2013 (II) ILR - CUT- 355

C.NAGAPPAN, CJ & I.MAHANTY, J

W.P.(C) NO. 12740 OF 2013 (WITH BATCH) (Dt.24.07.2013)

DR. HIMANSU SEKHAR SAHOO & ORS. ……..Petitioners

.Vrs.

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

Education – Admission to P.G. (Medical) Course 2013 in Odisha – Process of selection started from Dt. 12.11.2012, i.e., the last date of making online application – After preparation of merit list and prior to counseling state changed the eligibility criteria by issuing guidelines Dt. 27.05.2013, redefining the definition of "in service candidates" under clause F-2 by reducing the period of service from five years to three years – Action challenged in writ petition.

Held, once the process of selection has started, the prescribed selection criteria cannot be changed by introducing any change into the eligibility criteria – Impugned guidelines would operate only prospectively, i.e., from Dt. 27.05.2013 – Clause F-2 of the impugned guidelines Dt. 27.05.2013 shall not apply for admission of "in service candidates" in P.G. (Medical) courses for the year 2013 – Directions issued to Op. 1, 2 & 3, only to consider the candidates having five years service experience as "in service candidates" for admission into P.G. (Medical) Course 2013 – Further directions issued to complete the admission process within the period as directed by the Apex Court.

(Paras 18,19,20)

Case laws Referred to:-

1. (2005) 4 SCC 154 : (Secretary,A.P.Public Service Commission-V- B. Swapna & Ors.)
2. (2008) 3 SCC 512 : (K. Manjusree -V- State of Andhra Pradesh & Anr.)
3. (2010) 7 SCC 560 : (Mohd. Raisul Islam & Ors.-V- Gokul Mohan Hazarika & Ors.)
4. AIR 1973 ORISSA 199 : (Bishnu Charan Mohanty-V- State of Orissa & Ors.)

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For Opp. Parties- Mr. R.K.Mohapatra, Govt. Advocate
Mr. R.C.Mohanty (for D.M.E.T. & M.C.I.)

For Intervenors - Mr. S.K.Padhi, Sr. Advocate
Mr. S.P.Mishra, Sr. Advocate

C.NAGAPPAN, C.J. In this batch of writ petitions, the petitioners herein are the Doctors who have served under the State Government for more than "five years" and they seek to challenge the guidelines framed by the State Government for allotment of candidates for Post Graduate (Medical) Course, 2013 in Odisha, communicated under cover of letter dated 27.5.2013 and further seek to challenge the decision of the State Government to treat the Doctors who have served for "three years" under the "in-service category" for admission into Post Graduate (Medical) Course in the academic year 2013-14.

2. Learned counsel for the petitioners submits that the petitioners after completion of their M.B.B.S. degree registered themselves under the Orissa Medical Council as registered doctors and after they were selected by the Orissa Public Service Commission (OPSC) were appointed as Asst. Surgeons under the service of the State and have all completed five or more years of service under the State. It is stated on behalf of the petitioners that in exercise of the power under Section 33 of the Indian Medical Council Act, 1956, the Medical Counsil of India passed a regulation called "Post Graduation (Medical) Education Regulation 2000" which have been amended from time to time and by amendment made by the Notification dated 21.12.2010, the Medical Council of India decided by way of regulation to hold a common National Eligibility cum Entrance examination for admission into the P.G. (Medical) Courses throughout the country each year. Such examination is called as the "National Eligibility cum Entrance Test (NEET) for Admission to P.G. (Medical) Courses". To conduct the aforesaid examination, the National Board of Examinations (NBE) was constituted and

such common eligibility test was to be given effect to from the session 2013-14.

3. Pursuant to the aforesaid decision, the National Board of Examinations issued a "information bulletin" requiring eligible candidates to apply for admission into P.G. courses for the year 2013. The said bulletin stipulates the time schedule which requires the submission of application form through online registration between 4th October to 12th November, 2012 and the date of entrance examination was fixed from 23rd November to 6th December 2012 and declaration of result was to be made by 31st January, 2013. The most important clause in the Information Bulletin issued by the National Board of Examinations for our present purposes is at Clause-IV which is quoted hereunder.

> "The reservation of seats in medical colleges/institutions for respective categories shall be as per applicable laws prevailing in States/Union Territories. An all India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of marks obtained in National Eligibility-cum-Entrance Test and candidates shall be admitted to Post Graduate courses from the said merit lists only.
>
> Provided that in determining the merit of candidates who are in service of Government/public authority, weightage in the marks may be given by the Government/Competent Authority as an incentive at the rate of 10% of the marks obtained for each year of service in remote and/or difficult areas upto the maximum of 30% of the marks obtained in National Eligibility-cum-Entrance Test, the remote and difficult areas shall be as defined by State Government/competent authority from time to time."

04. It is further averred by the petitioners that, the term "as per applicable laws prevailing in States" so far as Orissa is concerned, refers to the policy of the Orissa State Government followed from 1980 till 2012 whereby, the "in-service candidates" have been defined in Clause-6.2.1 of the prospectus for Selection of Candidates for Post-Graduate Courses in the Government Medical Colleges of Odisha-2012 as follows:

> "Is in the employment in Government of Odisha and has completed a length of 5 years of service which includes all categories of employment like contractual/temporary/ad-hoc/regular by 31st December, 2011, excluding at-a-stretch leave of any kind, of

30 days or more. However the maternity leave is exempted from this exclusion and shall be counted towards the length of five years of service."

Relying on the above, it is asserted on behalf of the petitioners that at the time of their application they had completed "five years" of service and therefore, they alone should be considered for admission into seats reserved for "in-service" candidates and no others.

05. In the light of the above, it is submitted that whereas the notice for holding of the National Eligibility cum Entrance Test was issued in the month of September 2012 and online registration was to be held between 4th October, 2012 to 12th November, 2012 and examination was to be conducted by 23rd November and result were also to be declared by 31st January, 2013. The opposite party-State have sought at this belated stage to change the eligibility criteria by issuing the impugned guidelines under cover of letter dated 27.05.2013 by redefining the definition of "in-service candidates" and making such guidelines applicable for admission during the academic year 2013-14 which is as follows:

"F.2. An "In-service candidate" is one who at the time of application:-

Is in the regular employment in Government of Odisha/Govt. of Orissa Public Sector Undertakings/Govt. of India Public Sector Undertakings located in Odisha and has completed a length of 3 years of regular service including contractual, temporary, ad-hoc and has been duly selected by Govt./OPSC/PSU appointing authority, before 31st March 2013, excluding at-a-stretch leave of any kind, of 30 days or more. However the maternity leave is exempted from this exclusion and shall be counted towards the length of three years of service."

And also further issuing the following directions:

"The Selection committee shall collect the detail State Quota seats for the academic year 2013-14 from the Principals of three Govt. Medical Colleges and Hi-Tech Medical College, Bhubaneswar and prepare the seat matrix for counseling.

The reservation percentage should be strictly adhered to while preparing such merit list."

06. Learned counsels for the petitioners in the present batch of writ application while seeking to challenge the guidelines framed by Orissa as mentioned hereinabove and its communication to the DMET vide letter dated 27.5.2013, inter alia, submit that the said guidelines having been issued, much after the results have been declared, the same ought not to have been made applicable for admission in the year 2013. It is further submitted that such a policy itself cannot and ought not to have given any retrospective operation.

In this respect, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of **Secretary, A.P.Public Service Commission v. B.Swapna and others,** (2005) 4 SCC 154 which lays down the proposition that "once the process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play." For better appreciation, Paragraph-14 thereof is quoted herein below:

> "14. The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by learned counsel for Respondent 1 applicant it was the unamended rule which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criterion e.g. minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the rules showing the intention to affect existing rights the rule must be held to be prospective. If the rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only."

Reliance was also placed on the judgment of the Hon'ble Supreme Court in the case of **K.Manjusree v. State of Andhra Pradesh and another,** (2008) 3 SCC 512, wherein the Hon'ble apex Court has laid down the law that "Therefore, introduction of requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible."

Reliance was also placed on the judgment of the Hon'ble Supreme Court in the case of **Mohd. Raisul Islam and others v. Gokul Mohan Hazarika and others,** (2010) 7 SCC 560. While deciding the question as to whether the amended rule would operate prospectively or retrospectively, the Hon'ble Supreme Court held that "the effect of amendment to rules on seniority of persons recruited in selection process initiated prior to amendment, the applicable rules are those on basis of which selection process was commenced."

07. The State, on the other hand, opposed the prayer made in the batch of writ applications and placed reliance on the counter affidavit filed on behalf of opposite parties 1, 2 and 3 and submitted that the Govt. of Orissa on 16.10.2012 has taken a "decision" regarding the criteria of admission to P.G. students appearing in the National Eligibility cum Entrance Test, 2013 and it was decided as follows:

> "That, the total P.G. seats in different disciplines of Medical Colleges of our State comes to 343 earlier, 50% of the seats were filled up through selection process conducted by State P.G. Council and the rest 50% State quota was filled up from among direct and in-service candidates on 50:50 ration basis. Now a common entrance test will be conducted by National Board of Examination leaving no scope for State authority to intervene. In the larger interest of State following provisions may be incorporated by NBE while finalizing the norms of selection process.
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> 1. Even if a common test is conducted, 50% of the total seats need to be filled up from among the permanent natives of Odisha.
>
> 2. The system of percentage need to be converted to percentile should be lowered so as to fill up all the State seats by the native of Odisha.
>
> 3. The regular OPSC sponsored candidates having three years of service experience including the period of contractual/adhoc service may be considered as an in-service candidate.
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> 4. The seats reserved for in-service candidates need to be filled up from among the in-service candidates only.
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> 5. The State will prepare its own merit list from among the selected candidates by allowing additional weightage of 10%, 20% & 30% to in-service doctors serving in Remote/Tribal/backward area for a period of one, two and three years respectively and accordingly the

> State Govt. has send a letter to the Secretary, Ministry of Health and Family Welfare, Govt. of India, Nirmal Bhawan, New Deli regarding National Eligibility cum Entrance Test for P.G. students in the selection process to safeguard the interest of the State."

The regular OPSC sponsored candidates having three years of service experience including the period of contractual/adhoc service may be considered as "in-service" candidate and in support of this, placed reliance on Annexures-A/3 and B/3 respectively. It is further contended that once the Medical Council of India decided to hold the National Eligibility cum Entrance Test, several writ applications came to be filed before the Apex Court. The Hon'ble Supreme Court on 13th December, 2012, while adjourning the matter for further hearing, allowed the respective entrance examination which had already been notified to be held. As a consequence of this, National Eligibility cum Entrance Test was conducted. It is further submitted that while the State has not challenged the Notification of the Medical Council of India dated 27.12.2010 notifying the National Eligibility cum Entrance Test (NEET) for admission into Post Graduate Medical Course, on receipt of the orders of the Hon'ble Supreme Court dated 13.12.2012 intimated the National Board of Examination to conduct entrance test for P.G. (Medical) Course for the State of Orissa and further that the counseling would be conducted by P.G. (Medical) Selection Committee. In Paragraph-20 of the counter affidavit, relevant portion is stated as follows:

> "xx xx The DMET, Odisha had moved the file for approval of the guidelines for admission to P.G. Courses on 11.04.2012 which was finally decided on 29.04.2013 by the Government regarding the conditions/eligibility etc. for admission to the course, wherein it was decided that 3 years continuous service will be taken for consideration instead of five years for in-service doctors and the said decision of the Government was communicated along with the guideline to the DMET, Odisha on 27.05.2013. xx xx"

08. It is also pertinent to mention herein that, in the course of hearing of this case, it was brought to our notice that Hon'ble Supreme Court had finally disposed of the batch of writ applications by quashing the Regulation introducing the National Eligibility Entrance Test (NEET) vide judgment dated 18.7.2013.

09. In the light of the aforesaid circumstances, learned counsel for the State has appended various documents including note-sheets which clearly indicates that the various suggestions were being considered by the State

Government, in the respective Ministries regarding redefining the eligibility criteria for various reasons (including the fact that the challenge pending before the Hon'ble Supreme Court although various recommendations had been made) but it ultimately culminated in a decision only on 21.5.2013 (erroneously noted as 21.5.2012) when Hon'ble Chief Minister signed in the said file and communicated the said decision to the DMET, Odisha under cover of letter dated 27.5.2013.

10. Learned counsel for the intervenors, on the other hand, vehemently contended that in the present facts and circumstances of the case, there is neither any necessity nor any justification to interfere with the impugned guideline framed by the State of Odisha. As would be available from the counter affidavit of the State since in the past, the seats reserved for "in-service candidates" by the State of Odisha were going unfilled and remained vacant and since adequate number of eligible candidates having 5 years of work experience in the State were not being found, as a consequence a number of seats were being left vacant which was thereafter being given to the "direct candidates" and, therefore, no impediment is caused to the petitioners who claims to have 5 years or more experience.

11. It is further contended that the notification of the Medical Council of India and the bulletin issued by the National Board of Examination refers to "applicable laws prevailing in the State" and there being no law prevailing in the State of Odisha, no infraction thereof can be pleaded. At the very best, a prevailing practice or convention existed and such prevailing practice or convention cannot take the place of "existing law" as stipulated in NBE's instructions.

12. It is submitted on behalf of the intervenor that in the present facts situation of the case, the NBE did not issue any prospectus and only issued instructions, pursuant to which all applicants made their applications online. Therefore, in terms of the directions issued by the NBE, the petitioners as well as intervenor (who have completed "three years of work experience") appeared at the same examination. It is submitted that in the present case, there is no change of rules of the game after the game has begun, since the State had not framed any guideline or policy for admission for the year 2013. While the NBE conducted the examination, the State was at liberty to frame its guidelines, prior to selection of candidates for admission (counseling) and in the present case, the counseling is yet to be made for admission into P.G. Degree course for 2013. The guidelines of the State impugned herein would govern selection to be made after framing of the guidelines and, therefore, the case laws cited by the petitioners relating to change of the rules of the

game after the process of selection had begun, has no application. It is averred that in the present case, in the absence of any guidelines or policy of the State, all applicants i.e. the petitioners as well as opposite parties appeared in the self-same entrance exam and, therefore, their names finds mention in the merit list. But since counseling is yet to be conducted the issue of the impugned guidelines by the State, prior to counseling, cannot make the said guidelines retrospective in operation as alleged but prospective, since the counseling was yet to be conducted.

