the 1974 Rules.

(5) Rule 8(3) of the 1974 Rules applies to all aided schools irrespective of whether the school has started receiving full salary cost or not."

3. While the law laid down in the said Full Bench decision was holding the field again a reference was made to the Full Bench on the very same question in the case of ***Priti Ranjan Pradhan and others Vrs. State of Orissa and others*** reported in ***1996(I) OLR-145*** and the Full Bench in the said case, affirmed the conclusions arrived at by the earlier Full Bench in the case of *Golakh Chandra Mohanty (supra)* and observed in the concluding paragraph that the decision of the Full Bench of this Court in the case of *Golakh Chandra Mohanty (supra)* does not need reconsideration. The matter was again referred to a Special Bench in a batch of cases, the first case being of *Priti Ranjan Pradhan.* The Special Bench disposed of the batch of writ applications with the following conclusions:-

"19 (a) The decision of the Full Bench of this Court in Golakh Chandra Mohanty's case (supra) as contained in sub-paras (2), (3) and (4) of paragraph 26 is contrary to law. In paragraph 26(2) of the judgment, use of expression 'appointments' is admittedly improper as there is no question of direct appointment. In paragraph 20, the Full Bench itself observed that all posts were to be filled up as required by Rule 8(3) of the Rules. Regulation 17(2) of Chapter IX of the Board's Regulation is applicable to both aided and unaided institutions and

only when a person is a trained graduate with minimum of seven years of experience after training is eligible to become as Headmaster.

(b) In Priti Ranjan's case (supra) the second Full Bench observed that the date 3.6.1988 has rational nexus with the object sought to be achieved by the provisions. The conclusion is indefensible in view of the analysis made above. The basis for such conclusion was enactment of Rule 8(3). In view of the analysis made that the Regulation 17(2)(i) operated at all times, the basis for such conclusion does not hold good. The conclusion in Golakh Chandra Mohanty case (supra) as followed in Priti Ranjan Pradhan's case (supra) that in cases where prescribed qualifications had not been acquired by 3.6.1988, but were acquired subsequently were to be approved is clearly without any basis.

That there can be no arbitrariness in fixation of even a cut off date is not disputed before us by the learned counsel for the parties. This stand has been correctly taken, because after Article 14 has spread its wing in the field of administrative law following what principally held in Maneka Gandhi's case (AIR 1978 SC 597), no stand can be taken by any administrative authority that it can act arbitrarily. Indeed, even before the decision in Maneka Gandhi, law was that no administrative authority has absolute discretion to decide a matter within its competence the way it chooses. This has been the accepted position and the apex Court had cited with approval what had been stated in this regard in **United States v. Munderlich:** *(1951) 342 US 98,* the relevant part of which reads as below:

"Law has reached its finest moments, when it has freed men from unlimited discretion of some ruler, some official, some bureaucrat. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other invention."

In so far as fixation of cut off date is concerned, the same can be regarded as arbitrary by a Court if the same be one about which it can be said that it has been 'picked out from a hat' as was found to be by the apex Court in **Dr.Nim v. Union of India :** *AIR 1967 SC 1301* because of which fixation of 19.5.1991 as the date for the concerned purpose was held to be invalid.

As to when choice of a cut off date can be interfered was stated by *Holmes, J.* in **Louisville Gas and E. Co. v. Coleman: (***1927) 277 US-32* by stating that if the fixation 'be very wide of any reasonable mark' the same can be regarded arbitrary. What was stated by Holmens, J. was cited with approval by the apex Court in **Union of India v. Parameswaran Match Works :** *AIR 1974 SC 2349* in paragraph 10 by also stating that choice of a date cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. It was further pointed out where a point or line has to be, there is no mathematical or logical way of fixing it precisely, and so, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide of any reasonable mark.

The aforesaid decision was cited with approval in **DG Gouse and Co. v. State of Kerala :** *AIR 1980 SC 271 : so also in* ***State of Bihar v. Ramjee Prasad : (****1990) 3 SCC 368 : AIR 1990 SC 1300.* The position was again reiterated in **Union of India and another v. Sudhir Kumar Jaiswal :** *AIR 1994 SC 2750.*

(c) The orders of approval passed by the Inspector of Schools are of no consequence and do not have any force on the question of promotion in terms of Rule 8(3)."

4. In a similar matter in the case of *Pabitra Mohan Das etc. Vrs. State of Orissa and others,* the question came up for consideration before the Hon'ble Supreme Court and the decision of the Special Bench of this Court was also considered by the Hon'ble Supreme Court. The law laid down by the Special Bench was affirmed by the Hon'ble Supreme Court and a part of paragraph-7 of the judgment in the case of *Pabitra Mohan Das (supra)* dealing with the controversy is quoted below:-

"Having examined the rival contentions and on a thorough scrutiny of two earlier Full Bench decisions as well as the impugned judgment of the Special Bench we are of the considered opinion that the Special Bench rightly thought it appropriate to reconsider the entire matter afresh and re-determine the issues involved in the light of the relevant provisions of the Act, Rules and Regulations after hearing at length on all issues and there was no infirmity on that score even though the point of reference was of a limited nature. Courts exist to interpret the law and while examining the provisions

of any Act, Rule or Regulation, if it is felt that the earlier decision on the question is not clear on any particular issue or has created confusion in resolving the disputes or has caused hardship to a group of people, it would be the duty of the court to re-examine the matter after giving opportunity to all parties concerned and by such process question of taking away anybody's vested right does not arise. In the case in hand it is not a particular writ or order that had been issued in favour of any individual which is sought to be nullified by the subsequent Special Bench decision. On the other hand the erroneous conclusion of the relevant provisions of the Act, Regulation and Rules are sought to be corrected and we see no infirmity in this approach of the Special Bench. That apart, though point of reference may be of a limited nature but in answering the same if the Court feels that it would be in the interest of justice to constitute a larger Bench and examine the correctness of any earlier conclusion which might have been made on an erroneous interpretation of any provision, then there would be no fetter for adopting that procedure. In this view of the matter we see no infirmity with the approach of the Special Bench in re-examining the issues afresh in the light of the relevant provisions of the Act, Rules and Regulations. We have also carefully examined the conclusions of the impugned judgment of the Special Bench and we are unable to persuade ourselves to agree with the submission of Mr.Ranjit Kumar that the said conclusions are either erroneous on interpretation of relevant provisions or in any way intended to take away the rights of any persons who have got the benefit of the earlier Full Bench decision. It is not disputed that with effect from 29.4.1977, Regulation 17 in the Board of Secondary Education has been brought into force which makes it obligatory for every institution to have a Headmaster who must be a trained graduate and must have 7 years of teaching experience as a trained graduate teacher. If subsequent to 29.4.1977 any appointment has been made to the post of Headmaster contrary to the aforesaid provisions of the Regulation then the said appointment would be invalid appointment and would not confer any right on the appointee. The expression 'approval' used in the second direction in Golakh Chandra Mohanty's case is referable to the approval contemplated under Rule 8(2)(b) of the Recruitment Rule and, therefore, if there has been an approval by the Director then in such a case the appointment made after the prior approval would not be invalidated. In our considered opinion the conclusion of the Special Bench that an approval of the Inspector

is no approval in the eyes of laws is the correct position, and as such, does not require any interference by this Court."

5. The decision rendered in the case of *Priti Ranjan Pradhan (supra)* by a Special Bench is reported in 1991(I) OLR-187 and the decision of the Hon'ble Supreme Court in the case of ***Pabitra Mohan Das etc. Vrs. State of Orissa and others*** has been reported in ***JT 2001(1) SC 473***.

6. The judgment of the Special Bench having not been implemented, a Contempt Application was filed before this Court vide OCRMC No.454 of 2001 by the Assistant Teachers. After notice was issued in the said Contempt Application, Government by order dated 9.7.2002 reverted the 854 Headmasters to the post of Trained Graduate Teachers. Again on 13.12.2002 some of the Assistant Teachers without disclosing the fact of pendency of OCRMC No.454 of 2001, filed a Contempt Application bearing No.632 of 2002 before the Hon'ble Supreme Court alleging violation of the judgment passed in *Pabitra Mohan Das* case, but the said Contempt Application was dismissed on 13.12.2002 by the Apex Court. While the matter stood thus, the Government issued a resolution on 22.1.2003 to rehabilitate the 854 reverted Headmasters against the ex-cadre posts meant for reserved category teachers on condition that as and when the said posts of Headmasters marked for reserved category are filled up from the reserved category Trained Graduate Teachers they shall be reverted to the post of teachers. Sometime after the said order was passed, again another order was passed by the Department revoking the earlier order of reversion. Therefore, the batch of Original Applications was filed before the Tribunal in the year 2005 challenging the said resolution. The said Original Applications filed before the Tribunal having been allowed in the impugned judgment, these batch of writ applications have been filed.

7. Shri K.K.Swain, learned Counsel, Sri J.K.Rath, learned Senior Counsel, Shri G.A.R.Dora, the learned Senior Counsel, Shri S.K.Padhi, learned Senior Counsel and Shri Jagannath Pattnaik, learned Senior Counsel appearing on behalf of the petitioners assailed the impugned judgment of the Tribunal on the following grounds:-

(1) The petitioners were beneficiaries of the first judgment delivered by the Full Bench of this Court in the case of *Golakh Chandra Mohanty (supra)*. Their promotion to the posts of Headmaster was protected in the said judgment and a direction was issued by the Court in the said Full Bench decision that promotions of incumbents made even after 29.4.1977 despite their not having had

the requisite qualification i.e. seven years experience as trained graduate teacher, would not be reopened if the appointments have already been approved. The above protection given by the First Full Bench was again affirmed by the Second Full Bench in the case of *Priti Ranjan Pradhan (supra)*. The law was changed by the Special Bench only in the year 1999 in a batch of cases, the first case being of *Priti Ranjan Pradhan (supra)*. Therefore, the law laid down by the First Full Bench in the case of *Golakh Chandra Mohanty* (supra) governed the field from 1993 till 1999 when the Special Bench judgment was delivered. It was therefore contended that even if the law has been changed by the Special Bench, the benefits extended to the petitioners by virtue of the previous Full Bench decision cannot be taken away and the doctrine of prospective overruling applies.

(2) In between 1993 to 1999 either in pursuance of the orders passed by this Court in different Writ Applications or by order of the Director, promotions of the 854 teachers to the post of Headmasters had been approved and the matter had attained finality between the parties. The judgments of this Court in those Writ Applications and the orders passed by the Director approving such promotion having not been challenged or questioned at any point of time, the 854 Headmasters could not have been reverted to the post of Trained Graduate Teachers solely on the basis of Special Bench decision, specially when neither the Special Bench nor the Hon'ble Supreme Court while affirming the decision of the Special Bench directed reversion of all the 854 Headmasters to the post of Trained Graduate Teachers.

(3) The schools in which 854 teachers were working had been taken over by the State Government in the year 1994 and, therefore, 1974 Rules governing service conditions of teachers working in the aided schools have no application to the case of the 854 Headmasters and, accordingly, taking recourse to 1974 Rules, they could not have been reverted to the post of Trained Graduate Teachers.

(4) The question before the Tribunal for determination was with regard to legality of the order adjusting 854 Headmasters against the ex-cadre posts as well as the order revoking the earlier order of reversion. Therefore, there was no necessity to go into the entire history of the case as most of the petitioners either by virtue of the order of the High Court or by order of the Director had got an order of

approval for their appointment/promotion to the posts of Headmaster and those orders having not been challenged, the Tribunal had no jurisdiction to hold that approval of such appointment/promotion was bad. Had this question been raised before the Tribunal, it could have been possible on the part of the petitioners to fruitful their submissions that those orders of approval had attained finality long back and could not be challenged before the Tribunal after the period of limitation was over.

8. Shri Sanjit Mohanty, learned Senior Counsel, Shri Aswini Kumar Mishra, learned Senior Counsel and Shri R.K.Rath, learned Senior Counsel appearing on behalf of the private opposite parties submitted that challenging the order of reversion in pursuance of the Special Bench decision, all the 854 reverted Headmasters had filed Original Applications before the Tribunal. Their Original Applications were dismissed by the Tribunal and the judgment of the Tribunal was challenged in this Court. While the matter was pending before this Court, the order dated 22.1.2003 was issued by the State Government to rehabilitate the 854 reverted Headmasters against the ex-cadre posts and, thereafter, the said Writ Applications were withdrawn from this Court. The said judgment of the Tribunal attained finality as the Writ Applications filed against the judgment of the Tribunal were withdrawn before any decision could be rendered in the said Writ Applications. Now therefore, it is no more open for the petitioners to say that the order of reversion was illegal.

9. It was also contended that not only when the matter was being heard by the Special Bench but also when the case was being heard by the Hon'ble Supreme Court, a prayer was made on behalf of some of the petitioners that they being beneficiaries of the decision of the First Full Bench in the case of *Golakh Chandra Mohanty (supra)*, their promotions should not be affected by the decision of the Special Bench. Such contention was considered and negatived by the Hon'ble Supreme Court on the ground that the teachers having been promoted to the posts of Headmaster without having seven years of teaching experience after training, no vested right accrued in their favour. Therefore, not only the Special Bench but also the Hon'ble Supreme Court rejected the said submission of the petitioners which is being advanced before this Court in the present batch of Writ Applications.

10. The first contention of the petitioners relates to applicability of doctrine of prospective overruling. It was contended that the petitioners are beneficiaries of the First Full Bench decision of this Court rendered in the case of *Golakh Chandra Mohanty (supra)* and the law laid down in the said

decision governed the field till 1999 when the Special Bench decided in the case of *Priti Ranjan Pradhan (supra)* that conclusions (2) (3) and (4) *in Golakh Chandra Mohanty (supra) are* contrary to law. In support of such submission, reliance was placed on a decision of the Hon'ble Apex Court in the case of ***Union of India Vrs. Madras Telephone SC & ST Social Welfare Association*** reported in ***(2006) 8 Supreme Court Cases 662***. In the said reported case, a prayer was made by the applicants to clarify the observation made by the Hon'ble Apex Court in its judgment and order passed in *Union of India Vrs. Madras Telephone SC & ST Social Welfare Association's* case which protects their seniority and consequent promotion of persons, who had judgments in their favour from the Central Administrative Tribunal duly confirmed by the Hon'ble Apex Court and thus attained finality. In paragraph-19 of the judgment, the Hon'ble Apex Court observed and directed that such of the applicants whose seniority had been determined by the competent authority, and who had been given benefit of seniority and promotion pursuant to the orders passed by Courts or Tribunals following the principles laid down by the Allahabad High Court and approved by the Hon'ble Apex Court, which orders have since attained finality, cannot be reverted with retrospective effect. The determination of their seniority and the consequent promotion having attained finality, the principles laid down in later judgments will not adversely affect their cases. Reliance was also placed on a judgment of the Hon'ble Apex Court in the case of ***State of West Bengal and others Vrs. Kamal Sengupta and another*** reported in ***2008 AIR SCW 4294.*** In paragraph-28 of the judgment, while laying down the principles relating to power of review, it was held that a decision/order cannot be reviewed on the basis of subsequent decision/judgment of a coordinate or larger Bench of the Tribunal or of a superior Court. Similar view was also expressed by this Court in the case of ***M/s. Kalinga Mining Corporation Vrs. Union of India and nine others*** reported in **104 (2007) CLT 737** while dealing with Section 11 of the Code of Civil Procedure. Reliance was also placed by the learned counsel appearing for the petitioners in another decision of the Hon'ble Apex Court in the case of ***Baburam Vrs. C.C.Jacob and others*** reported in JT 2009(2) SC 256. The Hon'ble Apex Court in the said case was considering prospective applicability of the decision rendered in the case of ***R.K.Sabharwal Vrs. State of Punjab and others*** reported in **JT 1995(2) SC 351**. In paragraph-4 of the judgment, the Hon'ble Apex Court observed that the prospectivity given to Sabharwal's case was obviously on the ground that there was a doubt in regard to the position of law until the same was clarified by the Hon'ble Apex Court in the Sabharwal case. The prospectivity was given to Sabharwal's case only to see that status prevailing prior to the judgment in Sabharwal's case should not be disturbed. Similar views expressed in some

other cases, such as, ***S. R. Bhagwat and others Vrs. State of Mysore*** reported in ***AIR 1196 SC 188***, ***J.S.Yadav Vrs. State of Uttar Pradesh and another*** reported in (***2011) 6 Supreme Court Cases 570*** were also relied upon by the learned counsel appearing for the petitioners.

11. There is no quarrel over the law laid down by the Hon'ble Supreme Court in the aforesaid decisions. Had this question not been raised earlier either before the Special Bench or before the Hon'ble Supreme Court, we could have followed the said decisions to answer the first point raised in favour of the petitioners. But in the present case, in paragraph-17 of the Special Bench decision, this Court held that after the amended provision, Regulation 17(2) in Chapter-IX came into force with effect from 29.4.1977, i.e. the date of publication of the aforesaid amendment in the Orissa Gazette Extraordinary. It has become operative and if anybody else has been appointed after 29.4.1977 as Headmaster in a High School without having seven years of teaching experience after training, the said appointment has no force in the eye of law. The cut off date 3.6.1988 is not rational. The Court further held that this Court cannot have prospective power of overruling as the said power is only available to the Hon'ble Supreme Court as has been decided in ***L.G.Golak Nath and others Vrs. State of Punjab and another*** reported in ***AIR 1976 SC 1643***. Therefore, the first ground taken by the learned counsel for the petitioners in relation to prospective power of overruling could not be considered by the Special Bench as it did not have power to do so. Therefore, the said question was raised before the Hon'ble Supreme Court in the case of *Pabitra Mohan Das* (supra)**.** From paragraph-7 of the judgment of the Hon'ble Supreme Court as quoted earlier it is clear that it was contended on behalf of some of the petitioners, who had intervened in the said case before the Hon'ble Supreme Court, that either the conclusions arrived at by the Special Bench are erroneous on interpretation of relevant provisions or in any way intended to take away the rights of any persons, who have got the benefit of earlier Full Bench decision. While answering such a question raised by the learned counsel, the Hon'ble Supreme Court observed that Regulation 17 has been brought into force by the Board of Secondary Education from 29.4.1977 which makes it obligatory for every institution to have a Headmaster, who must be a trained graduate and must have seven years of teaching experience as trained graduate teacher. If subsequent to 29.4.1977 any appointment has been made to the post of Headmaster contrary to the aforesaid provisions of the Regulation then the said appointment would be invalid and would not confer any right on appointee. Therefore, the argument of the learned counsel appearing for the petitioners that the *doctrine of prospective*

overruling should be applied in the batch of cases has no legs to stand as the very same submission was made before the Hon'ble Apex Court.

12. The second point canvassed before this Court is that in between 1993 to 1999 either in pursuance of the order of this Court in different writ applications or by order of the Director promotion of 854 teachers to the posts of Headmaster had been approved and the matter had attained finality between the parties. The judgments in pursuance of which approval orders were passed by the Director were not challenged either by the State or by the private opposite parties and, therefore, the question of approval for promotion of the petitioners to the posts of Headmaster having attained finality by virtue of the decision of the Special Bench or of the Hon'ble Apex Court in the case of *Priti Ranjan Pradhan (supra),* the 854 Headmasters cannot be reverted to the post of Trained Graduate Teachers. Reliance was placed by the petitioners in some of the decisions already referred to earlier and also a decision of the Hon'ble Supreme Court in the case of ***Jayadeep Mukharjee Vrs. State of West Bengal and others*** reported in ***AIR 2011 SC 1169***. The said reported decision relates to a Public Interest Litigation. The Hon'ble Supreme Court held that the jurisdiction of Supreme Court, in Public Interest Litigation, cannot be pressed into service where matters have already been completely and effectively adjudicated upon not only in individual petitions but even in the writ petitions raising larger question. Reliance was also placed on another decision of the Hon'ble Supreme Court in the case of ***Shankar Cooperative Housing Society Ltd. Vrs. M. Prabhakar and others*** reported in ***AIR 2011 Supreme Court 2161*** and in the said reported judgment, it was held that once a writ application challenging notification declaring evacuee property is rejected not only on the ground of alternative remedy but also on the ground of delay, the second writ application on the same cause of action and issue which had attained finality cannot be entertained. Some other decisions were also cited by the learned counsel for the petitioners on this issue.