13. Having heard the learned counsel for the petitioners, learned counsel for the State as well as the leaned counsel for the intervenors, we are of the considered view that the main issue that arises for consideration in the present case is, as to whether the impugned guidelines framed by the State of Odisha and communicated to the DMET on 27.5.2013 can be permitted to govern admissions into P.G. Degree courses for "in-service candidates" for the year 2013.

14. In this respect, it would be important to take note of the stand of the State as contained in the counter affidavit and in particular, Paragraph-6 in which it is stated that the State Government was facing problems as the in-service Doctors having minimum five years service were not sufficiently available and even if available were not qualifying at the entrance examination for which reason the State Government decided to reduce the period of service in the eligibility of "in-service candidates" from five years to three years. While this reason apparently forms the basis for the change of policy of the State Government, while we find the reason behind such decision to be germane and in the interest of the State, yet, the question remains as to whether such policy could cover admission for the academic year 2013-14 or not?

15. While the impugned guidelines in Clause F-2 defines that "an in-service candidate is one who at the time of application", is in the regular employment in Government of Odisha. Similarly, in Clause F-1 which defines that "a direct candidate is one at the time of application.

16. Since applications had been called for by the NBE between 4th October 2012 to 12th November, 2012 i.e. before midnight of 12th November 2012, the law prevailing at the time of submission of application would alone be relevant and no subsequent law or policy. Although it is contended by the State that the State was contemplating amendment to the eligibility criteria of "in-service candidates" from five years to three years in the counter affidavit in Paragraph-21, the stand of the State is unambiguous and clear. We can

do no better than to extract Paragraph-20 of the counter affidavit of the State which is as follows:

> "20. That, the State Government had not issued any guideline for allotment of candidates for Post Graduate (Medical) courses in the Govt. Medical Colleges of Odisha as the NEET (Post Graduate) for MD/MS/Post Graduate Diploma Courses 2013 admission sessions which was challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court order dated 13.12.2012 in which the Hon'ble Supreme Court had given liberty to hold the examination and directed not to declare the results. The State Government though had taken a policy decision to hold to the counseling only was able to issue the Guideline on 27.05.2013 after the order dated 13.05.2013 was passed wherein the Hon'ble Supreme Court had lifted the bar imposed on 13.12.2012 and allowed the results already conducted to be declared to enable the students to take advantage of the same for the current year. But the decision was taken by the Government, regarding the guidelines for admission counseling for admission to the P.G. course, 2013. The DMET, Odisha had moved the file for approval of the guidelines for admission to P.G. courses on 11.04.2012 which was finally decided on 29.04.2013 by the Government regarding the conditions/eligibility etc. for admission to the course, where in it was decided that 3 years continuous service will be taken for consideration instead of five years for inservice doctors and the said decision of the Government was communicated along with the guideline to the DMET, Odisha on 27.05.2013 in continuation to the earlier letter of the Government which was issued to DMET by the Government. xx xx"

17. The aforesaid stand of the State in its counter affidavit that the change of guideline was finally decided on 29.4.2013 is clearly erroneous. From the documents appended to the counter affidavit filed by the State under Annexure-F/2, it shows that on 29.4.2013 the Minister of Health and Family Welfare signed on the note-sheet and thereafter the same was placed before the Hon'ble Chief Minister, Odisha who signed on 21.5.2013 (erroneously noted as 21.5.2012) and communicated only on 27.5.2013 to the DMET. Therefore, until 27.5.2013, it cannot be said that any decision by the State had been taken.

18. In this respect, it is important to refer to the judgment of this Court in the case of **Bishnu Charan Mohanty v. State of Orissa and others,** AIR 1973 ORISSA 199, where this High Court after referring to various leading

judgments of the Hon'ble Apex Court dealt with the scope of Article 166(3) of the Constitution of India and concluded that while Article 163(3) of the Constitution lays down that "until such an order reaches the person concerned, it does not attain any finality. It is open to Government even to recall a letter sent to another office before it reaches the person concerned. When, however, the order is communicated to the person concerned, the order becomes final."

Therefore, the decision of the State Government though signed by the Hon'ble Minister on 29.4.2013, was approved by the Hon'ble Chief Minister on 21.5.2013 and communicated to the person concerned i.e. DMET, Odisha on 27.5.2013 and, therefore, the date 27.5.2013 has to be held the date on which the order was given effect to. Much prior thereto applications had been called for, examination had been held and results had also been declared. The law that was applicable to the State of Odisha, on the date of applications were made prior to midnight of 12.12.2012 and such law and/or policy prevailing at that time alone will govern the matter of admission for PG (Degree) Course for the year 2013.

We are further of the considered view that even though the impugned guideline have been issued by the State prior to the counseling for the year 2013, yet, the selection process having already commenced on the date of application i.e. 12.11.2012, the law/policy/guideline as it prevailed on the last date of application would govern the case at hand.

19. Taking into consideration of the judgments of the Hon'ble Supreme Court in the case of **Secretary, A.P.Public Service Commission** (supra), **K.Manjusree** (supra) and **Mohd. Raisul Islam and others** (supra), it is well settled principle of law that once the process of selection has started, the prescribed selection criteria cannot be changed and further that, introducing of any change into eligibility criteria after the selection process has commenced, would amount to changing the game after the game has been played. It is also further well settled that in the present case, the selection process commenced from 12th November, 2012 (i.e. the last date of making online application) and therefore, any requirement/selection has to be made on the basis of the process/ policy/law existing on the said date. We are of the further considered view that while the State is at liberty to change its policy and we are not required to comment upon the justifiability and reasonability of such a change of policy. We are of the view that the impugned guidelines/policy would operate only prospectively i.e. from 27.5.2013 for future examinations that may be conducted but insofar as admission of P.G.(Medical) Course for "in-service candidates are concerned

for the year 2013, Clause-F-2 of the impugned guidelines cannot be made to apply to such admissions into the seats reserved for "in-service candidates" for the year 2013-14.

20. Accordingly, all the writ petitions are allowed with directions to the opposite parties 1, 2 and 3 to only consider the candidates having five years service experience, as "in-service candidates" for admission into P.G. (Medical) Course 2013 and consequently, we declare that Clause-F-2 of the impugned guidelines dated 27.5.2013 shall not apply for admission of "in-service candidates" for P.G. (Medical) Courses for the year 2013. Since the Hon'ble Supreme Court has directed conclusion of counseling on or before 31st July, 2013, we direct opposite parties to act forthwith and complete the admission process within the period as directed by the Hon'ble Supreme Court.

Writ petitions allowed.

2013 (II) ILR - CUT- 366

C. NAGAPPAN, CJ & INDRAJIT MAHANTY, J.

W.P.(C) NO.10966 OF 2013 (Dt.09.07.2013)

DR. ANUP KUMAR NATH SHARMA & ORS. .....Petitioners

.Vrs.

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

COMMISSIONS OF INQUIRY ACT, 1952 – S.8-B

Notice U/s.8-B of the Act, 1952 issued to the petitioners to show cause – Petition filed by the petitioners seeking permission to Cross-examine Dr. Rajendra Kumar Pattnaik, the then Addl. District Medical Officer, District Headquarters Hospital, Jajpur and Sri Abhimanyu Das the then IIC, Jajpur P.S. first and there after to file show cause – Application rejected – Hence the writ petition.

In this case the petitioners participated in the initial inquiry by filing affidavits pursuant to notices issued U/s.5 (2) of the 1952 Act and appeared before the commission for being examined and Cross-examined – However, the Inquiry Committee having been prima facie satisfied of the likelihood of the petitioners being prejudicially affected

has issued them notices U/s. 8-B of the Act. - Held, petitioners would be permitted to Cross-examine the witnesses sought for but only after filing of show cause and leading of their evidences, if any, where after they have a right to seek Cross-examination of any witness, who may have earlier been examined by the commission – Impugned order needs no interference. (Para 9)

Case laws Referred to:-

1.1989(1) SCC 494 (2) : (Kiran Bedi-V- Committee of Inquiry & Anr.)
2.AIR 2003 SC 3357 : (State of Bihar-V- L.K. Advani & Ors.)
3.AIR 1983 (A.P.) 69 : (Md. Ibrahim Khan-V- Susheel Kumar & Anr.).

For Petitioner - M/s. B. N. Mohanty & S.N. Sharma.
For Opp.Parties- Addl. Govt. Advocate.

I.MAHANTY, J. In this writ application, the petitioners, who are all doctors in Government service have sought to challenge the order dated 20.04.2013 passed by the Justice P.K. Mohanty Commission of Inquiry into the Kalinga Nagar Police Firing, by which order a petition filed by the present petitioners with a prayer seeking permission to cross-examine Dr. Rajendra Kumar Pattnaik, the then Additional District Medical Officer, District Headquarters Hospital, Jajpur and Sri Abhimanyu Das, the then I.I.C., Jajpur Police Station first and thereafter, to be permitted to file their show cause to the notice under Section 8-B of the Commissions of Inquiry Act, 1952 came to be rejected.

2. Mr. B.N. Mohanty, learned counsel appearing for the petitioners submits that the Commission of Inquiry had issued notices to the present petitioners dated 25.06.2012 under Section 5(2) of the Commissions of Inquiry Act, 1952 read with Rule-8 of the Orissa Commissions of Inquiry Rules, 1979. Pursuant to the aforesaid notices, the petitioners filed their affidavits before the Commission of Inquiry on 17.07.2012, whereafter, the petitioners were examined-in-chief and cross-examined both by the counsel of the State as well as the Commission on 22.09.2012 and 29.09.2012.

Thereafter, it appears that the Commission has issued notices to the petitioners dated 22.03.2013 under Section 8-B of the Commissions of Inquiry Act, 1952. On receipt of such notices under Section 8-B, the petitioners had filed a joint petition with a prayer to cross-examine two witnesses (named hereinabove) before submission of their statements of defence and such petition upon being rejected by the impugned order dated 20.04.2013, the present writ application has come to be filed.

3. Mr. Mohanty, learned counsel for the petitioners submits that the petitioners are likely to be gravely prejudiced since their prayer to cross-examine the two witnesses and to submit their show cause thereafter came to be rejected. Reliance was placed on the judgments of the Hon'ble Supreme Court in the case of (1) Kiran Bedi Vs. Committee of Inquiry and another, 1989(1)S.C.C. 494 (2) State of Bihar Vs. L.K. Advani and others, A.I.R. 2003 S.C. 3357 and on the judgment of the Hon'ble Andhra Pradesh High Court in the case of Md. Ibrahim Khan Vs. Susheel Kumar & another, A.I.R. 1983(A.P), 69, in order to support their contentions that in normal practice in a trial, an accused is to be given an opportunity to cross-examine the witnesses, before leading the defence evidence and, thereafter, accused statement is to be recorded. Therefore, it is claimed that the Commission has erroneously rejected the petition filed on behalf of the petitioners.

4. Insofar as the case of Kiran Bedi (supra) is concerned, the Hon'ble Supreme Court was considering a situation where the Commission of Inquiry without issuing notices to the petitioners therein under Section 8-B of the Act was compelling them to enter the witness box "at the initial stage of inquiry" which was held to be discriminatory in the fact situation of the said case.

In the present case at hand, the petitioner has participated in the initial inquiry by filing their affidavits pursuant to notices issued under Section 5(2) of the 1952 Act read with Rule-8 of the 1979 Rules and also appeared before the Commission for being examined and cross-examined.

The Hon'ble Supreme Court in the aforesaid case came to hold that in the said case the Inquiry Committee was under misapprehension that the petitioners therein were not covered by Section 8-B, merely because no notices under that section had been issued to them and, therefore, held that the failure to issue the formal notices under Section 8-B to the petitioners therein would constitute no justification for not treating such a person to be covered by that Section, if otherwise, the ingredients of the said Section are made out. Therefore, in the present circumstance, since the petitioners have never challenged the notices under Section 5(2) issued to them and have instead submitted their affidavits in response to such notices and have further been examined and cross-examined before the Commission, the same is no longer available for questioning in the present case.

But more significantly, the Hon'ble Supreme Court in paragraph-17 of the aforesaid judgment has come to state as follows:

> "recourse to process under Section 8-B is not confined to any particular stage and if not earlier, at any rate, as soon as the Committee made the aforesaid unequivocal declaration of its intention in its interim report, it should have issued notice under Section 8-B to the two petitioners, if it was of the view as it seems to be, for which view there is apparently no justification, that issue of formal notice under Section 8-B was the sine qua non for attracting that section"

05. In the case at hand as would appear from the impugned order and the pleadings of the petitioners, Section 8-B not being confined to any particular stage, it is apparent that, the Inquiry Committee having been prima facie satisfied of the likelihood of the petitioners being prejudicially affected, has issued the petitioners notices under Section 8-B and, therefore, the procedure adopted by the Commission of Inquiry appears to in consonance with the judgment of the Hon'ble Supreme Court referred to hereinabove.

06. Insofar as the case of **State of Bihar (supra)** is concerned, in the said judgment the Hon'ble Supreme Court came to observe that one is entitled to have and preserve one's reputation and one also has a right to protect it. An individual has a right to safeguard his own reputation and, therefore, principles of natural justice have to be complied with "before being adversely commented upon by a Commission of Inquiry"

In the circumstance of the present case, it is clear that the Commission of Enquiry is yet to come any conclusion or render any adverse comment (if at all) against the petitioners and in compliance of Section 8-B read with Rule-12 has issued necessary notices to the petitioners in order to afford the petitioners an opportunity to safeguard their personal reputations from being adversely affected. Therefore, we are of the considered view that the impugned action of the Commission of Inquiry, in the present case, is also in consonance with the judgment of the Hon'ble Supreme Court in the aforesaid regard as well.

07. Insofar as the contention of the petitioners that they are in the position of an accused and, therefore, ought to be given an opportunity to cross-examine the witnesses before leading their defence evidence. The aforesaid contention is merely noted to be rejected, since it is well settled that in an inquiry before the Commission, is neither a dispute nor a decision which prejudicially affects any right, and is meant to be an "investigation" and a report of the facts to be ascertained and in fact there is no decision.

The Hon'ble Andhra Pradesh High Court in the case of **Md. Ibrahim Khan,(Supra)** has negatived the aforesaid contention in para-41 thereof and we can do no better, than extracting the same hereunder while rejecting this plea of the petitioner.

> "41- Quasi-judicial decision equally pre-supposes as a true judicial decision the existence of a dispute between two or more parties. It involves: (i) presentation of their cases by the parties; (ii) the ascertainment of any disputed facts by the evidence adduced by the parties; (iii) submission of arguments; and (iv) a declaration of the liabilities of the parties. In an inquiry before the Commission, there is neither a dispute nor a decision which prejudicially affects any right. There is an investigation and a mere report of the facts ascertained. There is no decision. Therefore, use of the accolade judicial or quasi-judicial to inquiries before a Commission of Inquiry appointed under the Commissions of Inquiry At is in appropriate. The Commission is not an adjudicating body, but an assisting body that assesses the facts and assists the Government in the arrival at an appropriate decision.

08. At this stage, it would be relevant also to take note of Rule 12 of the Orissa Commissions of Inquiry Rules, 1979 which is extracted hereunder.

> "12. Right of cross-examination and representation by legal Practitioners-The State Government, every person referred to in Section 8-B of the Act and with the permission of the Commission, any other person whose evidence is recorded under Rule 10-
>
> (a) may cross-examine a witness other than a witness produced by it or him;
>
> (b) may address the Commission; and
>
> (c) may be represented before the Commission by a legal practitioner or, with the consent of the Commission, by any other person."

09. It is clear on reading of Section 8-B along with Rule 12 that the petitioners would be permitted to cross-examine the witnesses sought for but only after filing of show cause and leading of their evidences, if any, whereafter they have a right to seek cross-examination of any witnesses, who may have earlier been examined by the Commission.

Therefore, we are of the considered view that the conclusion reached by the Commission of Inquiry does not suffer from any legal

infirmity and we find no justification to entertain the present writ application which, therefore, stands dismissed.

Writ petition dismissed.

2013 (II) ILR - CUT- 371

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

O.J.C. NO.16546 of 2001 (Dt.16.08.2012)

BASUDEB RATH ……Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

SERVICE LAW – Compulsory retirement – So long an order of compulsory retirement is not affected by mala fides or arbitrariness, the Courts have hardly any jurisdiction to interfere with the same specially when the adverse entries relate to lack of integrity.

In this case the adverse entries from the years 1981-82 to 1985-86 relate to lack of integrity and at no point of time petitioner filed any representation for expunction of the said adverse remark – The adverse remarks having accepted by the petitioner and merely because he was allowed to cross the efficiency bar w.e.f. 1.1.1988, it cannot be said that the adverse entries prior to 1988 not objected to by the petitioner got wiped out – Held, the petitioner having compulsorily retired in public interest on consideration of adverse entries relating to lack of integrity, there is no justification to interfere with the same.

(Para 10)

Case laws Referred to:-

1.(2001) 3 SCC 314 : (State of Gujrat –V- Umedbhai M. Patel)
2.(1992) 2 SCC 299 : (Baikuntha Nath Das & Anr.-V- Chief District Medical Officer, Baripada & Anr.)
3.(1999) 1 SCC 529 : (State of Gujarat & Anr.-V- Suryakanta Chunilal Shah)
4.AIR 1970 SC 2086 : (The State of Punjab-V- Dewan Chuni Lal)
5.AIR 1980 SC 269 : (Swami Saran Saksena-V- State of Uttar Pradesh)

For Petitioner - Mr. B. B. Dash
For Opp.Parties - Mr. Sangram Das,
Addl. Standing Council.

L. MOHAPATRA, J. The petitioner, while working as Assistant Settlement Officer in the district of Balasore, was prematurely retired on completion of age of 50 years by order of the Member, Board of Revenue dated 30th November, 1992 in Annexure-5 in public interest. Challenging the said order of compulsory retirement, the petitioner approached the Orissa Administrative Tribunal in O.A.No.2594 of 1992 and the said Original Application having been dismissed by the Tribunal on 13.7.1999, this writ application has been filed challenging the said order of compulsory retirement in Annexure-5 as well as the order of the Tribunal dated 13.7.1999 in Annexure-4.

2. The petitioner was appointed in the year 1970 under the Settlement Organization and he was promoted to the post of Assistant Settlement Officer with effect from 3.11.1972. He became a gazetted Assistant Settlement Officer under the Orissa Settlement and Consolidation Service with effect from 15.12.1973 and, accordingly, his services were guided by O.S.C.S. (Recruitment and Conditions of Service) Rules, 1980. He was confirmed in the O.S.C.S. cadre by notification dated 21.3.1985. He was allowed to cross the first efficiency bar by order dated 19.10.1987 passed by the Board of Revenue with effect from 1.1.1981. During his service tenure, he was proceeded with five departmental proceedings on different charges and the first proceeding was drawn in the year 1982. He was exonerated of the charges by order of the Government dated 25.2.1984, but during the period of suspension, adverse remarks were given in his C.C.R. Again in March, 1985 the second departmental proceeding was initiated and the petitioner faced minor punishment. The Reporting Officer, who had given adverse remarks for the year 1981-82 and 1982-83, also again gave adverse remark in 1983-84 and 1984-85. In July, 1986 the third departmental proceeding was initiated and the petitioner faced minor penalty. The 4th departmental proceeding was initiated in August, 1992. The petitioner was exonerated of all the charges by order of the Board of Revenue dated 21.4.1995. The petitioner was compulsorily retired on 30.11.1992. On the basis of a memo dated 8.7.1992 another departmental proceeding was initiated against him after such retirement, but the department could not prove the charges and, accordingly, he was exonerated of the charges.

3. It is the case of the petitioner that he having been exonerated in two departmental proceedings of all the charges and the major charges in the

other departmental proceedings having not been proved against him, there was no reason to prematurely retire him when the adverse remarks made during the relevant years are the basis for initiation of the departmental proceedings. It is also the case of the petitioner that he having been confirmed in the post on 21.3.1985 under the relevant rules, the previous C.C.R. entries could not be taken into consideration by the Government for the purpose of premature retirement. It is also the case of the petitioner that he having been allowed to cross the efficiency bar with effect from 1.1.1988, the adverse entries in between 1981-88 could not also be taken into consideration for the purpose of premature retirement. According to the petitioner, all the adverse entries up to 1.1.1988 got wiped out. The petitioner having been confirmed in the year 1985 and having been allowed to cross the efficiency bar with effect from 1.1.1988, there was only one adverse entry after 1.1.1988 showing the petitioner to be an average officer. Therefore, on the basis of one adverse entry he could not have been prematurely retired.

4. A counter affidavit has been filed by the Under Secretary, Directorate of Land Records, Survey, Board of Revenue, Orissa, Cuttack on behalf of opposite parties 3 and 4. It is stated in the counter affidavit that the petitioner had been punished in the departmental proceedings and during the year 1985-86, he was found unfit for public service as he was lacking integrity and was irresponsible and negligent. Adverse remarks made in the years 1984-85 and 1985-86 persuaded the Government to retire the petitioner prematurely. The petitioner has been given adverse remark in the CCRs from 1981-82 to 1985-86 touching his integrity and the review committee had taken those C.C.Rs into consideration to take a decision. The allegation of mala fide is also denied by the opposite parties 3 and 4 on the ground that the review committee had recommended not only the case of the petitioner but also six other officers for premature retirement in public interest and, therefore, the petitioner had not been singled out. It is also contended in the counter affidavit that the petitioner had been allowed to cross the first efficiency bar with effect from 1.1.1981 basing on the C.C.Rs prior to 1981 and, accordingly, the adverse entries in the C.C.Rs as well as the punishment imposed in the departmental proceeding after 1981 had not been taken into consideration. The petitioner never submitted an application for expunction of the adverse entries and, accordingly, the adverse entries continued in the record. Taking all these facts into account, the Tribunal dismissed the Original Application filed by the petitioner.

5. Learned counsel appearing for the petitioner assailed the order of compulsory retirement as well as the order of the Tribunal on the ground that

the adverse entries made prior to 1988 could not be taken into account after the petitioner was allowed to cross the second efficiency bar with effect from 1.1.1988. The adverse entries after 1981 could not also been taken into consideration as the petitioner was confirmed in service in the year 1985. Therefore, the review committee should have taken into account only one entry after 1988. The remark in the C.C.R. after 1988 is that the petitioner was an "average officer". On the basis of such remark in the C.C.R., no such decision for compulsory retirement could be taken by the review committee.

Learned counsel appearing for the State submitted that crossing efficiency bar does not stand on the same footing as that of the promotion and, therefore, merely because the petitioner was allowed to cross the efficiency bar by efflux of time, the adverse entries made in the C.C.Rs. can not be overlooked. The review committee specifically looked into the adverse entries for the year 1985-86 and onwards to come to a conclusion that the petitioner was not fit to continue as Officer any further in public interest and, accordingly decided to retire him prematurely.

Learned counsel for the State further submitted that this Court cannot sit in appeal over the decision of the review committee and reverse the order so long as the Court is not satisfied that the order of premature retirement is tainted with mala fide or arbitrariness.

6. Undisputedly, this Court has limited jurisdiction in interfering with a decision of the review committee to prematurely retire the petitioner in public interest. The Court can interfere only on certain circumstances. The Hon'ble Apex Court in the case of ***State of Gujrat Vrs. Umedbhai M.Patel*** reported in (2001) 3 Supreme Court Cases 314 reiterated the law, which is broadly summarized below:-

"(i) Whenever the services of a public servant are no longer useful to the general administration, he can be compulsorily retired for the sake of public interest.

(i) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(ii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iii) Any adverse entries made in the confidential record shall be taken note of and be given due weight in passing such order.

(iv) Even un-communicated entries in the confidential record can also be taken into consideration.

(v) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vi) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(vii) Compulsory retirement shall not be imposed as a punitive measure".

7. The limits of judicial review of an order of compulsory retirement has also been laid down by the Hon'ble Apex Court in the case of ***Baikuntha Nath Das and another Vrs. Chief District Medical Officer, Baripada and another*** reported in (1992) 2 Supreme Court Cases 299. In the said decision, the Hon'ble Apex Court held that judicial review of an order of compulsory retirement is open only on grounds of mala fides, arbitrariness and perversity. In the case of ***State of Gujarat and another Vrs. Suryakant Chunilal Shah*** reported in (1999) 1 Supreme Court Cases 529, the Hon'ble Apex Court held that public interest is the primary consideration for compulsory retirement. Only honest and efficient persons are to be retained in service while dishonest, corrupt and dead wood, to be dispensed with. Efficiency and honesty are to be assessed on the basis of material on record of which confidential reports are an important input. An employee with doubtful integrity cannot be considered as efficient. In the light of the above decisions, if the case of the petitioner is considered, it will be found that the petitioner had been given adverse entries from 1981-82. The entry in C.C.R. for the year 1981-82 is "integrity was doubtful". The entry for the year 1982-83 is "dishonest/corrupt officer, busy in extracting illegal gratification from raiyats and misappropriated peon's pay". The entry for the year 1983-84 is "doubtful integrity needing close watch". The entry for the year 1984-85 is "questionable integrity". The entry for the year 1985-86 is "lacking integrity". The entry for the year 1987-88 is "Good Officer" and the entry for the year 1988-89 is "average officer".

8. The above entries clearly show that from 1981-82 till 1986-87 the petitioner has been constantly rated as a dishonest officer. In relation to these entries, it was contended by the learned counsel for the petitioner that all these entries were made by one officer and during the said period, the departmental proceedings were started and in two of the departmental

proceedings, the petitioner had been exonerated from the charges. Though factually the learned counsel for the petitioner is correct in saying that during the said period out of four departmental proceedings two did not yield-result and the petitioner was exonerated of the charges, there is also no dispute that in two of the departmental proceedings he was found guilty and minor punishments were imposed. The allegation of mala fide made in course of hearing is not substantiated by any material. We are therefore unable to accept the above contention of the learned counsel appearing for the petitioner.

9. The other submission of the learned counsel for the petitioner relates to crossing of efficiency bar for the second time with effect from 1.1.1988. With reference to the same, it was contended by the learned counsel that once the petitioner was allowed to cross the efficiency bar with effect from 1.1.1988, all the adverse entries prior to that cannot be looked into. Reliance was placed by the learned counsel for the petitioner on a decision of the Hon'ble Apex Court in the case of ***The State of Punjab Vrs. Dewan Chuni Lal*** reported in AIR 1970 Supreme Court 2086. In the said reported case, a police Sub-Inspector was dismissed from service on the charges of inefficiency and dishonesty based on adverse reports of Superior Officers. A departmental proceeding was initiated against him. The Hon'ble Apex Court in paragraph-14 of the judgment observed that the reports earlier than 1944 should not have been considered at all inasmuch as the petitioner therein was allowed to cross the efficiency bar in that year. It is unthinkable that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942, they could have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944. Reliance was also placed on another decision of the Hon'ble Supreme Court in the case of ***Swami Saran Saksena Vrs. State of Uttar Pradesh*** reported in AIR 1980 Supreme Court 269. In the said reported case, a temporary Judicial Officer in the service of the U.P. State was compulsorily retired from service few months after he was allowed to cross the second efficiency bar. The Court observed that there was no material to show that his standard had deteriorated to such an extent in few months that an order for premature retirement could be passed.