13. Shri G.A.R.Dora, learned Senior Counsel appearing for some of the petitioners placed reliance on a decision of the Hon'ble Supreme Court in the case of ***Ram Sarup Vrs. State of Haryana and others*** reported in ***1978 (2) SLR 836.*** In the said reported case the appellant was appointed as a Statistical Officer on 20th February, 1961 and he was confirmed in that position on 15th October 1966. Sometimes after in February, 1967 he was appointed to the post of Chief Inspector of Shops and he worked in that capacity till 1st January, 1968 when he was appointed as Labour-cum-Conciliation Officer by the Government of Haryana. The appellant was thereafter transferred from the post of Chief Inspector of Shops to the post of

Labour-cum-Conciliation Officer since the Government had taken a decision that the posts of Statistical Officer and Labour-cum-Conciliation Officer should be treated as interchangeable but unfortunately for him, the Punjab Labour Service (Class-I and II) Rules 1955, which were statutory rules made in exercise of the power conferred under the proviso to Article 309 of the Constitution, were not amended in conformity with the said decision. The appellant continued in the post of Labour-cum-Conciliation Officer up to 28th April, 1977 when an order was passed by the Government reverting him to the post of Statistical Officer. The ground of reversion was that the aforesaid Rules of 1955 provided that in order to get promotion to the post of Labour-cum-Conciliation Officer, one is required to have minimum five years of experience in working of Labour Laws as Labour Inspector. The question for consideration before the Hon'ble Supreme Court was that the said appellant having completed five years of teaching experience after getting such promotion, whether the said benefit of promotion could be taken away by order of reversion. In paragraph-3 of the judgment, the Hon'ble Supreme Court held that promotion of the appellant without having five years of experience in working of Labour Laws was irregular and after obtaining the experience, such appointment must be considered to be regularized. Referring to this decision, it was contended by Shri G.A.R.Dora, learned Senior Counsel that in the present case, though the petitioners were appointed or promoted to the posts of Headmaster without having seven years of experience as Trained Graduate Teacher, subsequently they acquired the experience and, therefore, their appointments/promotions to the posts of Headmaster from the date they completed seven years of teaching experience as Trained Graduate Teacher, should be treated to have been regularized.

14. From the judgment delivered by the Special Bench in the case of *Priti Ranjan Pradhan (supra)* and the judgment of the Hon'ble Supreme Court in the case of *Pabitra Mohan Das (supra),* we find that this question had also been raised not only before the Special Bench but also before the Hon'ble Supreme Court. The Special Bench, as stated earlier, held that prospective overruling is within the jurisdiction of the Hon'ble Apex Court whereas the Hon'ble Supreme Court in the case of *Pabitra Mohan Das (supra)* answering such a question specifically held that if subsequent to 29.4.1977 any appointment has been made to the posts of Headmaster contrary to the Regulation then the said appointment would be invalid appointment and would not confer any right on the appointee.

In view of such specific observation made by the Hon'ble Supreme Court in the case of *Pabitra Mohan Das (supra),* we do not find any force in

the second contention of the learned counsel for the petitioners. We would like to refer to a judgment of the Hon'ble Apex Court relating to the same issue delivered in the case of ***State of Orissa and others Vrs. Subhranta Kumar Mohanty and another*** reported in (***2003) 12 Supreme Court Cases 53.*** The brief facts of the said reported case are that Bhagabati High School was established in the year 1982 and Subhranta Kumar Mohanty was appointed as Assistant Teacher in that School though he did not have the requisite qualification of B. Ed. He was promoted to the post of Headmaster by the management of the school on 11.11.1984. At that point of time the school was not a recognized institution. The school was recognized by the State on 10.12.1984. The Board recognized the school on 3.10.1985. Regulation-17 of Chapter IX of the Regulations of the Board of Secondary Education, Orissa provided that only a Trained Graduate in Arts or Science with minimum seven years of service experience after training could be appointed as a Headmaster. On 9.3.1990, the said Subhranta Kumar Mohanty completed seven years of experience as a trained teacher. On 22.5.1995 he was appointed by the management of the school again as Headmaster with effect from 9.3.1990. The School was given the grant-in-aid on 29.9.1995 with effect from 1.6.1994. The State, which was applicant before the Hon'ble Supreme Court in the said case, placed reliance on a decision of the Hon'ble Apex Court in the case of *Pabitra Mohan Das (supra)* and it was contended that the said Subhranta Kumar Mohanty was not qualified to be given the pay scale of Headmaster as he had also not completed seven years of training to hold the post of Headmaster. The Hon'ble Supreme Court placed reliance on the decision of the same Court in the case of *Pabitra Mohan Das (supra)* and allowed the appeal filed by the State. Therefore, finding of the Hon'ble Supreme Court in the case of *Pabitran Mohan Das (supra)* that any appointment made to the posts of Headmaster after 29.4.1977 contrary to the Regulation shall be invalid and would not confer any right on the appointee which was again confirmed in the case of ***State of Orissa and others Vrs. Subhranta Kumar Mohanty and another***. If no right was accrued in favour of such appointee, the question of finality of the dispute in between the parties will not arise for consideration and the promotions of 854 Trained Graduate Teachers to the posts of Headmaster being contrary to the Board Regulation are invalid.

15. The decision cited by Shri G.A.R.Dora, learned Senior Counsel shall have no application to the present case as the Hon'ble Supreme Court in the said case held that promotion of appellant therein without five years of experience in working of Labour Laws to be irregular but in the present case, the Hon'ble Supreme Court in the case of *Pabitra Mohan Das (supra)* specifically held that any such promotion/appointment to the posts of

Headmaster without having seven years of teaching experience as Trained Graduate Teacher is not only invalid but also it creates no right in favour of such Headmasters.

16. It will be worthwhile to refer to another decision of the Hon'ble Supreme Court relied upon by Shri R.K.Rath, learned Senior Counsel in the case of ***Director of Settlements, A.P. and others Vrs. M.R.APPARAO and another*** reported in (2002) 4 SCC 638. A similar question arose in the Andhra Pradesh High Court in two cases. Following the reasoning and conclusion of the earlier decision in Venkatagiri case, the Court issued a writ of mandamus to make interim payments to the petitioners therein in accordance with law laid down in Writ Petition No.4709 of 1970 dated 22.9.1971. Notwithstanding the aforesaid direction payments not having been made, they again approached the High Court by filing a fresh writ petition, which was reregistered as Writ Petition No.730 of 1978. The High Court disposed of the said case directing the State to implement the earlier order within a month. No interim payments had been made and in the meantime, the Hon'ble Supreme Court reversed the judgment of the Andhra Pradesh High Court on the basis of which relief had been granted in those two cases. It was contended that the order passed in those writ applications relying on the earlier decision of Venkatagiri case had attained finality having not been challenged by either party and, therefore, the benefit granted in the said order can not be taken away merely because the Hon'ble Supreme Court reversed the judgment in Venkatagiri case at a later date. In paragraph-16 of the judgment, the Hon'ble Supreme Court held that to have uniformity of the law and to have universal application of the law laid down by the Supreme Court in Venkatagiri case, it would be reasonable to hold that the so-called direction in favour of the respondents (petitioners) in those two writ applications became futile inasmuch as the direction was on the basis that the Amendment Act is constitutionally invalid, the moment the Supreme Court holds the Act to be constitutionally valid. Therefore, the Court expressed its opinion that no indefeasible right had accrued in favour of those petitioners in the two writ applications on account of the earlier judgment in their favour notwithstanding the reversal of the judgment of the Andhra Pradesh High Court in Venkatagiri case. The above judgment of the Hon'ble Supreme Court has clearly laid down that the beneficiary of an earlier judgment, which had been subsequently reversed by the Hon'ble Supreme Court even if attained finality does not create any indefeasible right in favour of the said beneficiaries. Similar view has also been expressed by the Hon'ble Supreme Court in the case in hand and it was specifically held that those Headmasters, who were appointed/promoted as such without having seven years of teaching experience as Trained Graduate Teacher,

could not be appointed in contravention of the Regulations framed by the Board of Secondary Education and their appointment/promotion is not only invalid but also does not create any right in their favour.

17. The third point raised by the petitioners is that in the year 1994, the schools in which the petitioners were working as Headmasters had been taken over and therefore, 1974 Rules governing service condition of teachers working in the aided schools have no application to 854 Headmasters. The question raised in this batch of cases is as to whether promotion of these petitioners to the posts of Headmaster in contravention of Rgulation-17 was justified or not. At the relevant point of time, the schools in which the petitioners were working as Headmasters were only aided schools and, therefore, their services were governed by 1974 Rules. We, therefore do not find any force in the above contention of the petitioners.

18. So far as 4th point raised by the petitioners is concerned, this Court has answered the question while dealing with the ground no.2 in paragraphs 12 to 16 of this judgment. Therefore, even if the order of approval passed in favour of each of the petitioners had not been challenged before the Tribunal as decided by the Hon'ble Supreme Court in the case of *Priti Ranjan Pradhan (supra),* such finality does not create any indefeasible right in favour of the petitioners being beneficiaries of the judgment in the case of *Pabitra Mohan Das(supra).*

Shri J.K.Rath, learned Senior Counsel appearing for the petitioners in one of the cases tried to distinguish the facts from the facts of the other cases, but on examination of the facts involved therein, we find that the points raised before this Court challenging the order of Tribunal are also involved in the said case where Shri J.K.Rath, learned Senior Counsel is appearing for the petitioners and, therefore, even though there are some distinguishable facts, we do not find that case to be in any way different than the other cases.

19. Having found no substance in any of the contentions raised before this Court on behalf of the petitioners, we also find no merit in any of the writ applications and, accordingly, dismiss the same.

Writ petition dismissed.

2012 (II) ILR - CUT- 461

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

JCRLA. NO. 56 OF 2003 (Dt.30.01.2012)

FAKIRA SANTA ……Appellant.

.Vrs.

STATE OF ORISSA

……Respondent.

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

Extra Judicial Confession – P.Ws.5 and 6 stated that the appellant confessed to have killed his wife only after the police gave him two to three slaps – Confession not being voluntary has no evidentiary value – Held, extra judicial confession as deposed by P.Ws.5 and 6 is not admissible in law. (Para 8)

For Appellant - Miss. Tapaswini Sinha
For Respondent - Sri Sangram Das,
Addl. Standing Counsel.

L.MOHAPATRA, J. This appeal is directed against the judgment and order of the learned Sessions Judge, Koraput-Jeypore dated 02.5.2003 in S.C No.183 of 2000 convicting the appellant for commission of offence under Section 302 of I.P.C and sentencing him to imprisonment for life.

2. The case of the prosecution as revealed from the record is that on 09.1.2000 night after taking meals, the appellant and his wife slept in their house. Their daughter Moti-P.W.9 was also sleeping in the house. At about midnight hearing the shout of the villagers, P.W.1 came out of his house and saw the appellant standing with an axe in front of his house. The appellant had been caught by P.W.3 from behind. When P.W.1 asked him as to what happened, both P.Ws.3 and 4 stated that the appellant had gone to their house in the midnight and stated that he has finished. On being questioned he further stated that out of anger he had killed his wife by means of the axe held by him. Thereafter P.W.1 also asked the appellant, who confessed before him to have killed his wife. Thereafter under direction of P.W.1, P.W.4 snatched away the axe from the hands of the appellant. Thereafter all of them along with the appellant went to the house of the appellant and found his wife lying dead with assault marks on her neck. Thereafter apprehending that the appellant may abscond they confined him in the house of P.W.10. On the next day morning the Ward Member-P.W.7 and the Sarpanch-P.W.12 were informed about the incident and they advised to

report the matter before the Police Station. P.W.1 thereafter proceeded to Kundra Police Station along with P.W.3 and others and reported the matter orally. The Officer-in-Charge of Kundra Police Station reduced the same to writing and treating the same as F.I.R started investigation. On completion of investigation chargesheet was submitted against the appellant for commission of offence under Section 302 of I.P.C.

3. The prosecution in order to prove the charge examined as many as 14 witnesses but none was examined on behalf of the defence. The plea of defence was complete denial of the prosecution case. Out of the 14 witnesses examined on behalf of the prosecution P.W.1 is the Informant. P.W.2 is the Head-man of the village. P.Ws.3 and 4 are the co-villagers. P.W.5 is the daughter of the appellant. P.W.6 is another co-villager. P.W.7 is the village Ward Member and P.W.12 is the Chairman of Panchayat Samiti, who advised for lodging the F.I.R. P.W.8 is a seizure witness and P.W.9 is another co-villager. P.W.10 is a witness in whose house the appellant had been confined. P.W.11 is the Police Constable, who escorted the dead body for postmortem examination and P.W.13 is the Doctor, who conducted the postmortem examination. P.W.14 is the Investigating Officer. Out of these witnesses, P.W.1, the informant, P.Ws.2, 3, 5, 6 and 7 are witnesses before whom the appellant is alleged to have made an extra judicial confession admitting his guilt.

4. The trial court relying on such extra judicial confession coupled with the medical evidence found the appellant guilty of the charge and convicted him thereunder.

5. Miss. Sinha, learned counsel appearing for the appellant submitted that the prosecution in absence of any direct evidence has tried to prove the charge through circumstantial evidence. According to Miss. Sinha, learned counsel appearing for the appellant the attempt of the prosecution to prove the charge through extra judicial confession coupled with the medical report has miserably failed. The extra judicial confession alleged to have been made by the appellant is in presence of the police and therefore no such confession is admissible in evidence. According to Miss. Sinha, learned counsel appearing for the appellant, if the evidence relating to extra judicial confession is not accepted the only other evidence available on record is the medical evidence as deposed to by P.W.13 and in absence of evidence connecting the appellant with the alleged crime an order of conviction cannot lie solely on the basis of medical evidence.

6. Mr. Das, learned Addl. Standing Counsel relied on the evidence of the above witnesses so far as it relates to extra judicial confession and submitted that the extra judicial confession made by the appellant is corroborated by the evidence of the Doctor-P.W.13 and therefore there is no reason for the Court to differ with the findings arrived at by the trial court.

7. On careful scrutiny of the entire evidence, we find that there is no direct evidence and the prosecution has tried to establish the charge through circumstantial evidence. The first circumstance on which much reliance has been placed by the prosecution is extra judicial confession.

7.1. P.W.1 is the informant. He deposed that in the night of occurrence while he was sleeping in his house, he heard a 'hullah' and woke up. He went to the house of the appellant and on being questioned the appellant confessed that out of anger he killed the deceased by an axe. The axe was lying at the spot. He also saw the dead body of the deceased inside the house. In cross-examination he stated that by the time he reached the house of the appellant 10 to 15 people were already present there and Madhab Naik – P.W.2, who is the Grama Rakhi of the village, was also present. By the time he arrived in the house of the appellant, he found the appellant shouting as to who killed his wife.

7.2. P.W.2 is the Head-man of the village. He deposed that coming to know about the occurrence he went to the house of the appellant and by that time many villagers had assembled there. On being questioned the appellant said to have killed his wife out of anger by means of an axe. In cross-examination he stated that in presence of police when he asked the appellant as to how his wife died, the appellant confessed to have killed his wife by an axe out of anger.

7.3. Similarly P.W.3 though stated about such extra judicial confession but admitted in cross-examination that such extra judicial confession had been made by the appellant in presence of police.

7.4. P.Ws.5 and 6 have gone a step ahead and in cross-examination both of them have stated that the appellant confessed to have killed his wife only after police gave him two to three slaps.

8. In view of such nature of evidence, it is clear that that appellant initially in presence of the villagers had not confessed to have killed his wife and on the other hand he was shouting as to who killed his wife. After arrival of police, the appellant is alleged to have confessed his guilty, that too after he was given two to three slaps by the police. Therefore such extra judicial

confession as deposed to by the above two witnesses is not admissible in law and no reliance can be placed on such extra judicial confession. The only other evidence is seizure of the axe which contained human blood of 'O' group and the medical report as deposed to by P.W.13. P.W.13 found three incised wounds; one on the left side of the neck, one on the right side of the neck and third one on the tip of right shoulder. He was of the view that all the injuries were ante mortem in nature and were sufficient to cause death in ordinary course of nature. He was also of the view that the injuries could be caused by the axe. From the evidence of P.W.13 the prosecution has been able to prove that the deceased died a homicidal death and that she had been assaulted by means of then axe, which contained human blood of 'O' group and matches with the blood group of the deceased.

8.1. The next question for consideration is as to whether seizure of the axe itself is such a circumstance that an order of conviction can lie only on the basis of such seizure. Admittedly the axe was lying at the spot and the police seized the same. Though it is the case of the prosecution in the F.I.R that the appellant was standing with an axe in his hand but in course of examination of witnesses the evidence that was placed before the trial court is that the axe was lying at the spot at the time of seizure. Therefore on the basis of such seizure it cannot be said that it is the appellant who had used that axe. The prosecution having failed to prove extra judicial confession and in absence of other circumstances connecting the appellant with the alleged offence, it is difficult on the part of this Court to confirm the findings arrived at by the trial court solely on the basis of the medical report.

9. We accordingly allow the appeal and set aside the impugned judgment and order of conviction dated 02.5.2003 passed by the learned Sessions Judge, Koraput-Jeypore in S.C No.183 of 2000 convicting the

appellant – Fakira Santa for commission of offence under Sections 302 of I.P.C. The appellant is acquitted of the said charge.

10. From the record it appears that the appellant is in custody. If that be so, the appellant be set at liberty forthwith, unless his detention is required in any other case. The Appeal is accordingly disposed of.

Appeal allowed.

2012 (II) ILR - CUT- 465

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

W.P.(CRL) NO.1156 OF 2011 (Dt.31.01.2012)

SANKAR MISHRA ……..Petitioner.

.Vrs.

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

NATIONAL SECURITY ACT, 1980 (ACT NO. 65 OF 1980) – S. 3(2).

Order of detention passed with reference to some cases basing on which earlier detention order passed and quashed by this Court – In most of those cases the petitioner had been acquitted – Non application of mind of the detaining authority – Held, impugned order of detention is quashed. (Para 8,9)

Case law Referred to:-

AIR 1989 SC 1234 : (Chhagan Bhagwan Kahar-V- N.L.Kalna & Ors.).

For Petitioner - M/s. B.Mohanty, A.Tripathy, S.Mohanty.
For Opp.Parties - Sri Dillip Kumar Mishra, Addl. Govt. Advpcate.

L.MOHAPATRA, J. The petitioner in this Writ Petition challenges the legality of the order dated 16.7.2011 passed by the District Magistrate, Sambalpur in exercise of power conferred under Sub-section (2) of Section 3 of National Security Act, 1980 (hereinafter referred to as 'the Act') directing detention of the petitioner in custody.

2. The case of the petitioner is that while he was in jail custody the impugned order was passed by the District Magistrate, Sambalpur on 16.7.2011 and the grounds of detention were served on him on 18.7.2011. The State Government approved the order of detention on 23.7.2011. On receipt of the grounds of detention the petitioner submitted representation through jail authorities separately to the Advisory Board, the State Government as well as the Central Government on 30.7.2011. The matter was placed before the Advisory Board in compliance of Section 10 of the Act but the petitioner was intimated on 15.9.2011 that the Advisory Board has confirmed the order of detention. The representation addressed to the State Government on 30.7.2011 was rejected on 24.8.2011 and there

was delay of 24 days in rejecting the representation. Similarly the representation of the petitioner dated 30.7.2011 addressed to the Central Government was rejected on 01.9.2011 and as such there was a delay of 31 days in disposal of the representation. It is also the case of the petitioner that most of the cases, on the basis of which the impugned order of detention has been passed by the District Magistrate, Sambalpur, were the subject matter of an earlier order of detention passed by the very same authority on 23.12.2005 and the said order of detention was quashed by this Court in W.P.(CRL) No.128 of 2006 disposed of on 09.8.2006. It is therefore the case of the petitioner that the detaining authority while passing the impugned order has not applied her mind.

3. A counter affidavit has been filed by the District Magistrate-cum-Collector, Sambalpur. It is stated therein that the petitioner was involved in 23 number of criminal cases apart from other antisocial activities and in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order, the order of detention dated 16.7.2011 was passed. It is further stated that the order of detention has been passed basing on criminal antecedents, law and order situation and also maintenance of public order in the larger interest of the general public. In paragraph-9 of the counter affidavit it is specifically stated that the order of detention has been passed not only basing on criminal cases in which the petitioner claims to have been acquitted but also taking into consideration of such other cases pending in High Courts and different Courts apart from such other incidents in which the conduct of the petitioner was prejudicial to the maintenance of public order. In paragraph-13 of the counter affidavit it is stated that the State Government rejected the representation on 12.9.2011 and a copy of the said order was served on the petitioner on 15.9.2011. The other averments made in the counter affidavit relate to each individual case on the basis of which the order of detention has been passed.

4. Central Government has also filed a counter affidavit wherein it is stated that the representation made to the Central Government was disposed of in time without delay. It is specifically stated that the report envisaged under Sub-section (5) of Section 3 of the Act made to the Central Government by the State Government on 23.7.2011 was received in the Ministry of Home Affairs on 01.8.2011. The parawise comments of the detaining authority was received on 24.8.2011 through the State Government by its letter dated 12.8.2011. Identical representation and parawise comments were also received from the detaining authority on 23.8.2011. Both the representations were put before the Home Secretary forconsideration on 25.8.2011. The representations were rejected by order

dated 27.8.2011 and accordingly it is stated that the first representation having been received by the Central Government in the Ministry of Home Affairs on 24.8.2011 and the same having been rejected on 27.8.2011, there was no delay in disposal of the representation.

5. From the averments made in the Writ Petition, counter affidavit filed by the detaining authority and the Central Government, it appears that the petitioner challenges the order of detention on the following grounds:-

i) There was non-compliance of Section 10 of the Act, the Advisory Board having considered the representation and disposed of the same after the expiry of the period provided in the said Section.

ii) The representation submitted by the petitioner against the order of detention to the State Government was disposed of after inordinate delay and therefore the order of detention is liable to be set aside.

iii) The order of detention has been passed with reference to some of the cases on the basis of which the order of detention was passed earlier in the year 2005 and the said order of detention was quashed by this Court on the ground that the fact of acquittal of the petitioner in some of those cases had not been considered by the detaining authority. Therefore the detaining authority while passing the impugned order of detention had not applied her mind.