10. The above decision is clearly distinguishable on facts as there is no material on record to show that prior to crossing of the efficiency bar, there was any adverse remark against the petitioner therein. The later decisions of the Hon'ble Supreme Court clearly lay down the law that so long as an order of compulsory retirement is not affected by mala fides or arbitrariness, the

Courts have hardly any jurisdiction to interfere with the same specially when the adverse entries relate to lack of integrity. In the present case as stated earlier the adverse entries from the years 1981-82 to 1985-86 relate to lack of integrity and at no point of time the petitioner filed any representation for expunction of the said adverse remark. The adverse remarks were accepted by the petitioner and, therefore merely because he was allowed to cross the efficiency bar with effect from 1.1.1988, it cannot be said that the adverse entries prior to 1988 not objected to by the petitioner got wiped out. The petitioner having been compulsorily retired in public interest on consideration of the adverse entries relating to lack of integrity, we find no justification to interfere with the same.

11. The writ application is accordingly dismissed.

Writ petition dismissed.

2013 (II) ILR – CUT- 377

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

W.P.(C) NO. 27638 OF 2011 (Dt.15.03.2013)

MANASI MISHRA ……..Petitioner

.*Vrs.*

UNION OF INDIA & ORS. ……..Opp.Parties

SERVICE LAW – Transfer of an employee – Transfer is ordinarily an incident of service which should not be interfered with except where mala fides on the part of the authority is proved – Mala fides are of two kinds i.e. malice in fact and malice in law – Malice in law means if the order of transfer passed on material which was non-existent.

In this case Petitioner was transferred from INHS Nivarini at Chilka to the Station Health Organization (V) at Family welfare Centre, Visakhapatnam - Even though show cause notices were issued to the petitioner no enquiry was conducted there in by giving opportunity to the petitioner and in the other hand basing on the same allegations the order of transfer was passed.

Held, the order of transfer was punitive in nature which is illegal and unsustainable – Impugned order passed by the Tribunal is

quashed and consequently the order transferring the petitioner also quashed – O.Ps. are directed to allow the petitioner to continue in INHS Nivarini in her previous post of FWEE – If in the meantime the petitioner has been relieved she shall be allowed to rejoin in her previous post with immediate effect.

Case law Referred to:-

(2009) 2 SCC 592 : (Somesh Tiwari-V- Union of India & Ors.)

For Petitioner - M/s. B. S. Tripathy, D.K. Mishra, M.R. Kar & N.K. Das.
For Opp.Parties - Mr. J.K. Khandayatray.

M. M. DAS, J. The petitioner has assailed the order dated 30.9.2011 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack in dismissing her O.A. No. 497 of 2011, wherein she challenged her order of transfer from INHS Nivarini at Chilka to the Station Health Organization (V) at Family Welfare Centre, Visakhapatnam.

2. From the facts, as revealed, it appears that the husband of the petitioner died in harness on 30.9.1997 while working in INHS Nivarini as CPO No. 203934-N. The petitioner was given appointment under the Rehabilitation Assistance Scheme as Family Welfare Extension Educator (for short, 'FWEE') in INHS Nivarini at INS Chilka in the district of Khurda on 16.2.1999. The service of the petitioner was permanent in nature and since the date of her joining, she was continuing there. It appears that the petitioner has made several representations to the opp. parties with regard to assigning duties to her over and above the duty of FWEE, but no action was taken thereon. The petitioner also alleged that the opp. parties 3 and 4 caused sexual harassment to her taking advantage of her helpless condition. She further alleged that the said opp. parties 3 and 4 pressurized the Oi/C, who took over the Family Welfare on 4.4.2011 to make allegations against her. The opp. parties 3 and 4 issued two show cause notices to the petitioner on 11.7.2011, one pertaining to a patient, namely, Mrs. Ritanjali Champati, who underwent sterilization on 6.7.2011 and the other on the issue of absence of the petitioner from duty on 9.7.2011. The petitioner furnished her show cause reply to both the said notices denying the allegations leveled against her as baseless, motivated and frivolous. Apprehending further action, the petitioner also endorsed the said show cause to the Flag Officer Commanding –in-Chief (for Command Medical Officer) Headquarters Southern Naval Command, Kochi and other higher authorities. It is asserted by the petitioner that she learnt from reliable

sources that the opp. parties 3 and 4 while issuing the show cause notices have also simultaneously requested opp. party no. 2 in writing to transfer the petitioner to Visakhapatnam making false allegations against her. On 29.7.2011 the petitioner suffered from ailment for which she submitted an application for grant of two days leave. As her health condition deteriorated, she was advised by the Attending Physician for better treatment, to go to Cuttack. She again submitted a leave application on 30.7.2011 seeking fifteen days leave on medical ground furnishing her leave address. While under treatment, she could come to know that the opp. party no. 2 has passed orders on 28.7.2011 permanently transferring her from INHS Nivarini to Station Health Organization (V) at Family Welfare Centre, Visakhapatnam purportedly on public interest. Aggrieved by the said order of transfer, the petitioner approached the Tribunal in O.A. No. 497 of 2011, inter alia, praying to quash the impugned order of transfer on the following grounds:-

(i) the order is a mala fide one;

(ii) the order is punitive in nature;

(iii) there was no public interest involved or administrative exigency warranting such transfer;

(iv) further, the said transfer was an out-come of extraneous reasons and was made at the behest and dictates of the opp. parties 3 and 4 against whom the petitioner earlier made serious allegations of sexual harassment.

3. During the pendency of the Original Application, on 3.8.2011, the learned Tribunal passed an order while issuing notice, to maintain status quo in so far as the transfer of the petitioner is concerned, which was allowed to continue till final disposal of the Original Application. The opp. parties filed their response to the said O.A. and the petitioner also filed a rejoinder affidavit before the learned Tribunal denying the assertions made in the counter and justifying her allegations.

4. The learned Tribunal in the impugned order after noting the facts of the case and the allegations and counter allegations made and taking note of various case laws of the Hon'ble apex Court as well as this Court with regard to the limited scope of the courts in interfering with the orders of transfer, came to the conclusion that there is no substance in support of the allegations levelled by the petitioner, the same having not been supported by any unimpeachable material. As law is well settled that people are prone

to make allegation of mala fide/usually raised by an interested party (as in the instant case), the Tribunal should be careful while quashing the order of transfer on such grounds. Thus concluding, the learned Tribunal declined to interfere with the order of transfer recording that it does so as the order of transfer is made in administrative exigencies.

5. Mr. Tripathy, learned counsel for the petitioner vehemently urged that from the counter filed by the opp. parties before the learned Tribunal, it is clear that the transfer order is punitive in nature and an out-come of mala fide.

6. Learned counsel for the opp. parties, on the contrary, submitted that the learned Tribunal on detailed analysis of the law with regard to interfering with an order of transfer has rightly held that the order of transfer of the petitioner being in administrative exigency cannot be interfered with.

7. This Court on perusal of the impugned order of the learned Tribunal finds that though the learned Tribunal referred to the decision in the case of *Somesh Tiwari v. Union of India and others,* (2009) 2 SCC 592 relied upon by the petitioner before it, but came to the conclusion that the post in which the petitioner was continuing was having a liability of All India transfer and the aforesaid decision in the case of *Somesh Tiwari* (supra) has no applicability to the facts of the case.

8. It appears that in the counter filed by the opp. parties before the learned Tribunal, it was categorically stated by the opp. parties that the applicant was assigned duties of FWEE as per orders of the competent authority, but she failed to perform the duties to the desired extent she was counselled. She has not utilized her skills and did not take enough interest for contribution to Family Welfare cause and community service commensurate to their qualification and pay. A complaint was also made by the officer in charge on 11.7.2011 to the Commanding Officer regarding non-performance of family welfare duties as she was not present prior to surgery of a lady patient for permanent sterilization nor did she visit her thereafter. She did not even turn up for disbursing family welfare incentive payment to patients on the day of discharge in spite of being informed repeatedly by the Family Ward Staff. Despite opportunity and show cause, she was not punctual in her duty. Considering all aspects of the matter, the competent authority decided to transfer the petitioner which needs no interference by the Tribunal. An order of the Calcutta Bench of the Tribunal was relied upon by the opp. parties for the above purpose.

(*emphasis supplied)*

9. In the case of *Somesh Tiwari* (supra), the Hon'ble apex Court was considering a case, where an anonymous complaint was made against the appellant therein, which was investigated by the departmental authorities , but nothing adverse was found against the appellant, yet he was transferred from Bhopal to Shillong. He resisted his transfer and did not move out of Bhopal. Subsequently, another order dated 28.12.2005 was passed transferring the appellant to Ahmedabad. He contested that order also. The Administrative Tribunal dismissed his application but the High Court found that the transfer order was not a bona fide exercise of power and, therefore, declared it invalid. But the High Court taking note of the fact that the appellant had not obeyed the transfer order and continued to stay in Bhopal, denied him salary for the period commencing fifteen days after the date of order of transfer till he rejoined in the duty at Bhopal station. The order of the High Court was challenged before the Hon'ble apex Court. The Hon'ble apex Court considered the validity of the appellant's transfer out of Bhopal as well as denial of salary to him. It also took note of internal notings in official files which showed that Government itself admitted that appellant's transfer to Shillong was a harsh posting and his second transfer to Ahmedabad was considered as "less harsh posting". The question was whether appellant's transfer in the facts and circumstances of the case, was a bona fide exercise of power. Second issue was whether appellant should have been denied salary for the period he did not obey second transfer order.

10. The Hon'ble apex Court allowing the appeal with costs assessed at Rs. 50,000/- and modifying the order of the High Court held that an order of transfer is an administrative order. Transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fides on the part of the authority is proved. Mala fides are of two kinds, first, malice in fact and second, malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane to passing of an order of transfer and based on an irrelevant ground, i.e., on the allegations made against the appellant in an anonymous complaint. The Hon'ble apex Court further held that it is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies, but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal. It may be noted that no vigilance enquiry was initiated against the appellant and the transfer order was passed on material which was non-existent. Thus, the order suffers not only from non application of mind but also from malice in law. Thus holding, the Hon'ble apex Court modified the judgment of the High

Court by concluding that the order of transfer was passed on material which was non-existent and, therefore, the said order not only suffers from total non-application of mind on the part of the authorities but also suffers from malice in law. *(emphasis supplied)*

11. Applying the ratio of the aforesaid decision to the facts of the present case, it is clear that in the instant case also even though show cause notices were issued to the petitioner, but no enquiry whatsoever was conducted therein by giving opportunity to the petitioner and in the other hand, basing on the same allegations, the order of transfer was passed.

This Court, therefore, finds that the order of transfer was punitive in nature, which is ipso facto illegal and unsustainable.

12. In the result, the order of the learned Central Administrative Tribunal, Cuttack Bench, Cuttack impugned in this writ petition stands quashed and as a consequence, the order transferring the petitioner from INHS Nivarini at INS Chilka to Station Health Organization (V) at Family Welfare Centre, Visakhapatnam also stands quashed and the opp. parties are directed to allow the petitioner to continue in INHS Nivarini in her previous post of FWEE. If, in the meantime, the petitioner has been relieved, she shall be allowed to rejoin in her previous post with immediate effect.

13. The writ petition is accordingly allowed, but in the circumstances, without cost.

Writ petition allowed.

2013 (II) ILR – CUT- 382

M. M. DAS, J.

O.J.C. NOS.14236/1996 & 2262/1998 (Dt.19.03.2013)

MANAGEMENT OF UPPER INDRAVATI PROJECT, KHATIGUDA & ANR. ……..Petitioners

.Vrs.

ITS WORKMAN. SMT. A. K. DHANPHUL & ANR. ……..Opp.Parties

INDUSTRIAL DISPUTES ACT, 1947 – Ss.25-F, 25-G & 25-H

When Provisions of Sections 25-G and 25-H invoked the workman may not have to establish that he had rendered 240 days continuous service during twelve months preceding the date of the order of termination and the management has to follow the "last come first go" principle.

In this case the workman has rendered only 201 days service during twelve months preceding the order of termination and she was terminated while her juniors were allowed to continue – Violation of Principles of Natural Justice – Held, award passed by the learned Labour Court invoking the principle of "last come first go" as provided U/s 25-G & 25-H of the Act is correct – Direction issued to the management to reinstate the workman forthwith with all consequential benefits, failing which, action may be taken U/s 29 of the Act against the management.

Case laws Referred to:-

1.2010 AIR SCW 1357 : (Harjinder Singh-V- Punjab State Warehousing Corporation)
2.1996 AIR SCW 3138 : (Central Bank of India-V- S. Satyam)
3.(2006) AIR SCW 6084 : (Bhogpur Co-op.Sugar Mills Ltd.-V- Harmesh Kumar).

For Petitioner - M/s. B.K. Nayak & D.K. Mohanty.
For Opp.Parties - Mr. P.C. Chinchani,(for O.P.No.1)

M. M. DAS, J. O.J.C. No. 14236 of 1996 has been filed by the management challenging the award dated 8.3.1996 passed in I.D. Case No. 55 of 1994 by the learned Presiding Officer, Labour Court, Jeypore, Koraput.

O.J.C. No. 2262 of 1998 has been filed by the workman - Smt. Alethes Kharin Dhanphul with a prayer to issue a mandamus to implement the award.

2. As both the writ petitions are inter-linked, they were heard together and are being disposed of by this common judgment.

3. The opp. party no. 1 – workman, Smt. Alethes Kharin Dhanphul in O.J.C. No. 14236 of 1996 was appointed as a Junior Typist in the establishment of the Upper Indravati Project, Khatiguda and continued to

work in the said post till 10.6.1988 without any break. She was retrenched from the service, while juniors, namely, Shri Niranjan Das and Kailash Chandra Pradhan were allowed to continue in service. The workman alleging that her retrenchment from service on 11.6.1988 was without any reason and without compliance of the mandatory provisions of section 25F of the Industrial Disputes Act (for short, 'the Act') and no notice was served by the management on her before retrenching her from service as well as no compensation was paid to her and illegally the management has appointed the above two persons, who were junior to her in service, she raised an industrial dispute. On failure of conciliation and submission of failure report, the State Government made a reference under section 12 (5) read with section 10 (1) of the Act, to the Labour Court to the following effect:-

> "Whether the termination of service of Smt. A.K. Dhanphul, Ex-Junior Grade Typist with effect from 11.6.1988 by way of retrenchment/ Discharge/dismissal or otherwise by the Chief Accounts Officer, Upper Indravati Project, Khatiguda, Nowarangpur is legal and/or justified and if not what relief the workman is entitled to ?

Statement of claim and written statement were filed by the parties before the Labour Court, who upon considering the rival contentions of the workman as well as the management framed eight issues for adjudication.

4. The case of the management in its written statement was that the workman was appointed as a Junior Typist against the post of Senior Grade Typist from time to time due to exigencies of office work and also due to non-filling of the post of Senior Grade Typist by the Government. There was clear stipulation in each appointment order to the effect that the appointment was purely temporary and on ad hoc basis and will be automatically terminated on expiry of period of appointment and she will have no right to the post after termination of the period of appointment made in each occasion without assigning any reason thereof. In view of such clear stipulation in her appointment order, the workman has no legitimate right over the post of Junior Typist. It was the further case of the management that the establishment of the management is not an industry as defined under the Act and, as such, the Labour Court has no jurisdiction to give relief to the second party – workman as claimed.

5. The issues framed by the learned Labour Court are to the following effect:-

(i) Whether the engagement of the workman in the establishment of the first party-management for a short period and termination of her services from time to time is a device to deprive the workman of the benefit of continuous service for the statutory period ?

(ii) Whether the management has followed the principles of natural justice while terminating the services of the workman ?

(iii) Whether the management has followed the principles of last come first go in giving engagement to the employees in the establishment of the first party-management ?

(iv) Whether the management is required to comply the provisions of section 25F of the I.D. Act, in terminating the service of the workman ?

(iv) Whether the workman was in service for a period of 240 days preceding the date of her termination ?

(vi) Whether the workman is entitled to reinstatement with back wages ?

(vii) Whether the termination of service of Smt. A.K. Dhanphul Ex-junior Grade typist w.e.f. 11.6.1988 by way of retrenchment/discharge/dismissal or other wise by the Chief Accounts Officer, Upper Indravati Project, Khatiguda, Nawrangpur is legal and/or justified ?

(viii) To what relief, if any workman is entitled ?

6. It may be mentioned here that as the Orissa Hydro Power Corporation Limited took over the Upper Indravati Project, a Misc. Case, being Misc. Case No. 576 of 1998, has been filed for allowing the petitioner-management in O.J.C. No. 14236 of 1996 to be designated as management of Upper Indravati Hydro Electronic Project (UIHEP) being represented through the Deputy General Manager (Finance) and, further a prayer has been made therein to permit Orissa Hydro Power Corporation Ltd. (in short, 'the OHPC Ltd.') to contest the matter as the petitioner. Thus, it appears that the OHPC Ltd. has stepped into the shoes of the petitioner – management as per the prayer made in the said Misc. Case and the learned counsel for the OHPC Ltd. was allowed to address the Court during the course of hearing as counsel for the management.

7. The findings of the learned Presiding Officer, Labour Court in the impugned award on the issues framed, are as follows:-

Issue No. 1.

The workman was given temporary and ad hoc appointment for different periods against a vacant post of Senior Grade Typist which was lying vacant then. So it cannot be said that the engagement of the workman in the establishment of the first party – management was for short period and termination of service from time to time is not a devise to deprive the workman of the benefit of continuous service for the statutory period.

Issue Nos. 2 and 3

The management has not followed the principles of "last come first go" in giving engagement to the employees in its establishment and, thereby, the management has violated the principle of natural justice in terminating the workman.

Issue nos. 4 and 5

From the documents produced by the workman and marked as Exts. H. J. and K, it appears that she has rendered service for only 201 days preceding the date of her retrenchment. Hence, the termination of service of the workman without payment of notice pay and compensation cannot be said to be illegal and unjustified.

Issue nos. 6 and 7

The management has committed illegalities by not giving further appointment to the workman after 10.6.1988. In this case, there is no infringement of section 25F of the Act. Back wages cannot be granted to the workman. However, when the management has failed to follow the principles of "last come first go" in giving engagement to the employees in the establishment and thereby violated the principles of natural justice, it would be just and proper to direct reinstatement of the workman in the post of Junior Typist.

8. Thus answering the reference, the learned Labour Court held that the termination of service of the workman with effect from 11.06.1988 is illegal and unjustified and she be reinstated to the post of Junior Typist without back wages within three months from the date of receipt of the award by the management.

9. Mr. B.K. Nayak, learned counsel for the management (in O.J.C. No.14236 of 1996) vehemently urged that the appointment of the workman comes under Section 2 (oo) (bb) of the Act and, hence, the award passed by the learned Labour Court for reinstatement of the workman is illegal and unsustainable.

This contention on behalf of the management is countered by Mr. Chhinchani, learned counsel for the workman, who relying upon the decision in the case of ***Harjinder Singh v. Punjab State Warehousing Corporation*** reported in 2010 AIR SCW 1357, submitted that in the said decision, the Hon'ble apex Court has clearly laid down that it is settled law that for attracting applicability of Section 25G of the Act, which embodies the rule of "last come first go", the workman is not required to prove that he had worked for a period of 240 days during 12 calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of "last come first go" without any tangible reason. In the said case, it is seen that the Hon'ble apex Court, by referring to an earlier decision in the case of ***Central Bank of India v. S. Satyam,*** 1996 AIR SCW 3138, laid down in the context of Section 25H of the Act that it is the duty of the employer to give an opportunity to the retrenched workmen to offer themselves for re-employment on a preferential basis. The argument that the offer of re-employment under section 25H and the rule of "last come first go" would only apply to the workman, who comes under Section 25F, has been negatived by the Hon'ble apex Court, even by interpreting Rules 77 & 78 of Industrial Disputes (Central) Rules, 1957.

10. Further in paragraph – 15 of the aforesaid judgment in the case of Harjinder Singh (supra), the Hon'ble apex Court, while highlighting the distinction between Sections 25F & 25G of the Act, referred to an earlier decision in the case of ***Bhogpur Co-op.Sugar Mills Ltd. v. Harmesh Kumar***, (2006) AIR SCW 6084, wherein it was held as follows :-

> "We are not oblivious of the distinction in regard to the legality of the order of termination in a case where Section 25-F of the Act applies on the one hand, and a situation where Section 25-G thereof applies on the other. Whereas in a case where Section 25-F of the Act applies the workman is bound to prove that he had been in continuous service for 240 days during twelve months preceding the order of termination in a case where he invokes the provisions of Sections 25-G and 25-H thereof he may not have to establish the said facts. See: Central Bank of India v. S. Satyam (1996 AIR SCW

3138); Samishta Dube v. City Board, Etawah (1999 AIR SCW 694); SBI v. Rakesh Kumar Tewari (2006 AIR SCW 235) and Jaipur Development Authority v. Ram Sahai (2006 AIR SCW 5963)"

11. In paragraph – 17 of the said judgment in the case of Harijinder Singh (supra), it was held as follows:-

> "Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts 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 the preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A 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 the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that "the concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State" – State of Mysore v. Worker of Gold Mines, AIR 1958 SC 923."

12. On perusal of the impugned award and on considering the factual findings of the learned Labour Court, this Court finds that the award passed by the learned Labour Court invoking the principles of "last come first go", as provided under sections 25G and 25H of the Act, is well founded and in accordance with the settled position of law.

13. This Court, therefore, finds that O.J.C. No. 14236 of 1996 filed by the management challenging the award is devoid of merit as the impugned award deserves no interference by this Court.

14. With regard to O.J.C. No. 2262 of 1998, in view of the above conclusion of this Court that the impugned award cannot be interfered with, as this Court finds that the said award has been notified by the State Government under section 17 of the Act, it is held that the said award is enforceable under sections 17-A and 18(3) (a) and (c) of the Act and is binding on the management. It is, therefore, directed that the management shall reinstate the workman forthwith with all consequential benefits, failing

which, action may be taken under section 29 of the Act, against the management.

15. In the result, therefore, O.J.C. No. 14236 of 1996 is dismissed and O.J.C. No. 2262 of 1998 is disposed of with the aforesaid directions. There shall be no order as to costs.

OJC No. 14236/96 dismissed.
OJC No. 2262/98 disposed of.

2013 (II) ILR – CUT- 389

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

W.P.(C) NO. 5280 OF 2013(Dt.22.04.2013)

THE COMMISSIONER, KENDRIYA VIDYALAYA SANGATHAN, NEW DELHI & ORS. ……..Petitioners

.Vrs.

V. SATYA NARAYAN MURTY ……Opp.Party

SERVICE LAW – Transfer of employee – Tribunal quashed the order being punitive – Order challenged – This Court finds that the Opp.Party-employee hesitated to discharge his duty assigned to him – The action on the part of the petitioner may be a motive for passing the order of transfer but not punitive in nature or attaching stigma to the Opp.Party – Held, the order of transfer is valid – Impugned order passed by the Tribunal is set aside. (Para 12)

Case laws Referred to:-

1.2004 sc 330 : (Union of India & Ors.-V- Janardhan Debanath & Anr.)
2.(2001) 8 SCC 574 : (National Hydroelectric Power Corporation Ltd.-V- Shri Bhagwan & Anr.).

For Petitioners - M/s. A. Mohanty & H.K. Tripathy.
For Opp.Party - Mr. Ganeswar Rath.

O R D E R

The petitioner has called in question the order of the Central Administrative Tribunal, Cuttack Bench, Cuttack dated 29.1.2013 in O.A. No. 590 of 2012 by which the Tribunal while allowing the Original Application quashed the order dated 1.8.2012 transferring the opposite party from KVS Regional Office, Bhubaneswar to K.V.Sambalpur and directing issuance of necessary order to that extent forthwith.

2. From the facts of the case, it is revealed that the opposite party while working as an Assistant at KVS Regional Office, Bhubaneswar was served with an order of transfer dated 1.8.2012 to the following effect:

No.F.15046/1/2012-KVS(BBS)/12748 Dated 01.08.2012

TRANSFER ORDER

Under para 7(e) of the transfer guidelines of KVS, Sh. V.S.N. Murty, Assistant is hereby transferred in public interest from KVS Regional Office, Bhubaneswar to Kendriya Vidayalaya, Sambalpur with immediate effect and stands relieved on 01.08.2012 (AN).
Sh. V.S.N. Murty, Assistant is entitled to TA/DA as per rules.

Sd/- R. KALAVATHI
DEPUTY COMMISSIONER

3. On receiving the said order of transfer, the opposite party preferred the aforesaid Original Application challenging the said order mainly on the ground that the said order of transfer is punitive in nature along with other grounds, such as, the other employees, who are continuing in the Regional Office for much longer period than the opposite party, have not been transferred and the opposite party has been transferred by applying the provisions of Clause 7 (e) of the Transfer Guidelines for Teachers (up to PGTs) and others up to Assistant. In the Original Application, the opposite party while seeking quashing of the order of transfer also prayed for quashing the Clause 7(e) of the Transfer Policy Guidelines on the ground that the same is contrary to the settled law that punitive transfer is bad in law.

4. The Tribunal in the impugned order considering the rival submissions made by the parties came to the conclusion that the sole point to be decided in the case is whether the transfer has been resorted to as a

measure of punishment. Referring to Clause 7(e), the Tribunal held that the said Rule unequivocally makes it clear that transfer of an employee could be effected, if his/her stay becomes prejudicial to the interest of the organization, where he was posted. The Tribunal interpreted the said clause by holding that the said clause gives a delicate hint that without reasons to be recorded in writing that the stay of the so called employee is prejudicial to the organizational interest, transfer can never be resorted to. The Tribunal referred to the Note Sheet from which it is found that the order of transfer could be issued on the ground that despite certain office orders, the applicant has not reported for duty in the Administrative Section. It also recorded that there are no such charge memo issued to the applicant in this regard to explain his conduct, let alone, holding the applicant guilty of misconduct. Even there has been no reason recorded in writing as to what prompted the authorities to resort to Clause 7 (e) of the Transfer Guidelines. It also observed that language of the Clause 7(e) has a bar and its consequence inasmuch as a stigma directly and unhesitatingly cast on the conduct of an employee at the whims and fancies of the authorities in the event any such inquiry in that behalf is not conducted and the delinquency established. Basing on the above findings and observations, the Tribunal came to the conclusion that the order of transfer is punitive in nature and is unsustainable.

5. Mr. Ashok Mohanty, learned senior counsel appearing for the petitioners vehemently urged that the Tribunal has failed to take note of the averments made in the counter filed before it by the writ petitioners wherein it has been clearly mentioned that as to what was the reason for taking recourse to Clause 7(e) of the Transfer Guidelines for transferring the opposite party to Sambalpur.