6. So far as the first ground taken by the petitioner is concerned, it appears from the record produced by learned counsel for the State that the order of detention was passed on 16.7.2011 and the Advisory Board confirmed the order of detention on 02.9.2011. In the present case reference to Advisory Board has been made within the time prescribed in Section 10 of the Act. Under Section 11 of the Act the Advisory Board is required to pass orders within seven weeks. The order by the Advisory Board having been passed on 02.9.2011 the same is within the prescribed period. Merely because the intimation was given to the petitioner after expiry of the period does not amount contravention of Section 10 of the Act.

7. So far as the second ground taken by the petitioner is concerned from the counter affidavit filed by the Central Government, it is clear that the representation of the petitioner addressed to the Central Government was received by the Ministry of Home Affairs along with parawise comments on 24.8.2011. An identical copy of the representation with parawise comments of the detaining authority had also been received in the Ministry of Home Affairs on 23.8.2011. Both the representations were considered by the

Home Secretary who has been delegated with the powers by Central Government on 25.8.2011 and the representations were rejected on 27.8.2011. Therefore there is no delay in disposal of the representations by the Central Government.

7.1. So far as the State Government is concerned we find from the record that the order of detention was approved by the Principal Secretary to Government in Home Department on 22.7.2011 and the said order was also approved by the Chief Minister on 22.7.2011. The note sheet dated 11.8.2011 shows that the District Magistrate, Sambalpur had forwarded a copy of the representation of the petitioner dated 06.8.2011 along with parawise comments and the same had been received on 11.8.2011. A copy of the representation along with parawise comments of the detaining authority were forwarded to the Ministry of Home Affairs, Government of India on the same day. The representation of the petitioner dated 06.8.2011 was dealt with by Home Department and the Principal Secretary to Government in Home Department rejected the representation on 17.8.2011. The file was placed before the Chief Minister and the order passed by the Principal Secretary to Government in Home Department was confirmed on 20.8.2011. Therefore effectively the representation of the petitioner addressed to the State Government dated 06.8.2011 was received on 11.8.2011 and was rejected by the Principal Secretary to Government in Home Department on 17.8.2011. Therefore there is no delay also in disposal of the representation filed by the petitioner to the State Government.

8. So far as the third ground taken by the petitioner is concerned, learned counsel for the State fairly submitted that cases appearing up to paragraph-12 might have been taken into account by the detaining authority in the year 2005 when the earlier detention order was passed. But the cases thereafter registered against the petitioner from 2007 till the order of detention was passed were not the subject matter of earlier order of detention. Therefore it was contended by learned counsel for the State that the detaining authority applied her mind in respect of the incidents that had taken place after the earlier detention order was passed, as narrated from paragraph-14 onwards of the grounds of detention and mere reference to those cases on the basis of which the earlier order of detention was passed does not amount to non application of mind.

8.1. Learned counsel for the petitioner submitted that the detention order is not only based on the alleged incidents that had taken place from 2006 onwards but also on the basis of those cases for which the earlier order of

detention was passed in the year 2005. In most of those cases the petitioner had been acquitted and considering that the earlier order of detention was quashed by this Court. The fact that reference has been made to those cases in the order of detention clearly establishes non application of mind by the detaining authority.

8.2. Learned counsel for the State in reply submitted that mere reference to the old cases does not amount to non application of mind, as the order of detention is based on the antisocial activities, in which the petitioner was involved after 2006. In this connection reference may be made to a decision of the Hon'ble Apex Court in the case of **Chhagan Bhagwan Kahar Vs. N.L.Kalna and others** reported in **AIR 1989 SC 1234**. The order of detention had been passed in the reported case under Gujarat Prevention of Anti-Social Activities Act, 1985. The first order of detention was quashed and the second order of detention was again passed taking into consideration all grounds of earlier detention along with fresh facts. Second order of detention was held to be invalid on the above ground.

8.3. In the present case also though it is stated by learned counsel for the State that the order of detention has been passed on the basis of cases registered against the petitioner after 2006, reference has been made to all those cases prior to 2006 on the basis of which an earlier order of detention was passed. This Court had quashed the earlier order of detention on the ground that the fact of acquittal in some of the cases referred to in the grounds of detention had not been taken into consideration by the detaining authorities. The same thing appears to have been repeated again by the detaining authority.

9. We are therefore, of the view that on this ground the petitioner's Writ Petition has to succeed. We accordingly allow the Writ Petition and set aside the impugned order of detention dated 16.7.2011 under Annexure-1 passed by the District Magistrate, Sambalpur. The Writ Petition is accordingly disposed of.

Writ petition allowed.

2012 (II) ILR - CUT- 470

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

JCRLA NO. 67 OF 2003 (Dt.27.03.2012)

HEDU @ RAJU SANDIL ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

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

Plea of insanity – In Cross-examination P.Ws.3 & 4 admitted that the appellant developed insanity during the period of occurrence – The appellant was moving alone, laughing and singing songs and at times becomes naked – Village boys were pelting stones to the appellant and the appellant was chasing after them – No evidence that the appellant made attempt to conceal himself or to abscond after the occurence – Evidence shows that he had no enmity with the appellant – Held, appellant-accused was suffering from insanity/unsoundness of mind within the meaning of Section 84 I.P.C. and he can not be held to have the requisite intention U/s.299 I.P.C. – Held, appellant is entitled to the benefit U/s.84 I.P.C. and he is entitled to an order of acquittal.

(Para 14)

Case laws Referred to:-

1.AIR 1964 SC 1563 : (Dahyabhai Chhaganbhai Thakkar-V- State of Gujarat)
2.2008(I) OLR 845 : (State of Orissa-V- Kalia @ Debabrata Maharana)
3.(2007)38 OCR 705 : (State of Orissa-V- Duleswar Barik)
4.AIR 2003 SC 976 : (Rizan & Arn.-V- State of Chhatishgarh)

For Appellant - Golaprani Jena.
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

B.K. PATEL, J. By the impugned judgment and order dated 10.4.2003 passed by learned Sessions Judge, Keonjhar in Sessions Trial Case No.173 of 1997, the appellant has been convicted under Section 302 of the Indian Penal Code (for short 'the I.P.C.') for having committed murder of deceased Tina @ Jiten Chatar and also under Section 307 of the I.P.C. for having

attempted to commit murder of P.W. 8 Hagura Nag. Appellant has been sentenced to undergo imprisonment for life under Section 302 of the I.P.C. and to undergo rigorous imprisonment for seven years under Section 307 of the I.P.C.

2. Deceased as well as injured P.W. 8 were aged about 5 to 7 years during the period of occurrence. Informant P.W. 5 is deceased's mother. P.W. 12 is injured P.W.8's father. Occurrence took place between 3.30 P.M. to 4.30 P.M. on 9.6.1997.

3. Prosecution case is that soon before the occurrence deceased, and his friends P.Ws. 6 and 8 were engaged in collecting edible leaves. Appellant called them inside nearby jungle on the pretext of plucking mangoes for them. He took them near a mango tree and asked them to close their eyes so that he could provide them mangoes. When the three boys closed their eyes, all of a sudden appellant assaulted the deceased with a knife on his abdomen and back. Also, in quick succession he dealt knife blow on P.W.8's abdomen. P.W.6 could manage to run away and escape. P.W. 10 and his wife P.W. 11 found P.W. 8 in a critical condition and took him to his house from where he was shifted to Bichhakundi Hospital by his father P.W. 12. P.W. 4 finding the deceased lying with injuries in the jungle, informed P.W. 3, who was playing football in the play ground. Both of them took the deceased to Bichhakundi Hospital. Deceased as well as P.W. 8 were referred and shifted to TISCO Hospital, Joda where the deceased was declared dead. Getting information from TISCO Hospital about a medico-legal case, P.W. 18, Sub-Inspector of Police, Joda Police Station went to the hospital where informant P.W. 5 narrated him regarding the occurrence. P.W. 18 reduced the same into First Information Report Ext. 14, sent it for registration and took up investigation. On completion of investigation, charge sheet was submitted against the appellant for commission of offences under Sections 302 and 307 of the I.P.C.

4. Appellant took the plea of denial. It also appears that appellant took the plea of insanity by making suggestions to that effect to the prosecution witnesses.

5. In order to substantiate the charge, prosecution examined eighteen witnesses. P.Ws. 6 and 8 were examined as eyewitnesses to the occurrence. P.W. 5 deceased's mother is informant in the case. P.Ws. 1 and 2 were witnesses to seizure of weapon of offence knife M.O.I at the instance of the appellant. Of them P.W. 2 was declared hostile. P.Ws. 3, 4, 10 and 11

were post occurrence witnesses. P.Ws. 3 and 4 took the deceased to the hospital whereas P.Ws. 10 and 11 took P.W. 8 to his house. P.Ws. 7 and P.W.8's father P.W. 12 were also post occurrence witnesses. P.Ws. 9, 14, 15 and 16 are doctors. P.W. 9 medically examined the appellant in Govt. Hospital, Joda. P.W. 14 medically examined P.W. 8 at TISCO Hospital, Joda. P.W. 15 deposed to have recorded P.W.8's statement in the TISCO Hospital. P.W. 16 conducted post-mortem examination over the dead body of the deceased. P.W. 13 was a witness to inquest. P.W. 17 is a constable who assisted in investigation. P.W. 18 was the investigating officer. Prosecution also relied upon documents marked Exts. 1 to 17 and material object M.O.I. No defence evidence was adduced.

6. Trial court placed reliance on the evidence of P.Ws. 6 and 8, stated to have been corroborated by medical evidence as well as seizure of weapon of offence M.O.I at the instance of the appellant and other incriminating circumstances to hold that the prosecution has proved the charge against the appellant.

7. In assailing the impugned judgment it was contended by the learned counsel for the appellant that both P.Ws. 6 and 8 were child witnesses aged about 5 years during the period of occurrence. Their evidence suffers from infirmities for which it cannot be ruled out that they were tutored before they deposed in court for which trial court should not have placed reliance on either P.W. 6 or P.W. 8. It was further contended that P.W. 1 having admitted in his cross-examination that he did not see the appellant before the seizure of knife M.O.I under seizure list Ext. 2, his evidence is not acceptable for the purpose of recording a finding that M.O.I was seized at the instance of the appellant. In the absence of any other circumstance, the prosecution has failed to establish the charge against the appellant. It was further contended that evidence on record does not indicate any motive on the part of the appellant for committing murder of deceased or attempting to commit murder of P.W.8. Both the victims were children aged about 5 years. There is also no evidence that the appellant concealed himself or absconded. He was arrested from his house in usual course of investigation. Both P.Ws. 3 and 4 categorically stated in course of their cross-examination that the appellant was of unsound mind during the period of occurrence. In such circumstances, even if evidence of P.Ws. 6 and 8 is accepted, appellant is entitled to the benefit of general exception under Section 84 of the I.P.C.

8. In reply, learned counsel for the State submitted that both P.Ws. 6 and 8, the two child witnesses, were natural witnesses. Their evidence was

not discredited in any manner during grueling cross-examination. P.W.8 is an injured witness. They were consistent in implicating the appellant with the commission of the offences all along. Therefore, there is absolutely no reason to discard their evidence. Nonetheless evidence of P.Ws. 6 and 8 is corroborated by evidence of post occurrence witnesses, medical evidence and other incriminating circumstances. It was also argued that appellant is not entitled to protection under Section 84 of the IPC as no defence evidence was led in support of the plea of insanity.

9. Evidence of P.Ws.6 and 8 is most crucial in addressing to the contentions raised on behalf of the appellant. Of them P.W.8 sustained injury in the same transaction. He is an injured eyewitness. He has stated in evidence that on the date of occurrence in the late afternoon he along with deceased and P.W.6 were engaged in collecting leaves (SAGA). At that time appellant came there and asked them to accompany him to the jungle alluring that he would provide mango. They accompanied appellant to the jungle where the appellant asked them to close their eyes so that he would supply mango and they closed their eyes. Suddenly appellant stabbed the deceased in his belly and he raised cry. Immediately thereafter P.W.8 ran but appellant apprehended him and stabbed on his belly. P.W.8 ran away and met P.W.10 and his wife P.W. 11 on the way. They physically lifted him to his house and thereafter he was taken to Bichhakundi Hospital and later on to Joda Hospital. P.W.6 the other eyewitness also deposed that the appellant called him, deceased and P.W.8 to accompany him to the nearby jungle alluring that he would pluck mangoes for them. They went with him. There appellant asked them to shut their eyes so that he would provide them mangoes. When they shut their eyes appellant first stabbed the deceased with knife on the belly and mouth, and thereafter stabbed P.W.8 with same knife on his belly. When the appellant wanted to stab him P.W.6 ran away to his home and reported to her mother. Though P.W.8 affirmatively replied to a question put by the defence to the effect that he was not examined by police, he denied to the suggestion that he had not stated before the I.O. that after stab on the deceased he ran and the appellant apprehended him and stabbed his belly and he ran away. P.W.8 categorically deposed in cross-examination that none tutored him. Likewise though P.W.6 stated in cross-examination that he was not examined by police, he categorically stated that the police did not tutor him before his statement was recorded under section 164 Cr.P.C. before the Magistrate. To another suggestion he simply agreed that he was tutored as to how to depose before court. It has to be kept in mind that both P.Ws. 6 and 8 were of very tender age during the period of occurrence. Learned Sessions Judge who had the occasion to see the demeanour of the witnesses in course of recording of their evidence has

made explicit observation that P.Ws.6 and 8 withstood the detail and grilling cross-examination without faltering and answered questions clearly, precisely and straight without hesitation. It is also been observed that trial judge did not find both the witnesses to be prevented from understanding the questions put to them or from giving rational answers by reason of their tender age. That apart, evidence of P.Ws. 6 and 8 finds corroboration from the post-occurrence witnesses as well as other circumstances. Deceased's mother informant P.W.5 stated that hearing that his son had been admitted in Bichhakundi Hospital she went there and found the deceased lying senseless with bleeding injury. P.W.8 who had also been hospitalized told that it was the appellant who stabbed them with knife. Evidence of P.W.5 is materially corroborated by the contents of First Information Report Ext.14 prepared on the basis of her oral narration soon after the occurrence in the hospital itself. P.W.10 stated that while returning from work he noticed P.W.8 coming weeping from jungle side. He had bleeding injury on his right belly and some portion of intestine protruded through the injury. He took P.W.8 to his house. P.W.10's wife P.W.11 was also with him. P.W.11 supported her husband P.W.10. P.W.4 stated that on his way to footfall ground he found a boy lying in the jungle with injuries. He went and reported the matter to P.W.3 and other boys. Thereafter they came and lifted the boy to Bichhakundi Hospital. P.W.3 stated that P.W.4 came and reported that a boy was lying in the nearby jungle. He along with others took the injured boy to Bichhakundi Hospital. P.W.16 who conducted post mortem examination over the dead body of the deceased and P.W.14 who medically examined P.W.8 opined that perforating and cut injuries sustained by the deceased on abdomen and lumbar region, and stab injury sustained by P.W.8 on abdomen could be caused by the seized knife M.O.I. Evidence of the Investigating Officer P.W.18 and seizure witness P.W.1 goes to show that knife M.O.I was seized from the house of the appellant at his instance. In such circumstances, we have no hesitation in holding that it was the appellant who caused fatal injury on the deceased and grievous injury on P.W.8.

10. Having come to the finding on the basis of evidence on record that appellant was the author of injuries on the deceased and P.W.8, now this Court has to determine as to whether appellant is entitled to the protection under section 84 of the I.P.C. by upholding the plea of insanity. Section 84 of the I.P.C. provides:

> "Act of a person of unsound mind.- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act,

or that he is doing what is either wrong or contrary to law."

11. In considering the plea of insanity it is pertinent to observe that burden of proof and standard of such proof are the two important aspects which the Court has to keep in mind. In **Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat**: AIR 1964 SC 1563, while dealing with plea of insanity under section 84 of the I.P.C. it has been held:

> "It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in S.299 of the Penal Code. This general burden never shifts and it always rests on the prosecution. But, under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused; and the court shall presume the absence of such circumstances. Under S. 105 of the Evidence Act, read with the definition of "shall presume" in S.4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under S.105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in S.299 of the Penal Code. If the judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:

(1) the prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.

(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S.84 of the Penal Code: the accused may rebut it by placing before the court all the relevant evidence- oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings;

(3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

12. It is the settled cardinal principle of criminal jurisprudence that the general burden of the prosecution to prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the I.P.C. never shifts. When an accused advances the plea of innocence on the ground of being covered under any of the general exceptions under the I.P.C., burden of proving the existence of circumstances bringing the case within such exception lies on the accused, and the court shall presume the absence of such circumstances. The accused is required to rebut the presumption that such circumstances did not exist. In order to prove the circumstances to negate the presumption, the accused may place reliance on prosecution evidence also. In the context of plea of insanity, there is a rebuttable presumption that the accused was not suffering from insanity or unsoundness of mind within the meaning of Section 84 of the I.P.C. The burden of proof for rebutting the presumption on the accused is no higher than that rests upon a party to civil proceeding. Accused is not required to prove existence of circumstances to satisfy the requirements under Section 84 of the I.P.C. beyond reasonable doubt. If the materials on record raise such probability so as to lead the judge to entertain reasonable doubt in support of plea of insanity, the accused will be entitled to acquittal, for in that event the accused cannot be held to have the requisite intention under Section 299 of the I.P.C. The state of mind of an accused at the time of

commission of offence can be established from circumstances which preceded, attended upon and followed the offence on the basis of evidence placed before the court by the accused or by the prosecution. In this context, decisions of this Court in **State of Orissa –v- Kalia @ Debabrata Maharana** : 2008(I) OLR 845 and **State of Orissa –v- Duleswar Barik**: (2007) 38 OCR 705 may also be referred to.

13. No doubt as provided under section 105 of the Indian Evidence Act burden of proving that case of accused comes within any of the General Exceptions in Indian Penal Code or within any special exceptions or proviso contained in any other part of I.P.C. or in any law defining the offence is upon the accused, but burden of establishing the plea of insanity of the accused stands discharged by showing preponderance of probabilities in favour of that plea on the basis of materials on record. (See. **Rizan and another –v- State of Chhatisgarh**: AIR 2003 S.C.976).

14. In the present case, undoubtedly no defence evidence has been adduced. However, proved circumstances of the case indicate that appellant had no apparent motive for stabbing two boys of very tender age. On the day following the date of occurrence the appellant appears to have been arrested from his house in normal course of investigation. There is no evidence that appellant made attempt to conceal himself or to abscond. P.W.8's father P.W.12 stated in his cross-examination that he had no enmity with the appellant. In the background of such attending circumstances, both P.Ws. 3 and 4 admitted in their cross-examination that the appellant had developed insanity during the period of occurrence. P.W.3 stated that appellant at that time developed mental problem. He was moving alone, singing songs and laughing. Boys were afraid of him and were running away at his sight. P.W.4 stated that appellant developed insanity at the time of occurrence. He was moving here and there, singing songs and at times also became naked. Appellant was chasing after the boys and boys were also pelting stones to him. That being the evidence available from the mouth of prosecution witnesses, we are of the considered judgment that benefit of section 84 of the I.P.C. has to be extended to the appellant. Consequently, the appellant is found to be entitled to an order of acquittal.

15. Accordingly, the appeal is allowed. The judgment and order dated 10.4.2003 passed by learned Sessions Judge, Keonjhar in Sessions Trial Case No.173 of 1997 is set aside. The appellant is acquitted of the charge.

Appeal allowed.

2012 (II) ILR - CUT- 478

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

JCRLA NO. 50 OF 2002 (Dt.27.03.2012)

RATHA BASALA .. …Appellant.

.Vrs.

STATE OF ORISSA …Respondent.

CONFESSION – Meaning of – Statement containing self-exculpatory matter, which if true, would negative offence confessed is not a confession.

In this case P.W.7 deposed that in the night of occurrence appellant came and told him that he had killed two persons namely Aji and Sura and went away – He has also stated in course of Cross-examination that appellant also told him that P.W.3 had relation with his wife and when he saw it he assaulted P.W.3 – According to P.W.7 appellant came out with an explanation with regard to the origin and genesis of the occurrence – If the explanation of the appellant to the effect that the occurrence had its origin in illicit relationship between his wife and P.W.3 is taken in to account appellant can not be said to have made any confession – On analysis of entire evidence on record it is seen that P.Ws.2 & 3 are silent regarding the origin and genesis of the occurrence although there is positive material on record that soon before the occurrence appellant and P.W.3 were engaged in scuffle when the appellant found P.W.3 in the company of his wife – Held, appellants extrajudicial confession can not be relied upon in view of exculpatory statement with regard to origin of the occurrence – Prosecution failed to bring home charge against the appellant who is entitled to be acquitted by availing benefit of doubt. (Para 12,13)

Case law Referred to:-

AIR 1939 pc 47 : (Pakala Narayana Swami-V- Emperor).

For Appellant - M/s. P.K.Panda, P.K.Kundu, R.Behera & Miss Nibedita Mohanty.
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

B.K. PATEL, J. By the impugned judgment and order dated 29.6.2002 passed by learned Additional Sessions Judge, Angul in Sessions Trial No.81-A of 2000/23 of 2000, the appellant has been convicted and

sentenced to undergo imprisonment for life under Section 302 of the Indian Penal Code (for short 'the I.P.C.') for having committed murder of deceased Suramani @ Sura Sahu and Aji @ Ajaya Sahu. Appellant has also been convicted under Section 323 of the I.P.C. for causing hurt to P.W.3 Cheru @ Hrusikesh Sahu, but no separate sentence has been awarded thereunder.

2. Informant P.W.2 is the nephew of the deceased persons as well as P.W.3. P.W.9 is appellant's wife. Occurrence took place on 21.1.2000 at 8.00 P.M.

3. Prosecution case is that at about 5.30 P.M. on the date of occurrence the appellant assaulted P.W.3 by means of a lathi and took away his motor-cycle. P.W.3 came to the house of deceased Suramani and informed about the incident upon which P.W.3 and deceased Suramani went towards the house of the appellant. Informant P.W.2 and deceased Aji also followed them in order to bring the motor-cycle. Appellant was not in his house, but the motor-cycle was kept in front of his house. They informed appellant's brother and brought the motor-cycle. Deceased Suramani was holding the handle of the motor-cycle whereas informant P.W.2 and deceased Aji were pushing it from behind. When they reached near the tank at about 8.00 P.M. the appellant obstructed and asked as to why they were taking the motor-cycle. Thereafter, he dealt a blow by means of a tangi on the head of deceased Suramani as a result of which Suramani sustained injury, fell down and died at the spot. When deceased Aji intervened, appellant dealt another blow by means of the tangi on him resulting in injury. Out of fear P.W.2 ran away from the spot and informed the villagers. On the basis of oral narration of informant P.W.2 at Handapa P.S., the Officer-In-Charge P.W.13 prepared the First Information Report Ext.1, registered the case under Sections 341, 302, 307 and 323 of the I.P.C. and took up investigation. Deceased Aji died while receiving treatment for injury in the hospital at Cuttack. On completion of investigation, charge-sheet was submitted against the appellant for commission of offences under Sections 341, 302 and 323 of the I.P.C.

4. Appellant took the plea of denial. Also, in course of cross-examination it was suggested to the witnesses that the appellant protested against illicit relationship between his wife and P.W.3 for which he has been falsely implicated in the case.

5. In order to substantiate the charge, prosecution examined thirteen witnesses. P.W.2 was examined as the only eye-witness to the occurrence. P.W.3 deposed regarding the occurrence in course of which the appellant

assaulted him and took away his motor-cycle. P.Ws.1 and 4 simply stated to have accompanied the informant to the police station. P.W.5 deposed regarding recovery and seizure of tangi at the instance of the appellant under seizure list Ext.4. P.W.6 denied to have any knowledge regarding the occurrence. P.W.7 deposed that the appellant made extra-judicial confession before him. P.W.8 was a post-occurrence witness. P.W.9, appellant's wife, deposed regarding the occurrence in course of which P.W.3 was assaulted and his motor-cycle was taken away by the appellant. P.W.10 also deposed regarding the occurrence which took place between the appellant and P.W.3 in the evening. P.W.11 was the doctor who conducted post-mortem examination over the dead body of the deceased. P.W.12 was the police officer who conducted the enquiry in Mangalabag P.S. U.D. Case No.101 of 2000 relating to death of deceased Aji. P.W.13 was the investigating officer. Prosecution also relied upon documents marked Exts. 1 to 21. No defence evidence was adduced.

6. Placing reliance mainly on the evidence of the eye-witness P.W.2 stated to have been corroborated by the evidence of post-occurrence witnesses and medical evidence as well as circumstances of recovery of tangi at the instance of the appellant, confession made by the appellant before P.W.7, and detection of blood stains on seized tangi and wearing apparels of the appellant, the trial court held the prosecution to have proved the charge against the appellant.

7. In assailing the impugned judgment it was contended by the learned counsel for the appellant that prosecution has suppressed the origin and genesis of the incident for which evidence of eye-witness P.W.2 is not acceptable. It is in the evidence that soon before the occurrence appellant found P.W.3 in the company of his wife for which there was mutual assault. Prosecution has not given any explanation with regard to injury on the appellant. P.W.2's evidence with regard to assault on deceased persons is too sketchy to be accepted without corroboration. Evidence of P.W.5 is altogether silent regarding any disclosure statement made by the appellant before recovery of the tangi. Moreover, the seized tangi and wearing apparels of the appellant were not produced in court. Evidence of P.W.7 with regard to extra-judicial confession made by the appellant cannot be relied upon without any indication as to why the appellant reposed confidence in him. Moreover, P.W.7 also admitted that the appellant made exculpatory statement that P.W.3 had illicit relationship with his wife which he saw before the occurrence. In view of such infirmities, the impugned judgment and order are liable to be set aside.

8. Learned counsel for the State supported the impugned judgment and order placing reliance on the evidence of eye-witness P.W.2. It was further argued that evidence of P.W.2 was corroborated by medical evidence, evidence of post-occurrence witnesses and other incriminating circumstances.

9. Homicidal death of two deceased persons has not been disputed. Medical evidence of P.W.11 and contents of the post mortem reports Exts.5 and 21 as well as bed head ticket Ext.20 remained unassailed. Deceased Suramani died on the date of occurrence itself. Cause of his death was shock and profused external haemmorrhage due to incised injuries to great vessels and cranial nerves of left side of face adjoining the neck. As is evident from bed head ticket Ext.20 deceased Aji died while undergoing treatment in hospital at Cuttack on 7.2.2000. Cause of his death was due to shock and haemmorhage from incised injuries on the neck.

10. Much reliance has been placed by the prosecution and the trial court on the evidence of informant P.W.2. He stated in his evidence that the incident took place at about 8 P.M. Prior to that, in the evening appellant assaulted P.W.3 with lathi causing bleeding injury. P.W.3 came to the house and told that appellant assaulted him with lathi and kept his motorcycle. Then P.W.3 and deceased Sura went to bring the motorcycle from the appellant. P.W.3 and deceased Aji followed them. Seeing the motorcycle in front of the house of the appellant they informed appellant's brother and brought the motorcycle. P.W.2 and deceased Aji pushed the motorcycle from back whereas deceased Sura held the handle. While they were at the tank appellant came from the tank side, challenged them and dealt a tangi blow to the left side cheek of deceased Sura. Deceased Sura fell down with injury. When deceased Aji protested, appellant dealt tangi blow on his neck. Out of fear P.W.2 ran to the house and narrated the incident in the village. Thereafter he went to the police station with P.W.4 and others and orally reported regarding the occurrence. In course of his cross-examination P.W.2 stated that he did not know why P.W.3 was assaulted nor did he enquire about it. A suggestion was put to him that deceased Aji assaulted the appellant with lathi causing injury on his right eye and hand but P.W.2 denied the suggestion. Though P.W.2 stated that P.W.3 and deceased Sura went to bring the motorcycle, and he and deceased Aji followed them, P.W.3 did not claim to be present with P.W.2 and deceased persons when the deceased persons were assaulted. P.W.3 stated that while he was returning with the motorcycle appellant assaulted him with lathi. So he left the motorcycle there and went away. He told regarding the incident to his brother and they went to bring the motorcycle. On the way, deceased Sura

asked him not to go, so he went away. Deceased persons and P.W.2 went to bring motorcycle. Sometime thereafter P.W.2 came and told that appellant assaulted the deceased persons with tangi. Gokuli along with P.W.2 went to the police station. P.W.3 went to the spot and saw dead body of Sura in the tank. P.W.3 did not depose to have seen deceased Aji in injured condition. P.W.3 in course of his cross-examination denied the suggestion that he had gone inside the house of the appellant and talked with his wife with whom he had illicit relationship and appellant saw him going with his wife. Though P.W.3 deposed to have been assaulted by the appellant without any rhyme and reason, P.W.10 deposed that he saw the appellant P.W.3 assaulting each other in the evening upon which she and her husband intervened. P.W.10 further deposed that P.W.3 left his motorcycle which was kept by the appellant in front of his house. P.W.9, appellant's wife, stated that at about 7 P.M. on the date of occurrence she saw P.W.3 at the Thakur Ghar and he enquired from her as to where she was going. Thereafter, P.W.3 tried to drag her. When she raised hullah appellant came and assaulted P.W.3 and her. In spite of such positive evidence of P.Ws. 9 and 10 indicating scuffle between P.W.3 and appellant soon before the occurrence consequent upon P.W.3 dragging appellant's wife, neither P.W.2 nor P.W.3 whispered a word regarding the same. It is also observed that in course of cross-examination P.W.13, Investigating Officer, categorically deposed that investigation revealed that due to assault by deceased Aji appellant sustained injury. Thus, contention raised on behalf of the appellant that prosecution has suppressed the origin and genesis of the occurrence does not appear to be without substance.

11. P.W.5 deposed that while in custody appellant admitted his guilt and led police party to the tank where he had concealed the tangi and pointed out the place and gave recovery of the tangi which was seized under seizure list Ext.4. P.W.5's evidence is altogether silent regarding any disclosure statement to have been made by appellant with regard to place of concealment of weapon of offence. Moreover, neither weapon of offence nor any other material object was produced in court. Therefore, there is no scope for the prosecution to seek the aid of section 27 of the Evidence Act to utilize the evidence of P.W.5 with regard to alleged seizure of tangi as an incriminating circumstance against the appellant.

12. P.W.7 deposed that in the night of occurrence appellant came to his house and told him that he had killed two persons namely Aji and Sura and went away. P.W.7 did not say regarding the reason for which appellant reposed confidence in him in making the confessional statement. Materials on record do not indicate that appellant and P.W.7 had intimacy or even

acquaintance. Moreover, in course of cross-examination P.W.7 stated that the appellant also told him that P.W.3 had relation with his wife and when he saw it, he assaulted P.W.3. Thus, according to P.W.7 himself appellant came out with an explanation with regard to the origin and genesis of the occurrence. If the explanation of the appellant to the effect that the occurrence had its origin in illicit relationship between his wife and P.W.3 is taken into account, appellant cannot be said to have made any confession. It is well settled that a statement that contains self exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession.(See **Pakala Narayana Swami –v- Emperor**: AIR 1939 Privy Council 47). If an accused, while admitting certain incriminating facts, gives out some facts which would bring his act within any of the general exceptions of the Indian Penal Code, such statement cannot be held to be a confession.

13. On analysis of entire evidence on record it is thus obvious that P.Ws. 2 and 3 are altogether silent regarding origin and genesis of the occurrence. There is positive material on record that soon before the occurrence appellant and P.W.3 were engaged in a scuffle when the appellant found P.W.3 in the company of his wife with whom P.W.3 had illicit relationship. Prosecution has not explained the injury on the appellant which, according to the Investigating Officer, was sustained by the appellant due to assault on him by deceased Aji. Neither weapon of offence nor any other incriminating material object has been produced in court. Appellant's so-called extrajudicial confession cannot be relied upon in view of exculpatory statement with regard to origin of the occurrence. In such circumstances, prosecution is found to have failed to bring home the charge against the appellant. Appellant is entitled to be acquitted by availing benefit of doubt.

14. In the result, the appeal is allowed. The judgment and order dated 29.6.2002 passed by learned Additional Sessions Judge, Angul in Sessions Trial No.81-A of 2000/23 of 2000 are set aside. The appellant is acquitted of the charge.

Appeal allowed.

2012 (II) ILR - CUT- 484

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

JCRLA NO. 38 OF 2003 (Dt.19.06.2012)

NADA PENTHOI & ORS. … ….Appellants

.Vrs.

STATE OF ORISSA ...……Respondent

CRIMINAL TRIAL – Appreciation of evidence – Murder of two small children – Conviction based entirely on circumstantial evidence – Recovery of weapon of offence i.e. knife at the instance of the appellant along with his lungi which was stained with human blood – No opinion about the blood group present on the knife and lungi – Prevaricating statements of witnesses to the seizure of knife – Only circumstance against the appellants is to the effect that they were last seen in the company of the deceased children but in the absence of any other circumstance it is difficult to arrive at a definite conclusion that it was the appellants who have killed the deceased children – Held, the impugned judgment convicting the appellants is set aside.

(Para 8,9)

For Appellants - Mr. B.B. Routray &
Mr. Subrat Ku. Mahapatra-1.
For Respondents - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment and order of sentence dated 21.12.2001 passed by learned Addl. Sessions Judge, Angul in Sessions Trial No.111-A of 1997 / 64 of 1997, convicting the appellants under Sections 302/201, I.P.C. and sentencing each of them to suffer imprisonment for life thereunder.

2. The occurrence happened on 05.06.1997 on the day of "Savitri Amavasya" at village Kathapal under Chhendipada P.S. in the district of Angul. Two innocent children namely Bapi and Muni are alleged to have suffered death in the hands of the present appellants. Informant Basant Kumar Panigrahi (P.W.3) is the paternal uncle of the deceased children. The prosecution case, as found from record, is that on the date of occurrence the bodies of deceased Bapi and Muni were recovered from a well situated at a distance of about 150 meters from their house. The Medical Officer of the Additional Primary Health Centre, Bagedia declared them brought dead. In the afternoon before dusk, the deceased children

were found watching the appellants catching squirrels. One of the appellants namely Birabar Nayak (appellant no.6) being known to the informant (P.W.3), he (informant) did not object the children to be present near the appellants. When the children did not return home, the family members searched for them. Mother of the informant (P.W.3) asked the appellants regarding the whereabouts of the children in course of such search, and the appellants gave out that the children had already returned home since long. When the children were not found, their family members asked the appellants to search for them in the nearby well suspecting that they might have fallen into the well. None of the appellants however agreed to search for the children inside the well. One Panchanan Majhi (P.W.15) ultimately entered into the well and brought out the bodies of the deceased children. Some injuries on the bodies of both the children were found. The well was full with 10 feets' deep water. The bodies of the children were immediately rushed to Bagedia A.P.H.C., where the Medical Officer declared them brought dead. On the basis of the information lodged by P.W.3, investigation was taken up by the Police and on completion of investigation, the I.O. (P.W.19) submitted charge-sheet against all the appellants implicating them in the offence punishable under Sections 302/201/34, I.P.C.

3. Altogether 19 witnesses were examined by the prosecution to prove the charge, out of whom P.Ws.3 to 5, P.Ws.9, 12 and 13 are the witnesses, who have testified about the fact that the deceased children had gone with the appellants while they (appellants) were hunting squirrels and further they are asserted to have proved the fact that the appellants were found near the well wherefrom the dead bodies of the deceased children were recovered. The aforesaid witnesses have further testified that when the appellants were questioned regarding the whereabouts of the missing children, they told that they have already gone to their house and the appellants also refused to search for the children by entering into the well. P.Ws.7 and 8 are the witnesses to the confessional statement of appellant Nada Penthoi and recovery of a knife (M.O.-I) at his instance. P.W.14 is a witness, who has testified the fact that he saw the children going near the appellants and sometimes thereafter he (P.W.14) heard about missing of the children. P.W.15 is the person, who entered inside the well to bring out the deceased children. P.W.17 is the witness to the seizure of Lungi (M.O.-II) of appellant Nada Penthoi, which was found to be stained with blood. P.W.11 is the Medical Officer, who conducted post-mortem over the dead bodies of the deceased children and P.W.19 is the I.O.

Defence has examined none on its behalf, though the defence plea is one of complete denial.

4. The case is based entirely on circumstantial evidence. Learned Trial Court taking into consideration the materials on record, found the appellants guilty of the charges and sentenced them accordingly.

5. Learned counsel for the appellants submits that the prosecution has failed to prove the circumstances incriminatory against the appellants and learned Trial Court has failed to apply judicial mind in drawing inference of guilt of the appellants from the circumstances alleged to have been proved.

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

6. The circumstances, on which reliance is placed, are – (i) The deceased children were seen last together in the company of the appellants; (ii) both the children were playing near the well where the appellants were hunting for squirrels; (iii) none of the appellants agreed to enter inside the well for search of the missing children, though requested; (iv) recovery of the knife (M.O.I) at the instance of appellant Nada Penthoi and presence of human blood on that knife as found from chemical and serological examination report; and (v) presence of blood also on appellant Nada Penthoi's 'Check Lungi' (M.O.-II), which was seized by the police on production by him.

7. From the chemical and serological examination report, we find that though human blood was found on the 'Lungi' (M.O.-II) seized on production by appellant Nada Penthoi, but no opinion could be given about its group. Similarly, no opinion on the blood present on the knife (M.O.-I) could be given regarding its origin or group. In view of such fact, no conclusive opinion could be given by the Analysts regarding presence of human blood of group 'O' or 'B' (which are blood groups of the deceased children) either on the 'Lungi' (M.O.-II) or the knife (M.O.I). In view of such inconclusive evidence, it cannot be said that presence of blood on the 'Lungi' (M.O.II) of appellant Nada Penthoi is incriminatory in any way or the knife (M.O.-I) was used in causing injuries to the deceased children. Presence of blood on a person's wearing apparels may be for various causes, especially when such a person earns his livelihood by engaging himself as a labourer and he is rustic. We therefore loathe to concur with the findings of the learned Trial Court to the effect that presence of human blood on the 'Lungi' (M.O.-II) seized on production by appellant Nada Penthoi and presence of blood on the knife (M.O.I) is one of the circumstances incriminatory against all the appellants.

8. The evidence regarding seizure of knife (M.O.-I) from beneath a heap of 'Kendu' leaves, at the instance of appellant Nada Penthoi on the basis of his disclosure statement, is contradicted by P.W.7, who, in his examination-in-chief has testified that the knife and chapals were seized by the police from the spot. Contradicting such statement, again he (P.W.7) has testified that while in custody, appellant Nada Penthoi told that the 'Chaku' (knife – M.O.-I) by which he killed the deceased children was concealed under a heap of 'Kendu' leaves and he led the police party to give recovery of that 'Chaku'. In view of such prevaricating statements of the witness, who was examined to prove the confessional statement and consequent recovery of the weapon of offence, we do not feel persuaded to place reliance on the evidence of recovery of the knife (M.O.-I) at the instance of appellant Nada Penthoi.

9. The next circumstance is to the effect that the appellants were seen last in the company of the deceased children and they refused to enter inside the well for search of the missing children, though requested. The cause of death of deceased Bapi is opined to be smothering and the cause of death of deceased Muni is opined to be throttling. There are some injuries on both the dead bodies. Admittedly, both the deceased children were playing near the well. The prosecution has designedly not proved the spot map and the defence counsel has not cross-examined the I.O. regarding the situation of the spot well. On verification of the record, it is fairly submitted by learned Additional Standing Counsel that the I.O., on his spot visit, has prepared the spot map and in the spot visit report he has specifically mentioned that there was no raised platform around the well. As the deceased were small children, it was not unnatural for them to fall into the well while immersed in playing. Further the appellants having stated to be engaged in hunting squirrels, might not have marked the children falling into the well and they on being questioned, have answered that the children had left the place since long. Anybody, who is not accustomed to enter inside a well may not agree to enter inside it, even if requested, as such an act may be at his peril. In view of such fact, we do not feel persuaded to accept refusal by the appellants to enter inside the well on request and their answer to the effect that the children have already left for their home since long as circumstances incriminatory against them. In absence of diatom test, it cannot be definitely said whether the death was due to drowning or not. Admittedly, the dead bodies of the deceased children were recovered from the well and the only circumstance against the appellants is to the effect that they were seen last in the company of the deceased children. In absence of any other circumstances, it is difficult to arrive at a definite conclusion that it was the appellants, who have killed the deceased children.

10. In view of the above, we set aside the impugned judgment of conviction and order of sentence passed by the learned Trial Court. The appellants are acquitted of the charges. The appellants, who are stated to be on bail, be discharged of the bail bonds. The Jail Criminal Appeal is accordingly allowed.

Appeal allowed.

2012 (II) ILR - CUT- 489

M. M. DAS, J.

F.A.O. NO.31 OF 2012 (Dt. 03.03.2012)

BANAJA JENA & ANR. …….. Appellants.

.Vrs.

GOURANGA CHARAN BISWAL & ORS. ……Respondents.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 7, RULE 10.

Return of plaint – When a Court finds that it lacks territorial jurisdiction over the subject matter of the suit or pecuniary jurisdiction to try the suit, the only course open for the learned Court to exercise power Under Order 7, Rule 10 CPC and return the plaint in accordance with the said Rule.

In the present case the learned trial Court entered into the merits of the suit, which it was not authorized to do Under Order 7, Rule 10 CPC. – Held, the impugned order is set aside.

Case laws Referred to:-

1.AIR 1965 SC 338 : (Athmanath Devasthanam-V- K.Gopalaswami Ayyangar).
2.2003(Supp.)OLR 675 : (M/s. Orissa Agro Industries Corporation Ltd.-V- M/s. K.C.S Private Ltd. & M/s. Orissa Agro Industries Corporation Ltd.-V- M/s. P.K.Rout, A Partnership Firm).

For Appellants - P.K.Sing
For Respondents - None

Heard Mr. P.K. Singh, learned counsel for the appellants.