6. In the counter filed before the Tribunal, we find the following to have been stated:-

> "That the assertions made in para-4.8 of the original application are not correct and hereby denied and further it is humbly submitted that an employee joined under Govt. of India service can not claim transfer to a desired location as matter of right and the transfer of an employee during the service period is not a punishment.
>
> Further it is not out of place to submit here that the applicant was working in KVS, R.O., Bhubaneswar w.e.f. 10.7.2007 and consequent upon retirement of one Assistant on superannuation on

30.11.2011 from K.V.S., R.O., Bhubaneswar, an office order dt. 19.3.2012 was issued to the applicant assigning the work of retired employee in Admn. Section in addition to his normal duties in Accounts Section with further direction that the applicant will not be assigned any audit duty in view of the above changes in his work, but the applicant did not work in Admn. Section as assigned by the competent authority i.e. Deputy Commissioner, K.V.S., R.O., Bhubaneswar till 16th April, 2012, as a result a large number of important/time bound 'Daks' marked to the applicant were kept pending and as the applicant did not attend the assigned work, the status of matter was brought to the notice of competent authority on 17.4.2012 but the applicant on the same day recorded his statement that "With reference to the aforesaid Note Sheet, it is submitted that the matter regarding reporting to Admn. Section for additional duty has already been issued with Deputy Commissioner on 17.4.2012 and appraised his position regarding consolidation of Annual Accounts-VVN/EWS/GPF etc." and on perusal of the aforesaid submission made by the applicant, the Deputy Commissioner being the competent authority on 19.4.2012 directed that "Before sending documents to Ranchi/Raipur, the work should be completed by 24.4.2012" and on the basis of said direction the status was put up by Admn. Section with the information that the applicant did not attend the work till date and the papers are pending for action.

Further the competent authority i.e. respondent no. 2 on 1.05.2012 advised the applicant "Please speak" and the applicant noted the said remarks of the competent authority on 01.05.2012 and remained silent without any written submission in connection with not attending the work in Admn. Section and since the applicant did not report in Admn. Section for attending the assigned work in violation of office order dt. 19.3.2012 another office order dated 19.6.2012 was issued to the applicant with the direction that "Shri V.S.N. Murty, Assistant now working in Accounts Section is hereby attached Administrative Section of this with immediate effect", but the applicant hardly sat in Admn. Section for ½ or 1 day for preparing some information haphazardly before the Deputy Commissioner's concerence-2012 held in Ist week of July, 2012 at New Delhi and after that the applicant did not attend the work assigned to him in Admn. Section and even he did not receive the letters of Admn. Section marked to him in violation of office order dt. 19.3.2012 and 19.6.2012 of the competent authority dismantling the discipline of office and healthy atmosphere which amounts to disobedience of

orders issued by the competent authority and such act of the applicant is prejudicial to the interest of the organization and in this case no inquiry is required when the applicant himself did not carryout the order issued on 19.3.2012 and 19.6.2012 by the competent authority which established the disobedience of the orders by the applicant. The copies of the letter dated 19.3.2012 and 19.6.2012 are annexed herewith as Annexure-R/4 and R/5 respectively."

7. For better appreciation, Clause 7(e) of the Transfer Guidelines is quoted hereunder:

"**7. METHOD FOR ADMINISTRARTIVE TRANSFER.**

(a) to (d) XXX XXX XXX

(e) Provided, an employee can be transferred from a location if the employee's stay has become prejudicial to the interest of the organization."

8. This Court, therefore, finds that the only question raised by the petitioners in this writ petition is as to whether in the facts and circumstances of the case, the order of transfer should have been held to be punitive in nature as has been held by the Tribunal. The answer to the above question if would be in the negative, the order of the Tribunal will become unsustainable. However, if the same is in affirmative, the said order has to be confirmed.

9. In order to appreciate the questions raised before this Court, it should be taken note of the fact that the legal position has been crystal clear in a number of judgments that transfer is an incident of service and transfers are made according to the administrative exigency. If there is no fault in the transfer order and the order does not affect the service conditions, such order cannot be interfered with. Judicial review has a limited scope with regard to the transfer order. It is no doubt true that if in the facts of a particular case, it is shown that the order of transfer is punitive in nature or by way of punishment or attaches stigma to the employee, such order can be interfered with by the Court. The Courts are always reluctant to interfere with the order of transfer of an employee unless such transfer is vitiated by violation of the statutory provisions or suffers from mala fide. The Courts or the Tribunals are not the appellate forum to decide the jurisdiction of the order of transfer on administrative grounds. The mode of administration should be allowed to run smoothly and the courts are not expected to

interfere with the working of the administrative system by transferring any officer to any other place. It is for the authority to take appropriate decision and such decision shall stand unless the action of the authority is vitiated either by implicating or by extracting conditions without any factual backdrop or foundation. As there cannot be a straight jacket formula in the facts of a particular case, the order of transfer is to be examined with its back drop to come to the conclusion that the order of transfer is punitive in nature and unsustainable.

10. In the facts of the present case, a bare reading of Clause 7 (e) of the Transfer Guidelines would go to show that the said clause is by way of proviso to the general conditions under which an employee of the KVS can be transferred. It emphasizes that if the authorities find that stay of an employee has become prejudicial to the interest of the organization the order of transfer under the said provision can always be passed. It cannot be held that just because the word 'prejudicial' to the interest of the organization has been used in the said clause, any transfer made under the said provision would be tainted with malice and will be considered as punitive in nature unless the person challenging the order of transfer satisfies the court of law that there are compelling circumstances from which any reasonable man will conclude that the order of transfer is by way of punishment. If the facts and circumstances of this case are considered in its proper perspective, it would be found that the opposite party hesitated to discharge his duty as assigned to him as stated in the counter affidavit filed before the Tribunal supported by documents. The said action on the part of the petitioner may be a motive for passing the order of transfer but cannot be by any stretch of imagination, considered to be punitive in nature or attaching a stigma to the opposite party, more so when the employee's service rights has been protected in his new place of posting. The transfer order is, therefore, one which comes under the category of administrative exigency and not by way of punishment on the opposite party. In the case of ***Union of India and others –v- Janardhan Debanath and another***, 2004 SC 330, the Supreme Court held in the facts of the said case that no Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and the efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as appellate authorities substituting their

own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by the Hon'ble Supreme Court also in the case of ***National Hydroelectric Power Corporation Ltd. –v- Shri Bhagwan and another***, (2001)8 SCC 574. In the facts of the said case, the Hon'ble Supreme Court taking note of the Rule governing transfer held as follows:

> "10. A bare reading of FR 15 makes it clear that except in cases where the transfer is (a) on account of inefficiency or misbehaviour or (b) on a written request, the Government servant cannot be transferred or except in a case covered by Rule 49 appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien. The clear intention of the prescription is that except the two categories indicated above, in all other cases the pay to be paid on transfer shall not be less than of the post on which he holds a lien. Exception is made in case of a transfer where it is on account of inefficiency or misbehaviour. In a case where transfer is on account of inefficiency or misbehaviour, the same can be made to a post carrying less pay than the pay of the post on which he holds a lien. Similar is the position where a transfer is made on a written request. Where the transfer is otherwise than for inefficiency or misbehaviour or on a written request made by the transferred employee, the protection of pay is ensured. <u>The High Court seems to have completely misconstrued the Rule as if there cannot be any transfer in terms of FR 15 on account of inefficiency or misbehaviour. The view is clearly contrary to the pronounced intention of FR 15."</u>

11. The said rules involved in the facts of the said case can be said to be in pari materia with Clause 7 (e) of the Transfer Guidelines in the present case. With regard to the question of attaching a stigma, the Hon'ble Supreme Court in the said case held that the manner, nature and extent of exercise to be undertaken by Courts/Tribunals in a case to adjudge whether it casts a stigma or constitutes one by way of punishment would also very much depend upon the consequences flowing from the order and as to whether it adversely affected any service conditions-status, service prospects financially and same yardstick, norms or standards cannot be applied to all category of cases. Transfers unless they involve any such adverse impact or visits the persons concerned with any penal consequences, are not required to be subjected to same type of scrutiny, approach and assessment as in the case of dismissal, discharge, reversion or termination and utmost latitude should be left with the department concerned to enforce discipline, decency and decorum in public service

which are indisputably essential to maintain quality of public service and meet untoward administrative exigencies to ensure smooth functioning of the administration.

12. Applying the above position of law to the facts of the present case, this Court finds that the order of transfer impugned by the opposite party before the Central Administrative Tribunal did not warrant any interference as it cannot be said that the said order is either punitive in nature or attaches a stigma to the opposite party. In the result, therefore, the impugned order passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 590 of 2012 is set aside and the transfer order of opposite party is held to be valid in law.

13. This writ petition is, accordingly, allowed, but in the circumstances without cost.

Writ petition allowed.

2013 (II) ILR – CUT- 396

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

W.P.(C) NO. 24252 OF 2012 (Dt.19.07.2013)

STATE BANK OF INDIA OFFICER'S ASSOCIATION & ANR. ……..Petitioners

.Vrs.

STATE BANK OF INDIA REPRESENTED THROUGH IT'S C.G.M & ANR. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 311, 226

Disciplinary Proceedings – Charge-sheet / articles of Charge issued to the Petitioner No.2-delinquent – Action challenged in Writ petition – Maintainability – Normally a Charge-sheet which does not give rise to any cause of action can not be challenged in a Writ petition unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings.

In this case the petitioners have not challenged the Charge-sheet on the ground that the authority issuing the same is not competent to initiate the disciplinary proceedings – Held, the writ application is sans any merit and hence deserves to be dismissed.

(Paras 15,16,17,20)

Case laws Referred to:-

1. (2001) 2 SCC 330 : (State of Punjab -V- V.K. Khanna & Ors.)
2. (2002) 3 SCC 496 : (Haryana Financial Corpn. & Anr–V–Jagdamba Oil Mills and Anr.)
3. (2012) A.I.R SCC 2250: Secy., Min. of Defence & Ors.-V-Prabhash Chandra Mirdha
4. (2007) A.I.R SCC 906 : Union of India and Anr.-V- Kunisetty Satyanarayana
5. (2009) A.I.R SCC 191 : Kerala State Electricity Board-V-Saratchandran, P & Anr.

For Petitioner - M/s. Ashok Mohanty(Sr. Advocate)
V.Narasingh, S.K. Senapati & S. Das

For Opp. Parties -M/s. R.K.Rath (Sr. Advocate)
& P.V.Balakrishna

Dr .A.K. RATH, J. Invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioners have prayed, inter alia, to quash the letter dated 27.9.2012 initiating departmental proceeding with articles of charge and statement of imputation of misconduct vide Annexure-4 series.

2. Shorn of unnecessary details, case of the petitioners is that petitioner no.1, State Bank of India Officers' Association, is a Trade Union registered under the Trade Unions Act, 1926 and affiliated to All India State Bank Officers' Federation, the Apex Body and petitioner no.2 is the elected General Secretary of the said Association. Petitioner no.1- Association through its apex body at different levels raised its objection for introduction of seven days week and has been consistently demanding a five day timing schedule keeping in tune with the policy as adopted by the Reserve Bank of India and NABARD. While the negotiations were taking place, the Chairman of the State Bank of India unilaterally announced in the press that the bank is going to adopt seven days week. This led to protest across all the State Bank all over the country and which was also led by the local Associations with the guidance of the Federation. The further case of the petitioners is that protesting against arbitrary action of the opposite parties in making a

declaration in the press without taking the employees representatives into confidence, there was a lunch time demonstration on 28.8.2012 in front of the Local Head Office at Bhubaneswar. Keeping in view the interest of the customers, the protesters resumed the work soon after the lunch hour. While the matter stood thus, on 30.8.2012, the DGM & Circle Development Officer issued a letter to the General Secretary of the Association calling upon to desist from such behaviour and not to repeat it in future vide Annexure-1. On 22.9.2012, the bank issued another letter to the General Secretary stating therein that action in holding demonstrations within the bank's premises and shouting slogans, apart from disturbing the peace, within the bank's premises and causing hindrance in bank's working also lowered the image of the bank in the eyes of the public, and such action tantamounts to violation of the provisions of Sec. 36-AD of the Banking Regulations Act, 1949 (hereinafter referred to as 'B.R.Act' for the sake of brevity) and that the bank may be constrained to take appropriate action as required. The petitioners further assert that pursuant to Annexure-2, petitioner no. 1 gave reply on 27.9.2012 stating therein that demonstration, which was held during lunch hour on 28.8.2012, does not come within the ambit of Sec. 36 AD of B.R.Act. In the said letter, it was clearly stated that at the relevant point of time i.e. on 28.8.2012 petitioner no.2 was not the General Secretary of the Association.

3. The further case of the petitioners is that on 27.9.2012, a letter was issued by the Disciplinary Authority and Circle Development Officer, State Bank of India, Local Head Office, Bhubaneswar initiating proceeding against petitioner no.2 and enclosing therein the copy of articles of charge, statement of imputation of misconduct and list of witnesses in support of articles of charge vide Annexure-4 series.

4. The articles of charge against petitioner no.2 are quoted hereunder:-

> "Shri Sambit Misra, Officer, MMGS-II while working in the Bank failed to discharge his duties with utmost devotion and diligence, failed to take all possible steps to protect the interest of the Bank and acted in a manner unbecoming of a Bank official. He has instigated other officers to commit misconduct by not maintaining good conduct and discipline. He has violated Rules 50(4), 50(5) and 50(6) read with Rule 66 of State Bank of India Officers' Service Rules as detailed in the enclosed statement of imputation of misconduct".

5. Statement of imputation against petitioner no.2 is that when petitioner no.2 was working as Deputy Manager in the Reconciliation Department has allegedly committed the following irregularities:-

i) On 28.08.2012 he instigated officers of the Bank to hold demonstrations within the Bank's premises/compound at LHO, Bhubaneswar and also shouted slogans. He himself participated in these demonstrations and also shouted slogans. This behaviour on his part has disturbed the peace within the Bank's premises and there was hindrance in Bank's working and disturbance in the regular business activity of the Bank.

ii) Instead of protecting the Bank's interest and guiding the other officers of the Bank, he wrongfully instigated the other officers of the Bank to misbehave by shouting slogans and demonstrating with intention to disturb peace disrupt the Bank's operations and discouraged bank's officers from performing their lawful duties within ulterior motive to lower the image of the bank in the eyes of the customer and public at large.

iii) He has organised and designed the demonstration with deliberate intention to tarnish the image of the Bank which he is required to protect and enhance as an officer of the Bank.