This appeal has been preferred against the order dated 09.12.2011 passed in C.S. No.879 of 2011 by the learned Civil Judge (Sr.Divn.), Bhubaneswar directing return of the plaint to the appellants. The appellants as plaintiffs filed the above suit with the following prayer:

> "In the interest of justice and for the reasons stated above, it is therefore prayed that (I) the ex parte decree dated 16.02.1999 passed in original title suit no.318 of 1997 may kindly be set aside,

(II) the plaintiffs be awarded the costs of the suit and such other relief/reliefs as in the circumstances be deemed just and proper."

The learned trial Court in the impugned order has found that the appellants were not parties in the suit previously filed, being T.S. No.318/1997, the ex parte decree of which is sought to be set aside by the appellants in the present suit without a prayer for declaration.

A court is authorized to return the plaint filed before it as per provision under Order-7, Rule-10, C.P.C., which is quoted hereunder:

"Return of plaint- (1) [Subject to the provisions of rule 10-A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

[Explanation – For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

(2) Procedure on returning plaint- On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for retuning it."

Dealing with the question as to what is the duty of a court when it finds that it has no jurisdiction over the subject matter of the suit, the Supreme Court in the case of ***Athmanath Devasthanam Vrs. K. Gopalaswami Ayyangar,*** AIR 1965 SC 338 held that when the court has no jurisdiction over the subject matter of the suit, it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint.

It is a well settled proposition of law that a Court if finds that it lacks either territorial jurisdiction over the subject matter of the suit or pecuniary jurisdiction to try the suit, the only course open to the Court is to exercise power under Order-7, Rule-10, C.P.C. and return the plaint in accordance with the said Rule. In the case of ***M/s.Orissa Agro Industries Corporation Ltd. Vrs. M/s. K.C.S. Private Ltd. and M/s. Orissa Agro Industries Corporation Ltd. Vrs. M/s.P.K.Rout, A partnership Firm***, 2003 (Supp.) OLR 675, this Court laid down that by mere disposal of an application under Rule-10, Order-7 practically a suit is not disposed of but the plaint is returned

to be presented in a court having jurisdiction. A reading of the impugned order in the present case clearly shows that while returning the plaint, the trial court has digressed its jurisdiction as vested in it under Order-7, Rule-10, C.P.C. by entering into the merits of the suit and making various observations with regard to the same, which it was not authorized to do under Order-7, Rule-10, C.P.C.

The impugned order, therefore, is set aside. As Mr. P.K.Singh, learned counsel submits that after passing of the impugned order the plaint has not yet been returned to the plaintiffs, which still lying with the learned Civil Judge (Sr.divn.), Bhubaneswar. The learned Civil Judge (Sr.Divn.), Bhubaneswar is, therefore, directed to admit the suit, if the subject matter of the suit comes within his territorial jurisdiction. Question of pecuniary jurisdiction in this case does not arise as the pecuniary jurisdiction of a Civil Judge (Sr.Divn.) is unlimited, except in suits for recovery of money covered under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the present suit is not one of such nature.

The FAO was taken up for final hearing and disposed of as the impugned order was passed before admission of the suit for which no notice was required to be issued to the respondents. The FAO is accordingly allowed as above.

Appeal allowed.

2012 (II) ILR - CUT- 492

M. M. DAS, J.

CRLMC. NO.2564 OF 2010 (Dt.27.02.2012)

HEMANTA KUMAR PATRA …….Petitioner.

.Vrs.

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

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

Cognizance taken U/s.409 I.P.C. – Allegation of misappropriation against the petitioner while working as Branch Post Master – No document has been seized except an audit report – Since the entire case is based on an audit report and no conviction can lie on such report, continuance of Criminal Proceeding against the petitioner would amount to an abuse of the process of the Court specifically when the concerned account holders stated on oath that they have no grievance against the petitioner who has never misappropriated any amount from their accounts – Held, the impugned order is set aside and the entire G.R.Case is quashed. (Para 7)

Case laws Referred to:-

1.1985 CLR 308 : (State of Orissa-V- Chamara Panda).

2.Vol.58(1984)CLT 80 : (Okila Luha-V-State of Orissa).

3.(1998)15 OCR 137 : (Bainkunthnath Mishra-V- The State of Orissa).

4.AIR 1999 SC 1301 : (Jiwan Dass-V- State of Haryana).

5.(2008)4 OCR(SC)427 : (Nikhil Merchand-V-Central Bureau of Investigation & Anr.)

For Petitioner - M/s. S.K.Sahoo, G.Sahoo & A.Mohanty.

For Opp.Parties- M/s. H.S.Satpathy, A.N.Sahu, M.Panda, M.M.Swain, S.Biswal & H.K.Behera(for O.P.2)

M. M. DAS, J. The petitioner in this application under Section 482 Cr.P.C. is the accused in Balliguda P.S. Case No.89 (3) of 2009 corresponding to G.R.Case No.253 of 2009 now pending in the court of learned S.D.J.M., Balliguda and has prayed to set aside the order dated 4.5.2010 passed by the learned S.D.J.M., Balliguda in G.R.Case No.253 of

2009 taking cognizance of the offence under Section 409 I.P.C. against the petitioner and issuing process to him.

2. Facts reveal that the petitioner was working as Branch Post Master to Mahasinghi Branch Post Office, Balliguda. On 8.11.2009, one Satya Narayan Mishra, Inspector of Post Office, Balliguda Sub-Division, Balliguda lodged an information before the I.I.C., Balliguda Police Station alleging that when the petitioner was working as Branch Post Master of Mahasinghi Branch Office has committed the offence of misappropriation of detailed in the F.I.R., with regard to various account holders in the said Branch Post Office i.e. recurring deposit account of one Sudarsan Patra, one Dhan Singh Mallick, one Smt.Aaran Kothadalai, one Namita Patra and one Surasingh Kothadalai. The petitioner was alleged to have committed irregularities by making wrong entries in their accounts thereby misappropriating amounts of Rs.1100/-, Rs.1826/-, Rs.6000/- and Rs.1600/- respectively from the aforesaid accounts. The F.I.R. also discloses that the informant Shri Mishra, who was the Inspector of Post Office, Balliguda Sub-Division, stated that all the connected records relevant to the allegations are with the Superintendent Post Office, Phulbani Division for departmental enquiry against the petitioner. The informant also requested to call for those records and seize the same from the Superintendent Post Office.

3. On the above allegations, after completion of the investigation, a charge-sheet was submitted against the petitioner by the Investigating Officer for commission of the alleged offence under Section 409 I.P.C. upon which the order taking cognizance of the said offence against the petitioner has been passed, which is impugned in this application. Affidavits have been annexed to the Crl. Misc.Case Petition and all the five account holders from whose accounts, it is alleged that the petitioner has misappropriated the amounts as stated above, in those affidavits, have stated that they have no grievance against the petitioner and the petitioner has never misappropriated any amount from their accounts, which they deposited. The case diary was called for during hearing of this petition, which has been produced by the learned counsel for the State. It appears from the case diary that except that audit report, no other documents have been seized by the Investigating Officer during investigation of the case and the entire allegation in the F.I.R. is based on the audit report. The learned counsel for the State also on instruction, submitted that no other documents or materials have been seized during the course of investigation.

4. Mr. S.K. Sahoo, learned counsel appearing for the petitioner vehemently contended that since the Investigating Officer has not seized any

other registers of the Branch Post Office where the petitioner was working as Branch Post Master, such as, copy of the ledger accounts of the alleged account holders from whose account it is alleged that money has been misappropriated by the petitioner and the cash book of the said post office or any other relevant register to show that the amount deposited by the depositors was misappropriated by the petitioner. He further contended that the audit report can by no stretch of imagination be held to be a conclusive evidence with regard to any irregularity pointed out by the auditor. Such irregularity, if pointed out by an auditor, the person who is stated to be responsible for commission of such irregularities, is required to be asked to show cause or explain such irregularities found during any audit. Mr. Sahoo also contended that in the present case, all the five depositors named above have sworn affidavits stating that the petitioner has never misappropriated any amount deposited by them in the post office inasmuch the audit report annexed to the F.I.R. clearly mentioned that the loss has been made good by the charged officials. Out of all the witnesses named in the charge-sheet, five witnesses are the depositors, who have sworn their affidavits stating that they have no allegation against the petitioner. At this stage, it may be made clear that as stated above, the Investigating Officer has not seized any other register or documents during investigation of the case. Mr. Sahoo further submitted that basing only on the audit report, the Investigating Officer could not have filed the charge-sheet against the petitioner and even if such charge-sheet is filed, the court below could not have passed the order taking cognizance of the offence under Section 409 I.P.C. against the petitioner.

5. The question as to whether an audit report can be considered to be of conclusive nature and without any order evidence can form the basis of conviction has come up before this Court in various cases. In the case of ***State of Orissa –vrs.- Chamara Panda,*** 1985 CLR 308, this Court categorically laid down that an audit report of an inconclusive character which notes down some statements of objection cannot, by itself, saddle any person with criminal liability. In the case of ***Okia Luha-vrs.- State of Orissa,*** Vol. 58 (1984) CLT 80, this Court held that an order of conviction cannot be based on an audit report, which is of an inconclusive character, as an Auditor notes some objection therein and until the objections are brought to the notices of the persons concerned and the liabilities are fixed by the authorities after proper enquiry, no legal culpability can be fixed. Law was made further clear in the case ***of Bainkunthnath Mishra –vrs.- The State of Orissa***, (1998) 15 OCR 137 where it was held by the Court that conviction under Section 409 I.P.C. cannot be based merely on the basis of an audit report in the absence of any independent evidence with regard to entrustment. It would be profitable to note the observation and the ratio laid

down by the Apex Court in the case of ***Jiwan Das-vrs.- State of Haryana,*** AIR 1999 SC 1301 where the Supreme Court categorically held as follows:

> "Mr. Ajay Siwach, the learned counsel appearing for the State of Haryana, however, very strenuously argued that Jiwan Dass being a senior officer and having been deputed with the bank draft for the purpose of taking delivery of the oil and the letter of authority being in favour of Jiwan Dass, it must be held that the entrustment of diesel had been made to Jiwan Dass or at least he had the dominion over the same. Mere fact that Jiwan Dass had taken the bank draft and that an authorization had been given in his favour by his superior officers to take delivery of the diesel, cannot be the basis for coming to a conclusion that in fact the diesel had been entrusted to said accused-Jiwan Dass or he had dominion over the same. When in point of fact it is established beyond reasonable doubt that delivery had been taken by accused Mittar Pal Yadav and in token of the same he had signed the relevant papers and register, Jiwan Dass being a senior officer may be responsible for dereliction of his duty in not taking delivery of the diesel himself. But on that score, it cannot be said that in-fact the prosecution has been able to establish that diesel had been entrusted to Jiwan Dass and there has been shortage of the diesel to the tune of 4300 litres. In our considered opinion the gravamen of the charge being misappropriation of 4300 liters of diesel oil which was found to be in shortage while measuring the diesel that had been brought and the said diesel having been delivered to Mittar Pal Yadav, who had singed the relevant documents in token thereof, the entrustment to or dominion over the diesel by Jiwan Dass bas not been established and as such the prosecution has not been able to establish the charge under Section 409, I.P.C. beyond reasonable doubt as against accused Jiwan Dass in respect of the shortage of diesel to the tune of 4300 litres. It is no doubt true that Jiwan Dass appears to have given in writing on 2.3.1982 that he would be completing the quantity of 10,000 litres of oil but that writing neither can be held to be a confession or admission of the guilt on the part of the accused Jiwan Dass, nor that can form the basis of convicting the accused-Jiwan Dass for an offence under Section 409 I.P.C. In a prosecution for offence of criminal breach of trust if there is absence of legal and independent evidence with regard to the entrustment, then it would be improper either to put a question with regard to the entrustment to the accused and if put an answer is obtained, partially admitting entrustment, the same does not establish the case of entrustment. In the aforesaid

premises and in view of our conclusion that the prosecution has failed to establish entrustment of diesel to accused-Jiwan Dass, the conviction of Jiwan Dass under Section 409, I.P.C. cannot be sustained and we, accordingly set aside the conviction and sentence against the accused-Jiwan Dass and acquit him of the charge leveled against the Criminal Appeal No.990 of 1995 is accordingly allowed and his bail bonds stand discharged."

6. Recently in the case of ***Nikhil Merchand-v. Central Bureau of Investigation and another***, (2008) 41 OCR (SC) 427, the Hon'ble Apex Court relying upon various decision of the said court took note of the fact of compromise between the parties and held that continuing with the allegation would only amount to misuse the process of the Court and quashed the criminal proceeding by setting aside the order of the High Court which dismissed the petitioner's revision for quashing of the same.

7. As this Court after perusing the case diary and finding that the entire case is based on the audit report and no conviction can lie on such audit report as the same cannot be considered to be of conclusive character, continuance of the criminal proceeding against the petitioner would amount to abuse of the process of court, moreso when the account holders from whose accounts misappropriation against the petitioner as alleged, have already stated on oath that they have no grievance against the petitioner, who has never misappropriated any amount from their accounts. This Court, therefore, while setting aside the impugned order by which the learned S.D.J.M., Balliguda took cognizance of the offence under Section 409 I.P.C. against the petitioner quashes the G.R. Case No.253 of 2009 in its entirety. The CRLMC is accordingly allowed.

Application allowed.

2012 (II) ILR - CUT- 497

M. M. DAS, J.

F.A.O. NO. 314 OF 2006 (Dt.15.03.2012)

MALA BARGE @ TAPASWINI ROUT …….Appellant.

.*Vrs.*

SUBASH CHANDRA PATI & ORS. …….Respondents.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 41, RULE 21 & ORDER 32, RULE 12.

Suit/Appeal filed by minor – If it is discovered by the trial Court/Appellate Court during pendency of the suit or appeal that the minor had attained majority then the Court is under legal obligation to call upon the minor, if such minor not present, direct him to be present in the Court to ascertain his wishes as to whether he/she elects to proceed with the suit/appeal or he/she elects to abandon it and the court is required to proceed as per the wish/statement of such minor who has attained majority.

In this case the suit filed by respondent No.1 was dismissed but in appeal the decree of the trial Court was reversed and suit was decreed by the lower appellate Court – The present appellant filed an application under Order 41 rule 21 C.P.C. alleging that on the date of filing Title appeal she was a minor and she attained majority during pendency of the appeal and no notice was issued to her and the judgment passed in the appeal construed to be an exparte judgment and the appeal should be reheard – Application dismissed on the ground that she was represented by her GAL and there being sufficient representation application under Order 41 Rule 21 C.P.C. is not maintainable – Held, impugned order is set aside – Direction issued to the Lower appellate Court to rehear the Title Appeal.

(Para 7,8)

Case laws Referred to:-

1.AIR 1996 Rajasthan 214 : (Gopal Dash-V- Tej Singh)
2.AIR 1940 Bom. 58 : (Ratanchand Dhulaji & Anr.-V-Jasraj Kasturichand)
3.AIR 1929 Lahore 555(2) : (Ishar Singh-V- Bakshis Singh & Ors.)

For Appellant - M/s. S.P.Mishra, S.Mishra, S.Dash, S.Nanda, B.S.Panigrahi & S.S.Satapathy.

For Respondents- M/s. S.K.Padhi, B.K.Sahoo & G.Mishra (Respondent No.1).

M. M. DAS, J. This F.A.O. has been filed against the order passed by the learned Additional District Judge, (Fast Track Court), Bargarh in Misc. Case No.1 of 2005 arising out of T.A. No.18-37 of 2000-03 passed on 09.03.2006 by which the application filed under Order-41, Rule-21, C.P.C. by the appellant was rejected.

2. The facts of the case disclose that the respondent no.1 herein filed the suit for specific performance of contract on the allegation that the father of the appellant executed an agreement to sell the suit property and received part consideration, against the appellant and the respondent nos.2 to 5, who are the legal heirs of the executant of the agreement for sale, as the said executant, expired in the meanwhile. The learned trial court dismissed the suit, against which the respondent no.1 carried Title Appeal No.18-37 of 2000-2003. The judgement and decree of the learned trial court was reversed and the suit filed by the respondent no.1 was decreed by the learned lower appellate court. Thereafter, the appellant filed an application under Order-41, Rule-21, C.P.C., inter alia, alleging that on the date of filing of the Title Appeal though she was a minor, she attained majority during pendency of the appeal but after attaining majority, no notice was issued to her and the learned appellate court erroneously on 12.04.2002, by which time she was already a major, appointed a guardian ad litum on her behalf. Therefore, the judgment passed in the appeal should be construed to be an ex parte judgment passed against the appellant without notice and the appeal should be reheard.

3. Learned counsel for the respondent no.1-plaintiff submits that since a G.A.L. was appointed on behalf of the appellant and was also heard on her behalf by the lower appellate court, she cannot complain of being unrepresented in the appeal.

4. On verifying the lower court record, it appears that in the plaint the appellant was described to be of 10 years of age and during course of hearing of the suit, a G.A.L. was appointed on her behalf by the trial court during pendency of the suit, i.e., T.S. No.82 of 1994. In the memo of appeal filed by the respondent no.1 against the judgment and decree of the trial court on 27.04.2000, the appellant was described to be of 16 years of age. Undoubtedly, therefore, when the learned lower appellate court by its order

dated 12.04.2002 appointed one Sri S.Pradhan as G.A.L. of the appellant as well as the respondent no.3 (who was still a minor) in the appeal before him, the appellant was already a major. The order sheet of the lower appellate court discloses that his fact was lost sight of by the appellate court and erroneously on 12.04.2002, the learned lower appellate court passed an order appointing a G.A.L. to represent the appellant on the presumption that she continues to be a minor though by that date, she had already attained majority.

5. Miss. Mishra, learned counsel for the appellant relies upon the decision in the case of ***Gopal Dash-Vrs. Tej Singh***, AIR 1996 Rajasthan 214 in support of her contention that when a minor during pendency of the proceeding attains majority, it is the duty of the court to declare such minor as major and issue notice to the said minor, who has attained majority, to appear before the court and file his statement on oath as to whether he wants to prosecute/contest the case or want to abandon/remain ex parte in the case.

6. In the case of the Gopal Dash (Supra), the Rajasthan High Court referring to the decision of the Bombay High Court in the case of ***Ratanchand Dhulaji & Another Vrs. Jassraj Kasturichand***, AIR 1940 Bom, 58 as well as the decision reported in the case lf I***shar Singh Vrs. Bakshis Singh & others,*** AIR 1929 Lahore 555 (2) came to the conclusion that where during pendency of the suit or an appeal on behalf of a minor, it is discovered by a trial court or by an appellate court that the minor had attained majority after institution of such suit or appeal, then a court is under legal obligation to call upon the minor, if such minor was not present in the court, and direct him to be present in the court to ascertain his wishes as to whether he/she elects to proceed with the suit or an appeal or he elects to abandon it ? The court thereafter is required to proceed as per the wish/statement of such minor, who has attained majority.

7. This Court agreeing with the aforesaid view of the Rajasthan High Court finds that in the instant case the learned lower appellate court could not have appointed a G.A.L. to represent the appellant on 12.04.2002 by which time the appellant was already a major. The course open to the court was to issue fresh notice to the appellant, who was a respondent before it and to give an opportunity to the appellant to contest the appeal, if she so chose. It is, therefore, abundantly clear that the judgment passed by the learned lower appellate court in T.A. No.18-37 of 2000-03 was an ex parte judgment against the present appellant and an application under Order-41, Rule-21, C.P.C. was correctly filed by her. The learned lower appellate court

on an erroneous assumption that the appellant was represented by her G.A.L. (even though by the date of the appointment of the G.A.L. she was already a major) was sufficiently represented and the application under Order-41, Rule-21, C.P.C. is not maintainable.

8. In view of the above, the impugned order is set aside and the lower appellate court is directed to rehear Title Appeal No.18-37 of 2000-03 as Miss Mishra submits that the appellant will contest the said appeal. For the above purpose on production of the certified copy of this order before the learned lower appellate court by the appellant, notice shall be issued to the other respondents as well as the appellant before the learned lower appellate court and he shall rehear the appeal afresh. The judgment dated 31.07.2003 passed by the lower appellate court in T.A. No.18-37 of 2000-03 is also set aside. The learned lower appellate court after rehearing the appeal shall pass a fresh judgment in the appeal, on merit.

9. It is submitted by the learned counsel for the respondent no.1 before me that in the meantime execution was levied to execute the decree passed by the learned lower appellate court and the possession of the disputed property has been delivered to the respondent no.1. Miss Mishra, learned counsel for the appellant submits that if ultimately the Title Appeal is dismissed thereby confirming the dismissal of the suit, the appellant will take steps under section 144, C.P.C. for restitution of the property. This will depend upon the result of the Title Appeal. This Court makes no observation on the above submissions with regard to either delivery of possession of the property or restitution of the same, which will be dealt with in accordance with law after disposal of the Title Appeal. It is submitted by the learned counsel for the respondent no.1 that the learned lower appellate court in the impugned order has also made an observation that the application under Order-41, Rule-21, C.P.C. was filed after about one year three moths from the date of disposal of the appeal and on that ground he rejected the application. However, it is seen from the L.C.R. that an application under section 5 of the Limitation Act was filed for condonation of delay, which was not duly considered by the learned lower appellate court except making a cursory observation that the application has been filed with a long delay. This question also becomes academic as this Court has set aside the impugned order and directed rehearing of the appeal on merit and fresh disposal of the same.

10. Since this is an old appeal, the learned lower appellate court shall take expeditious steps and make an attempt to dispose of the appeal within

a period of six months from the date of production of certified copy of this order before him.

11. The F.A.O. is accordingly allowed. The L.C.R. be sent back immediately.

Appeal allowed.

2012 (II) ILR - CUT- 502

INDRAJIT MAHANTY, J.

CRLMC NO. 2743 OF 2011 (Dt.26.06.2012)

DHANESWAR PRADHAN … ….Petitioner

.Vrs.

STATE OF ODISHA ……..Opp.Party

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

Quashing of order taking cognizance U/s.7, 13(2) P.C. Act, 1988 – Informant/Complainant categorically stated that he offered the bribe on being demanded by the R.I. – Presumption U/s.20 of the Act – Prima facie Case has been made out for the purpose of taking cognizance – Held, no justifiable reason to quash the order of cognizance.

(Para 8,9)

Case laws Referred to:-

1.2008(1) OLR-249 : (Jaganmaya Mishra-V- State of Orissa)
2.2009(1) CCC 533 (SC) : (State of A.P.-V- P.Satyanarayana Murthy)

For Petitioner - M/s. Dr. Gangadhar Tripathy, B.Jalli, J.Prakash Tripathy.

For Opp.Party - Mr. P.K.Pani, (Addl. Standing Counsel(Vig.).

I. MAHANTY, J. In the present application under Section 482 Cr.P.C. the petitioner has sought for quashing the order dated 30.6.2011 passed by the learned Special Judge (Vigilance), Jeypore in G.R. Case No.42 of 2010 (V) arising out of Koraput Vigilance P.S. Case No.42 of 2010 pending before the learned C.J.M.(Vig.), Jeypore taking cognizance against him for the alleged commission of offence under Sections 7/13(2) read with 13(1)(d)/7 P.C.Act,1988

2. Dr. Gangadhar Tripathy, learned counsel for the petitioner contended that on perusal of the F.I.R. under Annexure-1 and detection report under Annexure-2, it appears that the initiation of the proceeding against the petitioner is wholly baseless and it also establishes that no offence as alleged has been made out.

3. It is submitted by the learned counsel for the petitioner that that the allegation of demanding of Rs.300/- by the petitioner from the informant to submit the enquiry report before the Tahasildar, Kolnora does not arise since before the date of the alleged offer of gratification, the report of enquiry prepared by the petitioner had already been forwarded to the Tahasildar since the complainant though requested but the petitioner had not provided the requisite documents for the purpose of enquiry and hence, the report has been submitted by the petitioner to the Tahasildar on 20.09.2010 prior to the date of trap.

4. The next contention of the learned counsel for the petitioner relating to the present fact that the money has not been found from the possession of the petitioner but inside the register and the petitioner's hands do not touch the tented money. Apart from the above, strong reliance was placed by the learned counsel for the petitioner on the detection report under Annexure-2 where it is noted that the accompanying cum over hearing witness Sri Alekha Ranjan Mahankuda had been instructed to see the transaction of bribe money between the complainant and the accused and over hear their conversation and give the pre arrange signal to the remaining members of the trap team. Dr. Tripathy submits that it would be evident from the detection report that the accompanying witness-Alekha Ranjan Mahankud is stated to have been accompanied the complainant-Sri Siba Sankar Hikaka to the office room of the petitioner but the accompanied witness did not either over hear the conversation between the petitioner and the complainant nor did he see handing over any bribe to the petitioner. The accompanying witness-Alekha Ranjan Mahankud further submitted that he gave a signal to the trap party on being informed by the complainant that he was handing over the bribe money to the petitioner. Therefore, it is submitted on behalf of the petitioner that in view of the fact that the accompanied witness neither over hear any conversation where the petitioner demanded any gratification nor saw the transaction of handing over the illegal gratification and merely giving the signal to the trap party only based on the submission made to the accompanied witness by the informant/complainant. Hence, it is asserted that there is absolutely no possibility of the petitioner being found guilty in trial and the proceeding ought to be quashed.

5. Dr. Tripathy, learned counsel for the petitioner placed reliance on the judgment of this High Court in the case of ***Jaganmaya Mishra v. State of Orissa,*** 2008 (1) OLR - 249 and in particular, Paragraphs-15 and 16 thereof which is quoted herein below:

> "15. The present petitioner, except counting the currency notes paid by the informant and keeping it on the table of the other co-accused, as directed by the co-accused, had no role to play in the occurrence. There is no allegation by the prosecution that the petitioner demanded any illegal gratification and in lieu thereof received the money paid by the informant for doing any official act.
>
> 16. This Court is, therefore, satisfied that there is no prima facie case whatsoever made out against the present petitioner, of committing offence under the above mentioned sections of the Act. Thus, the impugned order by which cognizance of offences under the above sections has been taken against the petitioner is liable to be quashed and the said order, however, shall be held to be legal and valid as against the co-accused Narayan Chandra Behera."

6. Mr.Pani, learned Addl. Standing Counsel (Vigilance), on the other hand, submitted that whether the adequacy or otherwise of the evidence can only be agitated on conclusion of the trial and in the present case since charge-sheet has been submitted and order of cognizance has been passed which is premature any evidence to submit whatsoever. He further submits that the F.I.R. and detection report together fairly establish the prima facie case and, therefore, does not justify any interference whatsoever. He submits that it has now been well settled by the Hon'ble Supreme Court in the case of ***State of A.P. v. P. Satyanarayana Murthy,*** 2009(1) Criminal Court Cases 533 (S.C.) that the conviction on the basis of sole testimony of the complainant is also permissible in view of the presumption raised under Section 20 of the P.C. Act. For better appreciation of the fact, Paragraphs-3 and 5 of the said judgment is quoted herein below:

> "3.Learned counsel for the appellant-State submitted that the High Court by a cryptic order has set aside the well reasoned judgment of the trial Court. Merely because some persons were not examined, same cannot be a ground to discard the evidence of a reliable witness. It is pointed out that the bribe money purported to have been given by Narsimha Reddi was also seized. The Investigating Officer had clearly stated the reasons for the non examination of Narsimha Reddi. It was stated that he had joined naxalites. The presumption available under Section 20 of the Act was not kept in view by the High Court. It is submitted that the High Court's conclusions are based on surmises and, therefore, the judgment of acquittal cannot be maintained.

> 5. It is to be noted that the evidence of P.W.1 has not been discarded by the High Court. But it is observed by the High Court that there was no corroboration to the evidence of P.W.1 and therefore it recorded the order of acquittal. The evidence of P.W.1 does not suffer from any infirmity. Mere non-examination of any other person would not render his evidence suspect. The IO has categorically stated that Narsimha Reddi was not available to be examined as a witness. Further, there was no suggestion given by the accused that money was forced on his hands and thereafter he put it on the table. No such suggestion was given and for the first time during examination under Section 313 of the Code of Criminal Procedure, 1973 (in short 'the Code') such a stand was taken. The High Court has also not considered the effect of the presumption flowing from Section 20 of the Act. It is not understood as to the basis on which the High Court found that accused would not put the application form and the money in different places. The conclusion has no basis. The accused did not dispute that the application form Ext.P5 was found in a brief case. In fact the bribed money from Narsimha Reddi was also seized. It has been clearly indicated by the witness that the money given by PW1 and money given to Narsimha Reddi were kept side by side and were not mixed up. In the present case, the trial Court had elaborately dealt with the evidence to record conviction. The High Court has not indicated any reason as to how the conclusions of the trial Court are wrong. In any event, the High Court by a cryptic conclusion held that the evidence led was not sufficient. As noted above, reasons for Narsimha Reddi's non examination has been disclosed by the prosecution."

7. Relying on the aforesaid judgment, learned Addl. Standing Counsel (Vigilance) submitted that since the complainant himself averred that the demand had been made by the petitioner and pursuant to the demand, he had handed over the bribe demanded, there is no reason as to why the present proceeding should be quashed and the matter should be left for consideration for the trial court on completion of the trial.

8. Therefore, while I refrain to express any opinion on the contentions advanced by the learned counsel of either side since it is likely to cause prejudice to the parties, it is suffice for me to note that in the present case, the informant/complainant has categorically stated that he offered the bribe on being demanded by the R.I. Hence, I find no justifiable reason to enter into any elaborate consideration thereto and also of the considered view that the present case is not a fit case where the order of cognizance

ought to be quashed.

9. Accordingly, since a prima facie case has been made out for the purpose of taking cognizance, the prayer for quashing the order of cognizance dated 30.06.2011 passed by the learned Special Judge (Vigilance), Jeypore in G.R. Case No.42/2010 (V) stands rejected. However, it is made clear that nothing stated in this order shall prejudice to either side and the parties are at liberty to raise all such contentions as may be available to them in course of such trial.

10. With the aforesaid observation, the CRLMC stands dismissed.

Application dismissed.

2012 (II) ILR - CUT- 507

INDRAJIT MAHANTY, J.

O.J.C. NO. 7425 OF 2000 (Dt. 18.04.2012)

M/S. ESSEL MINING &
INDUSTRIES LTD. …… Petitioner.

.Vrs.

PRAVAKAR MAHAKUD & ANR. … …Opp.Parties.

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – S.11-A.

Punishment of dismissal – Workman approached Industrial Tribunal – Tribunal felt the punishment imposed is shockingly disproportionate to the charge and directed re-instatement without back wages – Order challenged in writ petition – This Court held the Tribunal is competent to pass such order.

In this case the workman-driver while reversing his vehicle a child suddenly came behind and expired – The incident was clearly an accident – No allegation that he was under intoxication or incapable to drive the vehicle – There is nothing in the M.V. Act that the driver can not reverse or drive such vehicle in the absence of his helper or assistant – Held, the Industrial Tribunal is vested with the necessary authority U/s.11-A of the Act to take the aforesaid facts in to consideration and to impose a lesser punishment than originally imposed by the employer on conclusion of such disciplinary proceeding – Direction issued to the employer to implement the award.

(Para 9,10,11)

Case laws Referred to:-

1.(2008)2 SCC 74 : (Akhilesh Kumar Singh-V-State of Jharkhand & Ors.)
2.AIR 1998 SC 948 : (Colour-Chem Limited-V- A.L.Alaspurkar)
3.AIR 2003 SC 1377 : (Kailash Nath Gupta-V-Enquiry Officer, Allahabad Bank)
4.AIR 1996 SC 484 : (B.C. Chaturvedi-V- Union of India)

For Petitioner - M/s. Durga Prasad nanda, S.K.Mishra, P.K.Mishra, D.P.Nanda, U.N.Nayak, J.K.Nanda, P.K.Mohapatra, M.K.Pati.
For Opp.Party No.1 – Mr. Sanjit Mohanty, Sr. Adv., M/s. S.C.Samantaray, N.C.Sahoo, D.Mohanty,

S.Nanda, S.Panda, S.Pattnaik & P.K.Muduli.
For Opp.Party No.2 - Addl. Standing Counsel (Central).

I. MAHANTY, J. In the present writ petition, the petitioner-M/s. Essel Mining & Industries Ltd. (hereinafter termed as 'the employer') has sought to challenge the award dated 27.03.2000 passed by the learned Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.147/97(C) directing reinstatement of Sri Pravakar Mahakud-Opposite Party No.1 (hereinafter referred as 'the workman'), who had been employed by the petitioner-company as a Driver of a heavy vehicle. It appears that the learned Presiding Officer, Industrial Tribunal came to hold that although the domestic enquiry proceeding leading to imposition of punishment on the workman was fair and proper and all the articles of charge except the charge of dishonesty had been established against the workman who had caused an accident leading to death of a child, while driving the heavy vehicle (Dumper) by allegedly not observing the required safety measures, yet included that the imposition of penalty of termination was unduly harsh and directed reduction of punishment, to reinstatement without back wages.

The employer has sought to challenge the observations of the learned Presiding Officer, Industrial Tribunal in this writ application that the punishment of termination imposed in the disciplinary proceeding was severe, harsh and disproportionate since the accident was the first accident that had occurred in course of the workman's career and the direction directing imposition of lesser punishment i.e. the workman to be reinstated but as a punishment was not entitled to get back wages for the period until reinstatement.

2. Learned counsel appearing for the petitioner vehemently urged that the learned Presiding Officer, Industrial Tribunal was not competent to judge whether the punishment imposed on the workman was severe, harsh or disproportionate and further, since the Tribunal came to hold that the domestic enquiry was fair and proper and had also agreed with the conclusion reached in the domestic enquiry vis-a-vis that all the charges against the workman having been proved, no occasion arose for the Tribunal to interfere, purportedly, on the ground of disproportionate punishment. She further alleged that the negligence on the part of the workman was very severe in nature and while driving the heavy duty Dumper, an accident had occurred resulting the death of a young child and hence, the imposition of punishment of termination from employment ought to have been upheld.

3. Mr. S.C. Samantaray, learned counsel for opposite party No.1-workman, on the other hand, submitted that the evidence recorded in course of the domestic enquiry, as well as before the learned Presiding Officer, Industrial Tribunal, Rourkela would clearly go to show that the charges framed against the workman had clearly not been established. He placed reliance on a judgment of the Hon'ble Supreme Court in the case of ***Akhilesh Kumar Singh Vrs. State of Jharkhand and Ors.,*** (2008) 2 S.C.C. 74 in support of his contention that in the present case, a domestic enquiry had been initiated against both the opposite party-workmen i.e. the Driver, namely, Pravakar Mahakud as well as his Helper (Sadhu Mahakud) on the selfsame charges of alleged negligence and/or misconduct. It is asserted that though Sadhu Mahakud was exonerated in the selfsame domestic enquiry, yet the opposite party-workman, the Driver, namely, Pravakar Mahakud had been found to be guilty. In this respect, learned counsel for the opposite party workman submits that, since the allegation against the Driver as well as the Helper had been the same, the Disciplinary Authority was required to reach a common conclusion and not to discriminate amongst the workmen. Thus, it was submitted that if the charges against the workmen are identical, it was desirable that they be dealt with similarly without any discrimination.

Mr. Samantaray further placed reliance on a judgment of the Hon'ble Supreme Court in the case of ***Colour-Chem Limited Vrs. A.L. Alaspurkar,*** A.I.R. 1998 S.C. 948 in order to support his contention that the Tribunal was competent to vary the punishment suitably in a case, where it come to a conclusion that the punishment imposed was "shockingly disproportionate" having regard to the particular misconduct alleged against the workman, as well as by taking into consideration the workman's past records. He also placed reliance on the judgments of the Hon'ble Supreme Court in the case of ***Kailash Nath Gupta Vrs. Enquiry Officer, Allahabad Bank,*** A.I.R. 2003 S.C. 1377 and in the case of ***B.C. Chaturvedi Vrs. Union of India***, A.I.R. 1996 S.C. 484 in support of the aforesaid proposition.

4. On a consideration of the submissions advanced by the learned counsel for the respective parties and on perusing the records of the present case, it appears that the basic facts of the case are that on 29.01.1996, the opposite party-workman (Pravakar Mahakud) and the Helper (Sadhu Mahakud) had taken the Dumper out of the Mines to a nearby village for checking out the tyre pressure. It further appears that when the vehicle reached the tyre work shop, while the opposite party-workman was trying to reverse the Dumper to park it properly for checking of the tyre pressure, at that very moment while the vehicle was being reversed, a young boy

suddenly came running across the road and came under the rear wheel of the vehicle and due to such an accident, it lead to his unfortunate death.

Out of such an accident, a domestic enquiry was initiated. In the said enquiry while no witness was examined from the side of the management, no documents were exhibited by the management nor supplied to the delinquent. The Enquiry Officer put some questions to the delinquent and the alleged answers to such questions were purportedly recorded by the Enquiry Officer in English vernacular. From the records of the enquiry it appears that the answers of the delinquent were also recorded in English and the delinquent had put his signature thereon. It was submitted on behalf of the opposite party-workman that while no copy of such statements were ever provided to the workman. On the conclusion of the domestic enquiry the Helper (Sadhu Mahakud) was exonerated but the Driver-Pravakar Mahakud (opposite party-workman herein) was found guilty and imposed with punishment of termination from service.

5. The opposite party-workman raised an Industrial Dispute before the learned Presiding Officer, Industrial Tribunal, Rourkela, before whom the Management had filed its reply. In course of the Industrial dispute, the management examined four witnesses and filed some documents and the opposite party-workman examined himself and another person on his behalf.

On conclusion of the proceeding, referring to the evidence of M.W.1, the Tribunal came to hold that even though a copy of the enquiry proceeding was not given to the opposite party-workman no prejudice was caused since the delinquent did not ask for the same. The Tribunal further held that the Helper (Sadhu Mahakud), who was examined as M.W.2 supported the opposite party-workman by stating that when wheel of any vehicle of the company gets deflated or punctured, it goes to Gurudi Chowk for repairs and no permission was required for such purpose. He further admitted that he was accompanying the Driver in the Dumper to the usual repair shop, but since the owner of that shop denied to give air pressure to the wheel of the Dumper, the opposite party-workman (Driver) took the Dumper to another shop at Guridi. In course of the proceeding before the Tribunal, this evidence of M.W.2 was not challenged by the management by declaring him hostile. The Tribunal also came to hold that the opposite party-workman vehemently denied either admitting his guilt or giving any statement as recorded under Ext.3. From this, it is clear that the statement of the delinquents had been written in English and the delinquent not being English educated, the opposite party-workman was never been made aware

of the contents of the statement, but made to sign in oriya vernacular below such statement by the Enquiry Officer.

In Paragraph-10 of the impugned award, the Tribunal came to hold that there is no evidence about any past misconduct on the part of the opposite party-workman in driving the vehicle and taking the same into consideration came to conclude that the imposition of punishment of termination of service was found to be disproportionate and hence, imposed a lesser punishment of reinstatement without back wages for the period under dismissal.

6. The aforesaid findings of the Tribunal must be taken into consideration in the light of the judgments of the Hon'ble Supreme Court relied upon by the learned counsel for the opposite party-workman. In the case at hand, it is clear that both the Driver as well as the Helper were charged with the selfsame offences and while the Driver was imposed with punishment of termination of service, the Helper was exonerated.

7. On perusal of the evidence recorded by the Tribunal in course of the proceeding, except the allegation that the opposite party-workman had sought to reverse the Dumper, at a time when his Helper had gone for lunch. There was apparently no evidence of negligence whatsoever that too the witnesses of the management state that the Driver attempted to reverse the Dumper, without waiting for the Helper to come back from his lunch to assist or guide him in reversing the Dumper. The entirety of evidence would indicate that there was no person behind the Dumper at the time when the opposite party-workman attempted to reverse the vehicle. Suddenly the child who was playing across the street came running across the road resulting in this unfortunate accident which lead to his death.

8. The term 'accident' has been defined in various dictionaries in the following manner:

According to Black's Law Dictionary:

> **"Accident-1.** An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. 2.Equity practice. An unforeseen and injurious occurrence not attributable to mistake, negligence, neglect or misconduct."

According to Butterworth's Judicial Dictionary:

"Accident-*An unexpected incident.*

> An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person or ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.
>
> ***According to Chambers Dictionary:***
>
> ***"Accident-Anything*** that happens; an unforeseen or unexpected event; a chance; a mishap; an unessential quality or property; unevenness of surface."

9. This Court is of the considered view that the incident which lead to the unfortunate death of a child was clearly an "accident" and no negligence can be attributed out of such accident. The opposite party-workman was holding a valid license under the M.V. Act and was competent to drive the vehicle in question. There is nothing in the M.V. Act which requires or mandates that the Driver of such motor vehicle cannot reverse or drive such vehicle if his helper or assistant is not available or not present. There is no allegation that the opposite party-workman was under any intoxication or in any manner incapable of driving the vehicle. While reversing such vehicle, the child suddenly came behind and there was no possibility in which such an accident could have been prevented. Therefore, this Court is of the considered view that the Tribunal was fully justified in the facts and circumstances of the present case to conclude that the punishment imposed in the domestic enquiry for termination of service was grossly disproportionate with the nature of the allegation made against him.

10. In this respect, this Court places reliance on the judgments of the Hon'ble Apex Court in the cases of ***Kailash Nath Gupta*** (Supra), ***Colour-Chem Limited*** (Supra) and ***Akhilesh Kumar Singh*** (Supra) ***B.C. Chaturvedi Vrs. Union of India,*** A.I.R. 1996 SC 484. The principles of law which is enunciated in those judgments clearly state that in a case where a competent court comes to hold that the punishment imposed by an employer is "shockingly disproportionate" with the nature of the allegation made, such court is competent to vary such punishment and imposed such punishment appropriate to the nature of the damage caused. This Court is of the view that the Tribunal acted in due discharge of its authority and was competent to reduce the punishment of termination to reinstatement without back wages.

11. This Court is of the clear view that under Section 11-A of the I.D. Act, the Industrial Tribunal is vested with the necessary authority to take the

aforesaid facts into consideration and to impose a lesser punishment than originally imposed by the employer on conclusion of such disciplinary proceeding. This Court is of the view that the Tribunal had acted within its jurisdiction conferred by the statute and had acted properly in exercise of such authority. In consideration of the above findings, I find no merits in the present writ petition filed by the petitioner-employer. This Court directs the employer to implement the award and extended all the benefits as due to the opposite party-workman within three months from today.