6. Pursuant to the same, petitioner no.2 filed his statement of defence denying the assertion made in the articles of charge and statement of imputation of misconduct vide Annexure-4 series. In response to allegation no.1, petitioner no.2 submitted that the demonstration was held during lunch hour on 28.8.2012 as per the direction of the All India State Bank Officers' Federation. The members were requested to assemble for the demonstration. He was not the General Secretary of the Association at the relevant point of time and that he had no role in organizing or designing it. It is further stated that all the registered Trade Unions in the country have right to demonstrate peacefully and this right flows from Article 19 (1) of the Constitution of India. It is further stated that he was in no way involved in any behaviour, which had disturbed the peace or hindered the banks' working or the regular business activity since the demonstration was held during lunch hour. So far as allegation no.2 is concerned, it is stated that petitioner no.2 have not called upon the members of the Association to hold lunch hour demonstration on 28.8.2012. He denied that making a demonstration does construe misconduct. So far as allegation no.3 is concerned, it is stated that

during demonstration, the members were apprised on the issue and no provocative speech was made against any official of the bank.

7. Pursuant to issuance of notice, opposite parties entered appearance and filed a comprehensive counter affidavit. Case of the opposite parties is that the writ application in its present form is not maintainable since mere charge-sheet does not give any cause of action since it does not infringe the right of any one. It is further asserted that the writ application is premature. Further case of the opposite parties is that the banking scenario has been undergoing a sea change with imminent and imperative need to adapt the change of upgrading the delivery of products and services to ensure customers' satisfaction. The advancements in technology were to be harnessed and in doing so the manner in which the officers perform their duties and responsibilities had to undergo a change. In order to implement the technology plan by introducing full computerization, the co-operation of the entire work force of the bank was necessary. To undergo a smooth transition, the bank has entered into various settlements/understandings with both the officers Association representing the officers and the staff union representing the employees. It is further stated that a Memorandum of Understanding was executed between the Bank and All India State Bank of India Officers' Federation on Technology and other issues on 23.7.2003. Clause 1 (1) of the Memorandum of Undertaking provides that branches/offices/service units may be placed, at the discretion of the bank, on round-the-clock working and seven days a week basis continuously depending upon its requirements. Furthermore, the Reserve Bank of India issued a Master Circular on Customer Service in banks through letter dated 2.7.2012. Parapgrah-7 of the said Circular provides that bank should normally function for public transactions at least for four hours on week days and two hours on Saturdays in the larger interest of public and trading community. Extension of counters, Satellite Officers, one man offices or other special class of branches may remain open for such shorter as may be considered necessary. Clause 7.3 of the said Circular deals with commencement/extension of working hours. It provides that commencement of employees' working hours 15 minutes before commencement of business hours could be made operative by banks at branches in metropolitan and urban centres. The banks should implement the recommendation taking into account the provisions of the Local Shops and Establishments Act. The Branch Managers and other supervising officials should, however, ensure that the members of the staff are available at their respective counters/cubicles right from the commencement of banking hours and throughout the prescribed business hours so that there may not be any ground for customers to make complaints. The banks should ensure that no

customer remains unattended during the business hours and uninterrupted service is rendered to the customers. Further the banks should allocate the work in such a way that no teller counter is closed during the banking hours at their branches.

8. It is the specific case of the opposite parties that the bank extended the business hours up to 6 hours on week days and 3 hours of Saturdays in pursuance of the Bi-partite Settlements/Understanding entered into with the Staff Federation and the Officers' Federation and that it is not correct to say that the demonstration was held during lunch time. It is further submitted that the Charter of Demands submitted by the All India Bank Officers' Confederation to the Chairman of Indian Banks' Association demanded certain improvements in the service conditions i.e., both monetary and non-monetary issues. One of the non-monetary issues pertains to 5 day working in a week.

9. While the matter stood thus, a Central Negotiating Council Meeting was held on 9th July, 2011 at Mumbai with the All India State Bank of India Officers' Federation. In the said Negotiation Council Meeting, the Deputy Managing Director and Corporate Development Officer in her opening remarks stated that the officers could strive for extending facility of 7 days banking to the customers though it may not be at all branches. In the said Negotiation Meeting, the President of Officers Federation expressed that seven day banking is debatable and that the bank should provide necessary infrastructure to the branches including Relief Staff to enable the Officers of such branches to get their weekly off etc. Further, in the Central Negotiating Council Meeting with the All India State Bank Officers' Federation held on 20.10.2011 at Patna, negotiation took place on certain issues and one of the issue pertained to 5 days week. The Deputy General Manager (IR) made it clear that the demand for 5 days week/two days off in a week is an industry level issue and the Federation is requested to take it up with the Indian Banks' Association.

10. While the negotiation was going on, the Chairman of the bank gave a statement to the Press that the bank is contemplating seven days banking in the branches of State Bank of India. The said statement was made in public interest with a view to enhance the business of State Bank of India and to keep the money flow throughout the week, which will help in building up customers' confidence and the National growth. Immediately, thereafter the Officers Federation addressed a letter to the Deputy Managing Director and C.D.O., Mumbai, protesting the news items appearing in certain newspapers referring to the statement made by the Chairman to credit analysts as

regards the desire of the bank to work 7 days in a week. The Association requested the Deputy Managing Director and C.D.O. vide letter dated 27.8.2012 to place the subject for Bi-partite discussions before initiating any move in this regard, but, without waiting for the response from the Management, the very next day i.e., on 28.8.2012., the General Secretary of the Association i.e., petitioner no.2 gave a protest call against the proposal of 7 days banking. According to the call given by the General Secretary, the demonstration was to be held during lunch hour i.e, at 2.35 p.m. in front of Local Head Office, Bangalore. The call was given to hold demonstration at other centres also. The specific case of opposite parties is that demonstrations were held within the bank premises/compound at the instigation of the petitioner no.2. The letter dated 30.8.2012 was addressed to petitioner no.2 referring to the demonstrations held on 28.8.2012 in the banks' premises/compound stating therein that the same was disturbing the peace within the bank premises. It is also stated in the said letter that action on the part of petitioner no.2 amounts to indiscipline and also resulted in lowering the bank's image in the eyes of public at large. Therefore, he was asked to desist from such behaviour in future. In continuation of the letter dated 30.8.2012, petitioner no.2 was informed that action of disturbing the peace in the premises of the bank on 28.08.2012 also violated the provisions of Sec. 36 AD of the B.R.Act and, accordingly, the bank may be constrained to take appropriate action. Articles of charge and statement of imputations of misconduct were issued to petitioner no.2 stating therein that action disturbing the peace within the bank's premises and that there was hindrance in bank's working and disturbance in the regular activity of the bank, amounted to lowering the image of the bank. Further, petitioner no.2 instigated the officers of the bank to hold demonstrations within the bank premises/compound by shouting slogans and the said behaviour was a breach of the Service Rules. It is further stated that petitioner no.2 instigated the other officers to commit misconduct by not maintaining good conduct and discipline. Therefore, he has violated Rules 50(4) and 50(6) read with Rule 66 of State Bank of India Officers' Service Rules (hereinafter referred to as 'Service Rules' for the sake brevity).

11. In course of hearing, Mr. Ashok Mohanty, learned Senior Counsel appearing for the petitioners submitted that being aggrieved by a press note issued by the Deputy Managing Director of the bank expressing the intention of the management to adopt 7 days week, when the matter is at the stage of negotiation between the management and Federation, a call for lunch time demonstration on 28.8.2012 at all local Head Offices was given by the apex body i.e. All India State Bank Officers Federation. Petitioner no.1-Association, which is affiliated to the Federation, in response to such call by

the Federation, held demonstration in front of the local Head Office at Bhubaneswar on 28.8.2012. It was further submitted that being rattled by such show of solidarity, the D.G.M.-cum-Circle Development Officer-cum-Disciplinary Authority, opposite party no.2, issued letter dated 30.8.2012, vide Annexure-1, to the General Secretary, State Bank of India Officers' Association calling upon to desist from such behaviour and warned not to repeat it in future. On 22.9.2012, vide Annexure-2, another letter was issued to the said General Secretary, State Bank of India Officers' Association referring to 36 AD of the B.R.Act. On 27.9.2012, petitioner no.2, who had by then taken over charge as the General Secretary on being elected, submitted his reply stating therein that as he was not the General Secretary on the relevant date, it was not possible on his part to state as to why a reply was not submitted to Annexure-2. He further submitted that Sec. 36-AD of the B.R.Act is not at all attracted in the case at hand. He further submitted that on 27.9.2012 invoking the power under Rule 68 (1) of the Service Rules, a decision was communicated to him to institute disciplinary proceeding against petitioner no.2 and articles of charge, inter alia, was alleged for violation of Rule 50(4), Rule-50(5) and Rule-50(6) read with Rule-66 of the Service Rules, whereafter the petitioner no.2 had submitted his defence controverting the allegations made by the bank. But then without considering the matter in its proper perspective, by order dated 30.11.2012, an Enquiry Officer was appointed. He further submitted that imputation of charges are ex facie vague and do not constitute any misconduct. Except petitioner no.2, at all India level no other officer, who was not holding the post of General Secretary on 28.8.2012, had been proceeded against for the demonstration on the said date and there is no violation of constitutional right to express dissent. He further submitted that in the counter affidavit, the word 'Federation' and 'Association' had been used to mislead the Court and that Federation is a apex body and the State Level Trade Union like petitioner no.1 is known as Association. He assailed the very initiation of the disciplinary proceeding on the ground, inter alia, that a combined reading of the Article of Charges as well as the statement of imputation, it is crystal clear that the same by no stretch of imagination come within the purview of Rule-50 (4), 50 (5) and 50 (6) of the Service Rules. He further submitted that the bank has taken a stand that proceeding has been initiated against petitioner no.2 in his individual capacity as an officer, but in the articles of charge as well in the statement of imputation of misconduct, it is repeatedly stated that he instigated the officers to shout slogans etc. He further submitted that the allegations are bald and the petitioner no.2 organised and designed the demonstration is absurd and he had never given the call for demonstration. Hence, the imputation of misconduct is vague. He further argued that one Ganesh Chandra Mishra, who was working as the General

Secretary of the petitioners' Association on the date of demonstration, has not been proceeded against and that the charge-sheet, which was issued to one Mr.Samar Mukharjee, who was the General Secretary of North East Circle and Vice-President of the Federation, was withdrawn. Mr. Mohanty submitted that the Chairman of the bank had made a statement after issuance of charge-sheet that the bank had decided to charge-sheet 28 office bearers, Secretary and President in each of the 14 Circles for penalty and as such the disciplinary proceeding becomes an empty formality.

12. To buttress his submission, Mr. Mohanty relied on a decision of the Hon'ble Supreme Court in the case of ***State of Punjab Vrs. V.K. Khanna and others*** **,** (2001) 2 Supreme Court Cases 330. Mr. Mohnaty further submitted that judgment of the Hon'ble apex Court should not be read as Euclid's theorems nor as provisions of the statute as held by the Hon'ble Supreme Court in the case of ***Haryana Financial Corporation and another Vrs. Jagdamba Oil Mills and another,*** (2002) 3 Supreme Court Cases 496.

13. Per contra, Mr. R.K.Rath, learned Senior Counsel appearing for the opposite parties submitted that framing of charge does not give rise to any cause of action and an employee has no right to stall the disciplinary proceedings. In support of his submission, he cited a decision of the Hon'ble Apex Court in the case of ***Secretary, Min. of Defence & others Vrs. Prabhash Chandra Mirdha,*** A.I.R.2012 SC 2250 and also cited the decision in the case of ***Union of India and another Vrs. Kunisetty Satyanarayana,*** AIR 2007 SC 906. Mr.Rath further submitted that pertaining to the very incident on 28.8.2012 action has been initiated in other States. In some of the States like Bihar, Tamil Nadu and Madhya Pradesh, employees filed writ applications before the respective High Courts questioning initiation of the proceedings. The High Court of Madras in *D. Thomas Franco Rajendra Dev (W.P.No.33731 of 2012) and in D.Suresh Kumar (W.P.No.33732 of 2012) Vrs. State Bank of India* did not interfere with the matter and dismissed the same. The High Court of Patna in the case of *Lalit Kumar Prasad Singh (Civil Writ Jurisdiction Case NO.499 of 2013) and in Anirudha Akhauri (Civil Writ Jurisdiction Case No.570 of 2013)* also took a similar view and dismissed the writ application. Furthermore, an identical matter came up before Madhya Pradesh High Court, which was also dismissed. The next plank of submission of Mr. Rath, learned Senior Counsel for the opposite parties is that the petitioners observed good conduct, discipline and integrity as required of them in terms of the Rules 50(4), 50(5) and 50(6) of the Service Rules are dependent on facts to be proved through evidence. The articles of charges, the defence taken by the petitioners etc. are required to be decided and crystallised by the enquiry officer in the enquiry. The next

plank of submission of Mr. Rath is that the head of the organization in any department of the Government or even in any other company or corporation is duty bound to protect the organizations and in course of the same, if certain comments have been made, such comments cannot be construed to mean that no enquiry can be conducted against an employee, who has been alleged with delinquencies.

14. On the rival submissions of the Bar, two points hinges for our consideration.

1. Whether framing of charge gives rise to cause of action so as to enable the petitioners to challenge the same in an application under Article 226 of the Constitution of India ?