12. With the aforesaid directions as noted hereinabove, the writ application is dismissed but in the circumstance, no cost.

Writ petition dismissed.

2012 (II) ILR - CUT- 514

SANJU PANDA, J.

RPFAM NO. 32 OF 2011 (Dt. 20.06.2012)

KAMINI GURU …….Appellant

.Vrs.

TRILOCHAN GURU …….Respondent

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.125.

Maintenance – Appellant black mailed another person earlier with the same plea and lodged complaint against him U/s.498-A I.P.C. – She had also filed complaint against the present respondent earlier for the offences U/ss.341, 323, 325/506 I.P.C. which ended in acquittal – Held, the appellant is in the habit of prosecuting the case to get some money – Learned Court below dismissed her application with a reasoned order – There is no infirmity in the impugned order calling for interference by this Court.

(Para 7)

For Appellant - M/s. B.Pujari, A.K.Baral, A.C.Nayak.

For Respondent- M/s. A.K.Tripathy, U.C.Barik, P.K.Nayak & P.Kar.

S. PANDA, J. The appellant has filed this petition assailing the judgment dated 9.3.2011 passed by the learned Judge, Family Court, Cuttack in Criminal Proceeding No.654 of 2005 thereby dismissing the petition filed by the appellant under Section 125,Cr.P.C.

2. From the record it appears that the appellant had filed an application under Section 125.Cr.P.C. claiming maintenance of Rs.1,000/- on the plea that she married to the appellant. After being married, the in-laws demanded dowry and tortured her. Apprehending danger to her life, she left the matrimonial home. She having no income and being a destitute, she filed the aforesaid application for maintenance. She further stated that respondent has sufficient income and he has neglected to maintain her.

3. After receiving notice in the said proceeding, the respondent filed his show cause and took a specific plea that he has not married the appellant and the appellant has blackmailing three persons earlier with similar plea to

extract money She married to one Tarinisen Das of village Merdha in the district of Jajpur she was driven out from the house of her husband, Tarinisen Das. In G.R.Case No.1037 of 1994 she has specifically stated that she was the wife of Tarinisen Das and admitted that her marriage took place in the year 1981-82 with Tarinisen Das. The respondent further pleaded that he is a married man having three children, 19 years son, namely, Premananda Guru, 15 years daughter, namely, Manorama and 13 years son, namely, Narayan Guru. Earlier the appellant had filed G.R.Case No.524 of 2003 in the court of learned S.D.J.M., Jajpur claiming herself as his wife. The said case was also dismissed. He further stated that in view of such conduct of the appellant, she is not entitled to any maintenance.

4. In support of their respective pleas, both the parties have examined themselves as witnesses and one other witness each and also filed documentary evidence, which were marked as Exts 1 to 3 and Exts A to G. The court below on analyzing the evidence came to the conclusion that O.P.W.2, Kalandi Charan Das, who is the neighbour of the Tarinisen Das of village Merdha has stated that the appellant married to Tarinisen Das and she was residing in his house as wife for a long period. Due to family dissension, she has been residing separately and there was no divorce between Tarinisen Das and the appellant. The evidence of P.W2 is not accepted as he has not named the sons who attended that marriage and the names of the priest and barber attending the marriage and he could not say if the temple authority granted receipt for the marriage. The said P.W.2 is the brother of the appellant and he is ignorance regarding the details of marriage which creates doubts. Learned court below also found no evidence to have been adduced by the appellant either oral or documentary, to prove that she has married to the respondent. On such finding the court below dismissed the claim of the appellant.

5. Learned counsel for the appellant submitted that the court below has not taken into consideration the statement of P.W.2 and the fact that the appellant has married to the respondent and she has complained before the Women Commission where the respondent has admitted to pay Rs.10/- per day to her. Therefore, the impugned order is liable to be interfered with.

6. Learned counsel appearing for the respondent has supported the impugned judgment and submitted that there is no material on record that at any point of time the appellant has resided with the respondent nor she has proved that she has married to the respondent. Therefore, the court below has rightly passed the impugned judgment and this Court should not interfere with the same.

8. Considering the rival submissions of the parties and after going through the material available on record and evidence of the parties, it appears that the appellant had lodged complaint against one Tarinisen Das, which was registered as G.R.Case No.1037 of 2004 (Trial No.175 of 1994) on the allegation of offence under Section 498-A, I.P.C. The appellant also had filed a complaint case alleging commission of offence under Sections 200,203/507, IPC against the present respondent earlier which was registered as G.R.Case No.524 of 2003(Trial No.250 of 205 alleging offence under Sections 341/ 323/325/ 506, IPC which was ended in acquittal, as prosecution has not proved its case beyond all reasonable doubt and the appellant is in habit of prosecuting the case to get some money and the court below has taken into consideration all the above aspect and passed a reasoned order. Accordingly this Court finds no illegality or infirmity in the impugned order, which warrants no interference by this Court. The revision is accordingly dismissed.

Revision dismissed.

2012 (II) ILR - CUT- 517

SANJU PANDA, J.

CRL. REV. NO.111 OF 2012 (Dt.25.04.2012)

NARAYAN TRIPATHY …….Petitioner.

.Vrs.

STATE OF ORISSA …….Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.457.

Vehicle seized being loaded with sisal wood – I.O. intimated the fact of seizure to the lerned S.D.J.M., Anandapur – Held, learned SDJM has jurisdiction to deal with the application U/s.457 Cr.P.C.

In this Case jurisdiction of the learned SDJM can not be denied on the ground that the offence report was submitted before the forest authorities under the Orissa Forest Act and the confiscation proceeding was registered and the same is pending – Held, the impugned order is set aside and direction issued by this Court for release of the vehicle. (Para 5,6)

Case laws Referred to:-

1.(2000)18 OCR 4 : (State of Orissa-V- Basant Nayak & Ors.)
2.(2007)36 OCR 828 : (Kuril Tiria-V- State of Orissa)

For Petitioner - M/s. J.N.Panda.
For Opp.Party - Addl. Govt. Advocate.

S. PANDA, J. The petitioner has filed this criminal revision challenging the order dated 13.02.2012 passed by the learned S.D.J.M., Anandapur in CMC No.17 of 2012 arising out of G.R. Case No.40 of 2012 rejecting his application filed under Section 457 Cr.P.C. for release of the vehicle bearing registration number OR-19-C-0577.

2. The brief facts of the case are as follows:

On the report of ASI of Ghashipura P.S. Station, Ghasipura P.S. Case No. 21 of 2012 corresponding to G.R. Case No.40 of 2012 was registered. During course of investigation, the I.O seized the aforesaid vehicle loaded with 42 numbers of Sisal Wood. The vehicle was seized on 20th January, 2012 at about 7 A.M and the same is kept at the police station.

The petitioner being the registered owner of the vehicle filed an application under Section 457 Cr.P.C before the court below for release of the vehicle as he had a valid permit and obtained contract carriage permit No.CC/PP/09/190/10 to use the vehicle for carrying the passengers in all motorable roads inside Orissa. His application was rejected by the court below on the ground that the vehicle was involved in a forest offence and seized by the police authorities and the forest produce was handed over to the forest authorities for initiating confiscation proceeding. The court below further observed that since the I.O has already intimated to the forest authorities for initiation of confiscation proceeding under Section 56 of the Forest Act, it has no jurisdiction to release the vehicle under Section 457 Cr.P.C.

3. Learned counsel for the petitioner submitted that this Court in the case of State of Orissa v. Basant Nayak and others, **(2000) 18 OCR 4** has held that when the vehicle and forest produce were seized and intimation thereof was given to the learned S.D.J.M., it has the jurisdiction to deal with the application under Section 457 Cr.P.C and his jurisdiction is not affected merely because a proceeding under Section 56 of the Orissa Forest Act has been initiated. The said decision was rendered by this Court taking into consideration the decision reported in Vol.57 (1984) CLT 381 (Sarat Kumar Malu v. State of Orissa) and 1988 (I) OLR 116 (Srinibas Panda v. State of Orissa). In view of the same, since in the present case, the police authorities seized the vehicle and intimation thereof was given to the learned S.D.J.M., the vehicle should have been released by the learned S.D.J.M in favour of the petitioner on such terms and conditions as he may deem fit and proper. Accordingly, he prays for setting aside the impugned order.

4. Learned Addl. Government Advocate submitted that as the Investigating Officer has already intimated the seizure of the vehicle involved in an offence under the Forest Act by submitting the offence report, the court below has rightly rejected his application filed under Section 457 Cr.P.C. In support of his submission, he has cited a decision of this Court in the case of Kuril Tiria v. State of Orissa, **(2007) 36 OCR 828** wherein this Court has held that in case the vehicle involved in forest offence is seized by the police authorities and the vehicle and the forest produce are handed over the forest authorities for initiating confiscation proceeding, the criminal Court would have no power under Section 457 Cr.P.C. However, Section 457 Cr.P.C petition can be entertained by the Magistrate if the vehicle seized by the police in connection with forest offence is produced before the Magistrate and no confiscation proceeding is pending.

5. From the rival submissions of the parties and after perusal of the case diary, it appears that the I.O has submitted offence report to the forest authorities. However, no material has been produced before this Court whether any confiscation proceeding has been initiated and registered by the forest authorities. The vehicle was seized since 20th January, 2012 and the same was produced before the court below. Therefore, the ratio decided in Kuril Tiria's case (supra) is not applicable to the facts of the present case; rather the ratio decided in Basant Nayak's case (supra) is applicable to the facts of the present case as the I.O has already registered Ghasipura P.S. Case No.21 of 2012 corresponding to G.R. Case No.40 of 2012 and intimated the fact of seizure of the vehicle to the learned S.D.J.M., Anandapur. Therefore, undoubtedly the learned Magistrate has jurisdiction to deal with the application under Section 457 Cr.P.C and pass the orders. The learned S.D.J.M did not lack jurisdiction only because the offence report was submitted before the forest authorities under the Orissa Forest Act and the fact that the confiscation proceeding was registered and the same is pending.

6. Accordingly, this Court sets aside the impugned order dated 13.2.2012 passed by the learned S.D.J.M., Anandapur in C.M.C No.17 of 2012 arising out of G.R Case No.40 of 2012 and directs him to release the vehicle bearing registration number OR-19-C-0577 after verifying the relevant documents with such terms and conditions as he may deem fit and proper with further condition that the petitioner shall furnish cash security and bank guarantee as per the value of the vehicle reflected in the current insurance policy. The CRL. REV. is accordingly allowed. No costs.

Revision allowed.

2012 (II) ILR - CUT- 520

S.K.MISHRA, J.

W.P.(C) NO. 14121 OF 2010 (Dt.03.02.2012)

S.M.S. PLANT, TALCHER & ANR. ……..Petitioners.

.Vrs.

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

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

Site Mix Slurry Plant (in short SMS Plant) at Talcher – Question arose whether the State Government or Central Government is the appropriate Government in respect of the SMS plant – Held, since SMS plant Talcher is under the control of the Central Government, the Central Government is the appropriate Government for SMS plant Talcher – Impugned order required no interference.

(Para 6)

Case law Referred to:-

2001 (I) LLJ 1087 SC : (Steel Authority of India Ltd. & Ors.-V-National Union Water Front Workers & Ors.)

For Petitioners - M/s. Somanath Mishra, B.C.Bastia, A.K.Sahoo & G.Tripathy.

For Opp.Parties - M/s. S.Palit, A.Mishra, A.K.Mahana, D.N.Pattnaik, A.K.Kejuriwal (for interveners-opp.parties 3 & 4)

S.K.MISHRA, J. The petitioners assail the order dated 14.05.2010 passed by the learned Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court in I.D. Case No.354 of 2001, wherein the petition filed by the petitioner regarding maintainability of the proceeding was rejected.

2. The first party-Management filed an application challenging the maintainability of the reference on the ground that the S.M.S. Plant at Talcher, where the workmen-opposite parties were employed, is a factory registered under the Factories Act in the State of Odisha. Therefore, it is contended that the appropriate Government in respect of the first party management i.e. the petitioner is the State Government under Section 2(a) of the Industrial Disputes Act, 1947, hereinafter referred to as "the Act" for

brevity. Therefore, the petitioner contended that the reference by the Central Government is illegal being without jurisdiction and the Tribunal is also devoid of any jurisdiction to adjudicate upon the dispute and hence, the case should be dismissed.

3. The specific case of the petitioner is that the Site Mix Slurry plant, in short S.M.S. plant, is a separate unit of I.B.P. It produces slurry used for blasting purposes after mixing the same with other chemical components. The slurry produced in the plant is not explosive. The explosives stored in the Plant are used for blasting in the coal mines of Mahanadi Coal Fields on contract basis. It further reveals that the work at the Talcher plant is of temporary and intermittent nature. It is also not disputed that the S.M.S. plant at Talcher does not deal with petroleum products. It is not disputed that during the pendency of the dispute in the Tribunal, the I.B.P. was merged with the Indian Oil Corporation Ltd. Accordingly, the petitioner company has filed an application to change the cause title of the first party management before the learned Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar. But it is not disputed that by virtue of such merger, the status of S.M.S. plant at Talcher has not undertaken any change and it remains as before.

4. The workman on the other hand contended that the IOCL (IBP Division) is an industry carried on by or under the authority of the Central Government. The standing orders applicable to the workman have been certified by the Regional Labour Commissioner (Central). The Ministry of Petroleum and Natural Gas has notified the Unit (I/c) of the S.M.S. Plant at Talcher to be the “occupier”. This fact goes to show that the S.M.S. plant at Talcher is wholly controlled by the Central Government as per Section 2(n)(iii) of the Factories Act, 1948. The Notification dated 5th May, 2008 so issued by the Ministry of Labour and Employment in exercise of the powers conferred by Section 39 of the Act rescinds the Notification of the Government of India in the Ministry of Labour published in the Gazette of India, Extraordinary, vide No. S.O. 556 (E) dated 3rd July, 1998, but the latter does not include the name of Indian Oil Corporation Limited or I.B.P. company in the schedule of Central Public Sector Undertakings, Corporations and autonomous bodies in respect of which all powers exercisable by the Central Government were also made exercisable by the State Government under the Act and Rules framed thereunder. Therefore, the State Government cannot be stated to be the appropriate government with regard to the Ist Party-Management. It is further urged that under the Explosives Act, license to deal with the explosives has been granted to the first party-Management by the Chief Controller of Explosives, Nagpur. The

company also follows the safety measures at mines site as per the guidelines prescribed by the Director General of Mines Safety, Bhubaneswar Region. The workmen disputes the assertion that since the S.M.S. plant at Talcher is registered under the Factories Act in the State of Odisha, it is carried on or over seen by the Chief Inspector of Factories and Boilers, Odisha. It is submitted that the Chief Inspector of Factories and Boilers only exercises his supervising control but not the managerial control over the plant. Therefore, the State Government cannot be held to be the appropriate Government in this case.

5. It is further pleaded that the conciliation proceedings were held between the Ist party-Management and the 2nd party workman before the Asst. Labour Commissioner (Central), Bhubaneswar and after failure of the conciliation proceedings the matter/dispute was referred to the Ministry of Labour and Employment, Government of India, who thereafter made a reference to the C.G.I.T.-cum-Labour Court, Bhubaneswar for adjudication. Hence, it is contended that the Central Government is the appropriate government and the reference is very much maintainable before the C.G.I.T. While disposing of the application, the learned Presiding Officer, C.G.I.T.-cum-Labour Court, Bhubaneswar has relied upon the decision of the Supreme Court in the case of ***Steel Authority of India limited and others v. National Union Water Front Workers and others***, 2001 (I) LLJ 1087 SC. wherein the Supreme Court has held that while deciding this aspect it is to be kept in mind that the Central Government will be the appropriate government under the CLRA Act and I.D. Act, provided the industry in question is carried on by a Central Government company/an undertaking under the authority of the Central Government. Such an authority, it is further ruled in the aforesaid case, may be conferred either by a Statute or by virtue of relationship of principal and agent or delegation of power. Where the authority is to carry on any industry for or on behalf of the Central Government is conferred on the Government company/any undertaking by the Statute under which it is created, no further question arises. But, if it is not so, the question that arises is whether there is any conferment of authority on the Government company/any undertaking by the Central Government to carry on the industry in question. This is a question of fact and has to be ascertained on the facts and in the circumstances of each case.

6. Learned counsel for the petitioner, in course of hearing, submitted that the I.B.P. company later on merged with the Indian Oil Corporation Ltd. might have been established by the Central Government, but as the S.M.S.

plant comes under the supervision of the Chief Inspector, Factories and Boilers, the State Government has to be considered as the appropriate Government. Section 2(a)(i) of the Act defines the "appropriate Government". It is an inclusive definition. It provides that in relation to any industrial dispute concerning any industry carried on by or under the authority of the central government or by a railway company etc. the central government is the appropriate Government. Section 39 of the Act provides that the appropriate Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act or rules made thereunder shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also where the appropriate Government is the Central Government, by such officer or authority subordinate to the Central Government or by the State Government, or by such officer or authority subordinate to the State Government, as may be specified in the notification. Clause (b) lays down the delegation of such powers by the State Government, which is not relevant for the purpose of this case. Learned counsel for the opposite party has drawn attention of the Court to the notification issued by the Ministry of the Labour and Employment on 05.05.2008, wherein in exercise of the powers conferred by Section 39 of the Industrial Disputes Act, 1947, the Central Government had rescinded the notification of the Government of India in the Ministry of Labour and Employment published in the Gazette of India, Extraordinary, vide number S.O. 556 (F), dated 3rd July, 1998, except as respects things done or omitted to be done before such rescission. The said notification has also been filed by the learned counsel for the opposite parties and a perusal of the list appended thereto, it is found that the Indian Oil Corporation has not been listed. In that view of the matter, this Court is of the opinion that the findings arrived at by the learned Presiding Officer, Central Government Industrial Tribunal, Bhubaneswar to the effect that the petitioner company is under the control of the Central Government and the Central Government, therefore, is the appropriate government. Such being the facts, this Court comes to the conclusion that no illegality has been committed by the C.G.I.T.-cum-Labour Court, Bhubaneswar and, therefore, it requires no interference.

It is seen that the case is pending since September, 2010 against an *inter locutory* order. In the interest of justice, this Court directs for expeditious disposal of the case. The writ application is accordingly dismissed. The parties are directed to appear before the C.G.I.T.-cum-Labour Court, Bhubaneswar on 15.02.2012. Learned Presiding Officer shall make all endeavour to dispose of the dispute within six weeks there from.

Writ petition dismissed.

2012 (II) ILR - CUT- 524

S.K.MISHRA, J.

O.J.C. NOS. 3262/1996 & 12504/1997 (Dt.23.02.2012)

MANAGEMENT OF STATE BANK OF INDIA & ANR. .....Petitioners.

.Vrs.

BHASKAR MOHARANA & ANR. ……..Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ of certiorari – It can be issued where orders passed by inferior Courts or Tribunals is without jurisdiction or is in excess of it or there is failure to exercise jurisdiction – The said writ can also be issued where the Court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice – Jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court – So the findings of fact reached by the inferior Court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings – An error of law which is apparent on the face of the record can be corrected by a writ but not an error of fact, however grave it may appear to be – However if the Court below has erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding or a finding of fact based on no evidence that can be regarded as an error of law which can be corrected by a writ of certiorari.

Held, the award passed by the Industrial Tribunal does not suffer from any jurisdictional error or any error of law apparent in the face of it calling for interference by this Court.

Case laws Referred to:-

1.AIR 2006 SC 1806 : (Secretary, State of Karnataka & Ors.-V-Umadevi & Ors.)
2.AIR 2010 SC 1116 : (Harjinder Singh-V-Punjab State Warehousing Corpn.)
3.2011 AIR SCW 3455 : (Devinder Singh-V-Municipal Council, Sanaur).

For Petitioner - M/s. A.K.Mishra, G.S.Panda, N.Mohanty & Tapan Mishra.

For Opp.Parties- M/s. R.K.Bose & G.Bhol(for O.P.No.1)
Addl. Govt. Advocate (for O.P.No.2)

S.K.MISHRA, J. In O.J.C. No.3262 of 1996, the Management of State Bank of India, Khodasingh A.D.B., Berhampur assailed the correctness of the award dated 29.09.1995 passed by the Industrial Tribunal, Bhubaneswar in I.D. Case No.28 of 1994. In the connected writ application bearing O.J.C. No.12507 of 1997, the workman has prayed for granting of back wages in addition to the award of reinstatement as daily wager. The Industrial Dispute was referred by the Central Government to the Industrial Tribunal, Bhubaneswar to determine; whether the action of the Management of State Bank of India, Khodasingh A.D.B., Berhampur in terminating the services of Bhaskar Moharana, Night Watchman, hereinafter referred to as the 'Workman', for brevity, w.e.f. 09.09.1988 is legal and justified and to what relief the workman is entitled to. Second dispute referred to for adjudication is whether the action of the Management in reducing the wages of the said workman from Rs.1011.80 to Rs.900/- per month is justified and to what relief the workman is entitled to.

2. The parties have put in their statements of claim. The concerned workman claimed that he was working as a Messenger in the said Bank from 15.11.1984 to 31.01.1986 temporarily. He was given continuous employment from 15.1.1986 to 09.09.1988; that his salary has abruptly been reduced by the Management during the period June, 1988 to 09.09.1988 without any rhyme and reason; that he was also doing the duty of the Night Watchman beside the duty of the Messenger; from 10.09.1988 he was refused to employment by the Management and since then he is out of employment. Claiming that while refusing the further employment to the workman, the Management did not comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947, hereinafter referred to as the 'Act', for brevity. The workman claimed for reinstatement with full back wages and ancillary service benefit.

3. The Management took the plea that during the period 15.11.1984 to 13.01.1986, the workman was engaged on daily wage basis to assist the Record Keeper, to spray water to khaskhas screen during the summer and performed the duty of the messenger during the leave vacancy of regular messenger and in total, he worked for 101 days intermittently and not continuously as alleged by the petitioner. The further case of the Management is that the Workman was engaged as temporary Night

Watchman from 15.01.1986 to 09.09.1988 on daily wage basis and he absented himself from duty after 09.09.1988. Therefore, another person was engaged in duty to perform the work of Night Watchman. The Management further pleaded that as the workman worked on daily wage basis and on his own accord, he abandoned his job, the Management was under no obligation to follow the legal procedure prescribed for retrenchment. As per the alleged reduction of the wages is concerned, the Management contended that it paid consolidated wage of Rs.30/- per day on the basis of mutual agreement, which the workman accepted during the period without any objection. Therefore, the Management pleads that the workman is not entitled to any relief.

4. On such pleadings, learned Presiding Officer, Industrial Tribunal framed several issues and addressed itself to determine whether the workman was refused employment by the first party Management; and if such refusal amounts to termination. It also addressed itself to adjudicate whether the action of the Management in terminating the services of the workman w.e.f. 09.09.1988 is legal and justified; whether the action of the Management in reducing the wages of the workman from Rs.1011.80 paise to Rs.900/- per month from June 1988 is legal and justified and to what relief the workman is entitled. In order to substantiate his case, the workman examined himself as WW 1, and exhibited three documents. The Management, on the other hand, examined two witnesses to substantiate its claim.

5. After taking into consideration the materials available before it, the Industrial Tribunal came to the conclusion that the reduction of wages from Rs.1011.80 to Rs.900/- per month, on mutual consent is not tenable and, as such, it held that such reduction is illegal. The Tribunal also refused to accept the plea of Management that the workman has abandoned the employment on his own accord and there is no termination on their side. Thus holding, the Tribunal directed reinstatement of the workman in service as a daily wager till the Management create a post or alternatively to allow to continue the workman as a casual labourer and receive salary as a messenger as before till a regular vacancy arises in due course.

6. In assailing the award passed by the Industrial Tribunal, learned counsel for the petitioner submitted that in view of the ratio decided by the Constitution Bench of the Supreme Court in ***Secretary, State of Karnataka and others v. Umadevi and others,*** AIR 2006 SC 1806, the services of the workman, who was not engaged against a vacancy and without following the procedure for selection and appointment, cannot be reinstated in service.

Learned counsel appearing for the workman, on the other hand, submitted that the award passed by the Industrial Tribunal does not suffer from any illegality and there is no scope of interference of the same for a court exercising writ jurisdiction.

7. In ***Secretary, State of Karnataka and others v. Umadevi and others*** (*supra*), the Constitution Bench of the Supreme Court has held that the High Court acting under Article 226 of the Constitution of India should not ordinarily issue directions for absorption, regularization or permanent continuance, unless the recruitment itself was made regularly and in terms of the Constitutional scheme. Further, the Supreme Court held that there is an essential distinction between a person engaged on daily wage and they cannot claim to be equal to those who have been employed by regular process of recruitment. There is no fundamental right in those who have been employed on daily wage or temporarily or on contractual basis to claim that they have a right to be absorbed in service. While there is no dispute regarding the ratio decided by the Hon'ble Supreme Court in the aforesaid case, there is a settled distinction between the claim of regularization in service and reinstatement for noncompliance of Section 25-F of the Act. In ***Secretary, State of Karnataka and others v. Umadevi and others*** (*supra*), the ratio decided by the Supreme Court is that they cannot claim to be regularized in service. The said case does not lay down that in case where a person has been retrenched without complying the provisions of Section 25-Fot the Act cannot be reinstated in service, even though his initial appointment was not through a proper selection procedure.

8. It is not disputed in this case that the workman remained in continuous employment from 15.01,1986 to 09.09.1988. Thus, he had completed 240 days of employment in the year preceding his termination. In this case, the Tribunal has taken into consideration the continuation of the correspondence in Bank's letter No. 42/200 dated 13.05.1986 and No.42/290 dated 17.09.1987. The Branch Manager has stated in that letter that B. Moharana (concerned workman) is still continued to work as Night Watchman of the Branch on daily wage basis and is being paid salary equal to that of a messenger. He further wrote that since the Night Watchman is required to stay in the branch premises over night and is in charge of Bank's guest room, it will be better if a person in regular Bank's service is posted instead of a temporary person. Thereafter, an interview was held and another person was appointed. This itself speaks that the Management did not give employment to the workman after 09.09.1988. It is also not disputed that the Management did not comply with the provisions of Section 25-F of

the Act. In that view of the matter, the order passed by the learned Presiding Officer, Industrial Tribunal is correct.

9. The Supreme Court in ***Harjinder Singh v. Punjab State Warehousing Corporation,*** AIR 2010 SC 1116 has held that while exercising jurisdiction under Articles 226 and 227 of the Constitution in the matters of industrial dispute, the High Court are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in preamble of Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39 (a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of community to subserve the common good and also ensure that the workers get their dues.

The Supreme Court in ***Devinder Singh v. Municipal Council, Sanaur,*** 2011 AIR SCW 3455 has held that the source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act. The definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

10. In the aforesaid case, the Supreme Court further held that there is limit in the jurisdiction of the High Court in issuing writ of certiorari under Article 226 of the Constitution. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however,

no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. The Supreme Court further held that this limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, the Supreme Court further ruled that a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with such cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding.

11. In applying these principles to the case in hand, this Court comes to the conclusion that the award passed by the Industrial Tribunal does not suffer from any jurisdictional error or any error of law apparent on the face of it, nor there is any grave error of fact based on any admissible evidence or no evidence. Such being the case, there is hardly any scope to interfere in the findings recorded by the Tribunal.

12. It was submitted in course of hearing of the writ petitions that the workman is still discharging his duty and is being paid Rs.1011.80 paise which was wage of a workman in the year 1988. This is grossly inadequate and it is also against the provisions of the Minimum Wages Act. The workman has claimed for his back wages in addition to reinstatement in service. The Industrial Tribunal has come to the conclusion that the workman is not entitled to back wages in view of the fact that the workman kept silent and did not agitate the matter for over two years. The Tribunal further noted that any direction for payment of back wages for the period of inaction on the part of the workman would be an avoidable and unnecessary burden on the Bank's exchequer. Such reasoning appears correct to this Court and hence, there is no reason to modify the same. So before parting with the cases, this Court directs that the workman be paid minimum wages as a daily wager as long as he is discharging his duties.

With the above observations, both the writ petitions are disposed of.

2012 (II) ILR - CUT- 530

B.K.MISRA, J.

JCRLA. NO.145 OF 2005 (Dt.08.02.2012)

JHUBA LAKRA & ANR. ……..Appellants.

.Vrs.

STATE OF ORISSA ……..Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.376 (2) (g).

Rape – Solitary statement of the prosecutrix – Evaluation of evidence especially in a rape case – Court should examine broader probabilities of the Case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix which are not fatal in nature – Held, a Court can convict an accused if the sole evidence of the victim appears to be absolutely trust worthy, unblemished and inspire confidence of the Court.

In the present Case there is nothing on record to show that there was ill feeling between P.W.6's family and appellants family so as to bring false accusation – It is highly improbable that P.W.6 who is a woman aged about 50 years and having given birth six children and was to give her daughter in marriage would implicate the two appellants in an offence like rape putting the family prestige at a stake and loosing her face in the society – Held, no reason to interfere with the order of conviction and sentence imposed by the trial Court.

(Para 13,14,15)

Case laws Referred to:-

1.(2011) 49 OCR (SC)-929 : (Krishna Kumar Malik-V- State of Haryana)
2.(2011)48 OCR (SC)-559 : (State of U.P.-V- Chhoteylal)
3.(1996)2 SCC 384 : (State of Punjab-V- Gurmit Singh & Ors.)
4.(1983)3 SCC 217 : (Bharwada Bhoginbhai Hirjibhai-V-State of Gujarat)

For Appellant - M/s. B.Rout & Associates.
For Respondent - Addl. Govt. Advocate.

B.K. MISRA, J. This appeal has been preferred by the appellants being aggrieved with the order of conviction and sentences imposed on them by the learned Assistant Sessions Judge-cum-C.J.M.,Rourkela in S.T. Case

No.203-47 of 2004. Learned Assistant Sessions Judge, Rourkela while convicting the appellants under Section 376(2)(g) of the Indian Penal Code (for short the 'I.P.C.') sentenced each of them to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- in default of which each of them to further to undergo rigorous imprisonment for one year.

2. The case of the prosecution is that on 24.1.2004 afternoon the prosecutrix Augustina Minz (P.W.6) had gone to the nearby hamlet of her village to invite persons for attending her daughter's marriage and around 8 P.M., while she P.W.6 was returning to her house the two appellants were following her and on the lonely road near Tungritola hamlet forcibly dragged her inside the 'Bari' which situate at the back side of the house of Mahendra Chouhan (P.W.4). It is alleged that after assaulting the prosecutrix the two appellants forcibly lifted her saree and ravished her one after the other for which it is alleged that the prosecutrix became unconscious.

3. On the next day morning P.W.6 could learn that she was brought to her house from the place of occurrence by her sons. P.W.6 reported the matter to her family members and thereafter she proceeded to Tangerpalli I.D.L. Out Post and orally reported the matter which was reduced into writing and a case was registered by Tangarpali Police Station. Investigation was taken up. On completion of investigation charge sheet was placed against the appellants to stand their trial.

4. The plea of the two appellants was that of complete denial of the occurrence and it is their further plea that they have been falsely implicated in this case.

5. The prosecution in order to establish its case against the appellants examined 12 witnesses in all and of them P.W. 6 is the victim lady. P.W.11 is the doctor, who examined the prosecutrix on 26.1.2004 on police requisition. P.W.10 is another doctor who had examined the two appellants on police requisition. P.W.12 is the I.O. P.W.5 is a witness who was accompanying P.W.6 on the night of 24.1.2004 i.e. at the time of the occurrence. P.W.3 is the husband of the victim woman. P.Ws.1 & 2 are the son and daughter of the prosecutrix respectively. P.Ws.4 & 9 are the two post occurrence witnesses. P.W.7 is another independent witness for the prosecution. P.W.8 is a seizure witness. The appellants declined to examine any witness in their defence.

6. Learned Assistant Sessions Judge formulated the point for determination and on analyzing the evidence on record and relying on

evidence of the victim lady convicted the two appellants and passed the impugned sentences.

7. The learned counsel appearing for the appellants while taking me through the evidence on record contended that the evidence of P.Ws.5 & 6 are contradictory to each other and besides that when the alleged occurrence took place on a dark winter night and when P.Ws.5 & 6 could not identify the persons who were then passing on the road it is but something strange that P.W.6 could identify the two appellants to have ravished her and besides that when there is no injury on the private part of the victim or on any other part and when the victim lady is aged about 50 years and was intoxicated it cannot be believed that she was ravished by the present two appellants. Accordingly, it was strongly urged that the two appellants who are languishing in jail custody since the alleged date of occurrence they may be acquitted.

8. Learned Addl. Government Advocate Sri D.K.Mishra appearing for the State on the other hand contended that the solitary evidence of the prosecutrix is sufficient to hold the two appellants guilty of the offence as there is nothing on record to disbelieve her testimony. It is also argued by the learned counsel for the State that it is the settled position of law that a conviction can lie solely basing on the solitary testimony of a witness provided his evidence appears believable, trustworthy and suffers from no infirmity. Accordingly, it was urged that the order of conviction and sentences should not be disturbed.

9. Now coming to the evidence on record it is seen that much reliance has been placed on the testimony of P.W.6, the victim woman by the learned trial court. Hence, let me now proceed to examine the evidence of P.W.6 to find out as to whether her evidence can be accepted to sustain the order of conviction and sentences Admittedly, P.W.6 is a married woman. It is the evidence of P.W.6 that on the evening of the date of occurrence i.e. 24.1.2004 she had gone to invite different persons in connection with the marriage of her daughter to be solemnized and while she was returning to her house from Tangarpali Basti along with Philisia Bodara, the accused persons were following them. It is also the evidence of P.W.6 that when Philisia (P.W.5) proceeded to answer the call of nature, the two appellants lifted her to the 'Bari' of Mahendra Chouhan (P.W.4) and after giving her slaps and fist blows she was raped by the two appellants one after the other and thereafter the two appellants left the spot. P.W.6 has been cross-examined at length but nothing has been elicited from her mouth to demolish her evidence that she was raped by the two accused persons one after the

other. Rather in her cross-examination she specifically deposed that each of the accused person had sexual intercourse with her. Thus, the substratum of the case of the prosecution that P.W.6 was raped by the two appellants remains unaffected. P.W.5 is Philisia Bodra, who deposed that Augustina Minz had gone to invite her to attend the marriage of her daughter Mukta and she accompanied her to leave her in her house and on their way she proceeded to answer the call of nature and at that time the two accused persons carried away Augustina Minz. But this evidence of P.W.5 in her examination-in-chief cannot be accepted as she in her cross-examination deposed that she is unable to see properly in the night and she has also gone to the extent of deposing that she cannot recognize a person from a distance of about five to six cubits from her. P.W.1 is the son of the victim, P.W.2 is the daughter of the victim and P.W.3 is the husband of the victim. Admittedly, all of them had no personal knowledge of the occurrence but they deposed that the victim was recovered from the 'Bari' of P.W.4 on the night of the occurrence in a senseless condition and she was brought to their house where on the next day morning the victim disclosed before them to have been sexually ravished by the two appellants on the previous night. It is also their evidence that the victim P.W.6 was recovered in an unconscious stage from the bari of P.W.4, Mahendra Chouhan and around 3 O' clock in the night P.W.6 regained her sense and when was asked about the incident she told to narrate everything in the morning as she was not feeling well then. Thus, the evidence of P.Ws. 1, 2 and 3 becomes admissible under Section 6 of the Evidence Act as it is seen that such evidence of P.Ws. 1 to 3 is contemporaneous with the acts as the time gap in between the occurrence and the reporting of the same by the victim before P.Ws. 1 to 3 does not give any scope for any fabrication. In that context reliance can be placed in a judgment of the Apex Court as reported in **(2011) 49 OCR (SC)-929, Krishan Kumar Malik V. State of Haryana**.

10. P.W.4 is Mahendra Chouhan and his evidence is also shows that Augustina Minz had gone to invite persons to attend the marriage of her daughter Mukta and he was informed around 10 P.M. in the night that Augustina had not returned to the house for which they all went in search of Augustina and on hearing from Philisia that the two appellants were following them that night and they might have done something for which he and others proceeded to the house of the appellant Jhuba but since he was absent in his house they proceeded to the house of the appellant Mohan and Mohan though initially denied to have any knowledge about the victim but later on disclosed that they had thrown the victim in the 'Bari' of P.W.4 and thereafter the appellant Mohan accompanied P.W.4, Francis (P.W.1), Suru and there appellant Mohan showed them Augustina who was lying unconscious with

her saree removed upto her thigh and the blouse and rest portion of the saree of Augustina were found in disorder manner. P.W.4 deposed in the morning when he went to the house of Augustina she disclosed before her husband and sons that the two accused persons had kidnapped her and after gagging her mouth and assaulting her, appellant Jhuba raped her and thereafter appellant Mohan also raped her. P.W.4 is a disinterested person having no axe to grind against the appellants. The evidence of P.W.4 that the victim narrated the incident before her husband and sons that the two accused persons raped her and the very fact that the victim was found lying unconscious in his 'Bari' and the appellant Mohan showed the place where they had thrown the victim lead me to the conclusion that whatever P.W.4 has deposed can be accepted as there is nothing on record to disbelieve such evidence. The evidence of P.W.4 lends overwhelming corroboration to the evidence of the victim, P.W.6 as well as the evidence of P.Ws. 1 to 3. P.W.11 is the doctor who on Police requisition examined P.W.6, deposed that she did not find any sign of recent sexual intercourse but however sexual intercourse cannot be ruled out and she has proved her report as Ext.7.

11. Much emphasis was given by the learned counsel appearing for the appellants that since P.W.11 did not find any injury on external or internal part of the body of the prosecutrix, the evidence of P.W.6 that she was raped by the two appellants for which she became unconscious cannot be believed. The Hon'ble Apex Court in several rulings have consistently held that:-

> "It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence, she was a helpless victim." **"(2011) 48 OCR (SC) 559, State of U.P. V. Chhoteylal"**.

12. P.W.10 is the doctor who examined the two appellants on Police requisition on 26.1.2004 and he deposed that sexual intercourse cannot be ruled out. P.W.10 deposed that when he examined Luis Mohan Lakra found one liner abrasion on the right molar face half inch in length and another liner abrasion one inch in length over just below right mandible which might have been caused by any pointed object within 24 to 72 hours of his examination and he did not find anything to suggest that he was not capable of having any sexual intercourse. It is also the evidence of P.W.10 that the injuries which he found on the face and neck of accused Luis Mohan Lakra could have been caused during forceful sexual intercourse and if there was

resistance offered by the victim. P.W. 10 has proved his medical examination report as Ext.6. This medical evidence also lends overwhelming corroboration to the evidence of P.W.6 the victim woman as the evidence of P.W.6 that when the two accused persons lifted her she was shouting and she had protested. Thus, the evidence of P.W.6 shows that she resisted when the accused persons sexually ravished her and it is also her evidence that when she shouted, the two accused persons threatened her not to shout and she was also assaulted. The evidence of P.W.9 who is the wife of P.W.4 shows that about a year back around 10 P.M. Henery Khaakaha called her husband and informed her husband that his wife has not returned back to the house and also requested to accompany him to search his wife and thereafter her husband accompanied Henery in search of the later's wife and around 11 P.M. when her husband returned she make query, her husband told that Henery's wife was lying unconscious in their bari. Thus, the evidence of P.W.9 is of no help to the case of the prosecution. P.W.7 simply deposed that Augustina had come to invite him to attend the marriage of her daughter and except that she did not depose anything. Thus, the evidence of P.W.7 is of no help to the case of the prosecution. P.W.8 is a seizure witness. P.W.12 is the I.O. and admittedly the I.O. is also a post occurrence witness.

13. Learned counsel for the appellants very forcefully submitted that the solitary evidence of P.W.6 cannot form the basis of a conviction and it would be highly unsafe to place any reliance on the uncorroborated testimony of P.W.6. But this contention of the learned counsel for the appellants cannot at all be accepted as it is the consistent view of the Hon'ble Apex Court and of this Court that solitary evidence of the prosecutrix is sufficient for conviction of an accused if it appears to be absolute trustworthy, unblemished inspire confidence and of sterling quality. The Apex Court also in several decisions have laid down that while evaluating evidence especially in a case of rape, the Court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. In the words of the Apex Court **"the Courts must while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court to make a humiliating statement against her honour such as is involved in the commission of rape on her. Seeking corroboration of her statement before relying upon the same as a rule would amount to add insult to injury. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. (1996) 2 SCC**

384, State of Punjab V. Gurmit Singh and Others."

14. In **Bharwada Bhoginbhai Hirjibhai V. State of Gujarat (1983) 3 SCC 217**, the Hon'ble Apex Court have held that:-

> "In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross examination. And we must do so with a logical, and not an opinionated eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical……..".

Thus, by applying the said golden principles of law there is hardly anything on record to disbelieve the evidence of P.W.6 as there is no independent corroboration to that. The prosecution has not brought anything on record to show if there was any ill feeling between P.W.6's family and the appellants so as to bring false accusation. It is highly improbable that P.W.6 who was a woman of 50 years old and having given birth to six children and was to give her daughter in marriage would implicate the two appellants and that too in an offence like rape thereby putting the family prestige at a stake and loosing face in the society.

15. As regards to the belated F.I.R. which was argued by learned counsel for the appellants to doubt the prosecution case suffice is to mention that plausible explanation has been given in the body of the F.I.R. lodged by P.W.6 for the little delay which occurred in reporting the matter at IDL Out

Post on 25.1.2004. Thus, in view of such explanation which has been given in the body of the F.I.R. it cannot be said that there has been abnormal delay in lodging the F.I.R. and no undue importance should be attached to such delay especially in a case of rape.

16. Thus, for the reasons stated above, I find no reason to interfere with the order of conviction and sentences imposed by the learned trial court on the appellants. The order of conviction and sentences are maintained and the appeal being devoid of merit stands dismissed.

Appeal dismissed.