2. Whether initiation of disciplinary proceeding and issuance of articles of charge are bad in law ?

15. First, we deal with the decision cited by Mr. Mohanty, learned Senior Counsel for the petitioners in the case of *State of Punjab supra* wherein the Hon'ble apex Court speaking for the Bench through Justice M. Jagannadha Rao, in paragraph-33 thereof held as follows:-

> *Para-33* "While it is true that justifiability of the charges at the state of initiating a disciplinary proceeding cannot be possibly by delved into by any court pending inquiry but it is equally well settled that in the event there is an element of malice or mala fide, motive involved in the matter of issue of a charge-sheet or the authority concerned is so biased that the inquiry would be a mere farcical show and the conclusions are well known then and in that event law courts are otherwise justified in interfering at the earliest stage so as to avoid the harassment and humiliation of a public official. It is not a question of shielding any misdeed that the Court would be anxious to do, it is the due process of law which should permeate in the society and in the event of there being any affectation of such process of law that law courts ought to rise up to the occasion and the High Court, in the contextual facts, has delved into the issue on that score. On the basis of the findings no exception can be taken and that has been the precise reason as to why this Court dealt with the issue in so great a detail so as to examine the judicial propriety at this stage of the proceedings".

In the case of ***Union of India and another Vrs. Kunisetty Satyanarayana***, A.I.R. 2007 SC 906 the Bench speaking through Justice Markandey Katju in paragraphs 14 and 15 held as follows:-

Para-14. "The reason by ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition maybe held to be premature. A mere charge-sheet or show-cause notice does not given rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance".

Para-15. "Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause or charge sheet".

16. After having a survey of the earlier decision of the Hon'ble apex Court in the case of ***Secretary, Min. of Defence and Others Vrs. Prabash Chandra Mirdha,*** AIR 2012 Supreme Court 2250, the Bench speaking through Hon'ble Dr. Justice B.S.Chauhan held as follows:-

Para-9. "Law does not permit quashing of charge-sheet in a routine manner. In case the delinquent employee has any grievance in respect of the charge-sheet he must raise the issued by filing a representation and wait for the decision of the disciplinary authority thereon. In case the charge-sheet is challenged before a court/tribunal on the ground of delay in initiation of disciplinary proceedings or delay in concluding the proceedings, the court/tribunal may quash the charge-sheet after considering the gravity of the charge and all relevant factors involved in the case weighing all the facts both for and against the delinquent employee and must reach the conclusion which is just and proper in the circumstances (Vide: The State of Madhya Pradesh v. Bani Singh & Anr., AIR 1990 SC 1308; State of Punjab & Ors. V. Chaman Lal Goyal,(1995) 2 SCC 570; Deputy Registrar, Co-operative Societies, Faizabad v. Sachindra Nath Pandey & Ors., (1995) 3 SCC 134; (1995 AIR SCW 3028); Union of India & Anr. V. Ashok Kacker, 1995 Supp(1) SCC 180; Secretary to Government, Prohibition & Excise

Department v. L. Srinivasan, (1996) 3 SCC 157; State of Andhra Pradesh v. N. Radhakishan, AIR 1998 SC 1833; Food Corporation of India & Anr. v. V.P.Bhatia, (1998) 9 SCC 131; Additional Supdt. Of Police v. T.Natarajan, 1999 SCC (L & S) 646; M.V.Bijlani v. Union of India & Ors., AIR 2006 SC 3475; P.D.Agrawal v. State Bank of India & Ors., AIR 2006 SC 2064; and Government of A.P. & Ors. v. V. Appala Swamy, (2007) 14 SCC 49) : (AIR 2007 SC (Supp) 587).

Para-10. "In Secretary, Forest Department & Ors. v. Abdur Rasul Chowdhury, (2009) 7 SCC 305 : (AIR 2009 SC 2925), this Court dealt with the issue and observed that delay in concluding the domestic enquiry is not always fatal. It depends upon the facts and circumstances of each case. The unexplained protracted delay on the part of the employer may be one of the circumstances in not permitting the employer to continue with the disciplinary proceedings. At the same time, if the delay is explained satisfactorily then the proceedings should not be permitted to continue".

Para-11. "Ordinarily, a writ application does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fat, charge-sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge-sheet or show-cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. (Vide : State of U.P. v. Brahm Datt Sharma, AIR 1987 SC 943; Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & ors. (1996) 1 SCC 327 : (AIR 1996 SC 691) ; Ulagappa & Ors. v. Div. Commr., Mysore & Ors., AIR 2000 SC 3603 (2); Special Director & Anr. v. Modh. Ghulam Ghouse & Anr., AIR 2004 SC 1467; and Union of India & Anr. v. Kunisetty Satyanarayana, AIR 2007 SC 906)".

Para-12. "In State of Orissa & Anr. v. Sangram Keshari Mishra & Anr., (2010) 13 SCC 311: (2010 AIR SCW 6948), this Court held that normally a charge-sheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority.

(See also: Union of India & Ors. v. Upendra Singh, (1994) 3 SCC 357) : (1994 AIR SCW 2777)".

> ***Para-13.*** "Thus, the law on the issue can be summarized to the effect that charge-sheet cannot generally be a subject-matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge-sheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings". (emphasis is ours)

17. On the anvil of the decisions cited supra, we have examined the present case. The petitioners have not challenged the charge-sheet on the ground that the authority issuing the same is not competent to initiate the disciplinary proceedings. Much argument was advanced by Shri Ashok Mohanty, learned Senior Counsel for the petitioners that on a combined reading of the article of charges as well as the statement of imputation, it is crystal clear that the present case does not come within the purview of Rule-50 (4), 50 (5) and 50 (6) of the Service Rules and that the charges levelled against petitioner no.2 are not based on fact since petitioner no.2 became the General Secretary of Association on 1.9.2012 i.e. much after 28.8.2012. It is too premature to consider the applicability of Rule-50(4), 50(5) and 50(6) of the Service Rules. Furthermore, after considering the reply to the show cause notice or after holding an enquiry, the authority concerned may drop the proceedings and/or hold that the charges are not established. Ordinarily a writ petition should not be entertained against a mere show cause notice or charge-sheet since at that stage, the writ petition may be held to be premature. A mere charge-sheet does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so.

18. Case of the petitioners does not come within the exceptions as pointed out by the Hon'ble apex Court in the cases of *State of Punjab and Secretary, Min. of Defence and others* supra. A feeble attempt was made by Mr. Mohanty that except petitioner no.2, no other officer at All India Level,

who was not holding the post of General Secretary on 28.8.2012, has been proceeded against the demonstration. We are not at all impressed by the said submission. In ***Kerla State Electricity Board vrs. Saratchandran, P and another***, A.I.R. 2009 S.C.191, the Hon'ble apex Court in para-23 of the report held that Article 14 of the Constitution is a positive concept. Provisions of Article 14 cannot be invoked only because some illegality has been committed by the employer as a result whereof some employee has obtained benefit. No equity can be claimed on the basis of an illegality. Merely because a charge-sheet issued to the delinquent employee has been withdrawn the same per se is not a ground to quash the same in respect of another employee.

19. Much emphasis was laid by Mr. Mohanty on the press note issued by the Chairman that the bank decided to charge-sheet 28 office bearers, Secretary and President in each of the 14 Circles for penalty and the disciplinary proceeding is an empty formality, we are of the view that the same is a sweeping and generalized statement made only with the intention to protect the image of the bank in the public eye made by the head of the bank and we observe that the enquiry to be conducted against the petitioner will in no way be influenced by such statement. However, such statement according to us, can never be construed to be a ground to quash the charges framed against the petitioner.

20. In view of the authoritative pronouncements of the Hon'ble apex Court in the decisions cited supra, and on an anatomy of the pleadings and submissions made by the learned counsel for the respective parties, we are in consensus ad-idem that the writ application is sans any merit and deserves dismissal. In the result, the writ application stands dismissed. No cost.

Writ petition dismissed.

2013 (II) ILR - CUT- 409

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

W.P.(CRL) NO. 1339 OF 2012 (Dt.23.07.2013)

KUTULI @ ISWAR NAIK …….. Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.parties

NATIONAL SECURITY ACT, 1980 – S.3(2)

Detention of the petitioner u/s 3(2) of the Act, 1980 – Order passed while the detenue was in custody in other criminal cases – Detaining authority was apprehensive that in case the petitioner released on bail he would again carry on criminal activities – No justifiable grounds to detain a person under the National Security Act – There is also delay in disposal of the representation of the petitioner by the State Government and the Central Government – Held, grounds cited do not make out a case of disturbance of Public Order – Impugned order of detention and the order of its confirmation as well as the order of the Authorisation Committee rejecting the petitioner's representation are quashed – Direction issued to set the petitioner at liberty forthwith provided his detention is not required in any other case. (Para 8)

Case laws Referred to:-

1. 2012 (1) OLR SC 550 : (Yumman Ongbi Lembi Liema -V- State of Manipur)
2. 2012 (II) OLR 1070 : (Pradeep Sahu-V- Union of India & Ors.)

For petitioner - M/s. Jugala Kishore Panda & D.R. Nanda
For O.P.1& 2 - Addl.Govt. Advocate
For O.P.3 - Mr. S.D.Das (Asst. Solicitor General of India)

I.MAHANTY, J. The present writ application seeking writ of habeas corpus has been filed by the petitioner-Kutuli @ Iswar Naik challenging the legality of his detention under Section 3(2) of the National Security Act, 1980.

2. Learned counsel for the petitioner asserts that the District Magistrate, Ganjam (opposite party no.2) in exercise of the power under Section 3(2) of the aforesaid Act has passed the order of detention dated 26.08.2012 and such order was served on the detenue while he was in judicial custody in some other criminal case.

He submits that on a plain reading of the impugned order of detention, the authorities purportedly in order to prevent the detenue from acting in any manner prejudicial to the maintenance of public order, passed the impugned detention order under section 3(2) of the Act. He further

submits that although the order of detention indicates that the same has been passed in order to, prevent the detenue from acting in any manner prejudicial to the maintenance of public order yet, in the said order there is absolutely no disclosure as to how any act or any omission on the part of the detenu has in any manner affected the tempo of public life in any area. Further it is asserted that none of the instances cited in the detention order, can be said to be prejudicial to the maintenance of public order. It is further asserted that the fact that the petitioner has been detained in some other criminal cases, cannot and does not provide any legally justifiable grounds to detain, a person under the National Security Act. It is asserted that none of the criminal cases can be treated as being against the public at large and, therefore, prejudicial to the public order.

Learned counsel for the petitioner further asserts that the State Government failed to apply its mind to the representation of the petitioner and the materials available on record and mechanically approved the detention order vide its order dated 3.9.2012. It is further averred that the petitioner-detenue submitted a representation before the Board on 22.10.2012 and although opportunity of hearing was granted to the petitioner in support of his representation, it is alleged that the Advisory Board has confirmed the order of detention of the petitioner and directed the detention of the petitioner for twelve months vide order dated 8.10.2012.

3. Challenging the order of detention and confirmation by the State as well as rejection of the detenue's representation by the Advisory Board, the present writ application came to be filed.

4. Learned counsel for the petitioner asserts that the grounds of detention merely indicate that the detaining authority was apprehensive that in case the petitioner is released on bail, he would again carry on criminal activities and based on such apprehension, passed the detention order. It is asserted that such detention of the petitioner is in violation of the judgment of the Hon'ble Supreme Court in the case of ***Yumman Ongbi Lembi Liema v. State of Manipur,*** *2012 (1) OLR SC 550*. Reliance was also placed on the judgment of this Court in the case of ***Pradeep Sahu v. Union of India and others,*** *2012 (II) OLR - 1070*.

It is further submitted on behalf of the petitioner that the detention ought to be declared to be illegal also on the ground that there is delay in disposal of the representation by the State Government and Central Government for which, the detention order was liable to be quashed.

5. Learned counsel for the petitioner submits that from the grounds of detention, it appears that the detaining authority has taken into consideration twelve cases mentioned in the order of detention which are noted below:

(i) Aska P.S. Case No.56/2000 dated 11.04.2000 under Sections 395 I.P.C./ 9(1-B) I.E./25-A Arms Act– Judgment dated 22.3.2003 passed by the learned Assistant Sessions Judge, Aska (Annexure-6) acquitting the accused persons.

(ii) Aska P.S. Case No.128/2000 – pending for trial.

(iii) Aska P.S. Case No.153/2000 – acquitted by judgment dated 29.9.2003 passed by the learned Asst. Sessions Judge, Aska in Sessions Case No.34/2001 (Annexure-7)

(iv) Aska P.S. Case No.174/2008, corresponding to S.T. Case No.28/2011- acquitted vide judgment dated 06.08.2012 passed by the learned Ad hoc Addl. Sessions Judge (FTC), Aska (Annexure-8).

(v) Aska P.S. Case No.176/2008 dated 10.7.2008 under Sections 302/ 120-B/34 I.P.C. & 25/27 Arms Act – pending for trial.

(vi) Aska P.S. Case No.7/2009 – pending for trial

(vii) Aska P.S. Case No.162/2010, corresponding to S.T. Case No.14/2011 – acquitted vide judgment dated 23.11.2012 passed by the learned Adhoc Addl. Sessions Judge (FTC), Aska (Annexure-9).

(viii) Aska P.S. Case No.129/2012 – pending for under investigation

(ix) Bhanjanagar P.S. Station Diary Entry Nos.382 and 384 dated 15.7.2012.

(x) Kabisuryanagar P.S. Station Diary Entry Nos.477 and 481 dated 21.7.2012

(xi) Kabisuryanagar P.S. Station Diary Entry Nos.523 and 526 dated 23.7.2012

(xii) Aska P.S. Station Diary Entry Nos.286 and 291 of 2012 dated 17.7.2012.

6. Learned Addl. Government Advocate for the State was directed to verify the aforesaid averments made by the petitioner in Paragraph-14 of the

writ application and on instructions, learned counsel for the State affirmed the aforesaid facts.

7. On consideration of the various cases noted hereinabove, it appears that out of 12 cases mentioned hereinabove, while cases at Serial Nos.(i), (iii), (iv) & (vii) the petitioner has been acquitted. Insofar as the case at Serial No.(viii) is concerned, investigation is pending before the police and Serial Nos.(ii), (v) & (vi), trials are pending and insofar as cases at Serial Nos.(ix), (x), (xi) & (xii) are concerned, are referred to Station Diary Entries at various Police Stations, where investigations are yet to be concluded and no F.I.R. has yet been registered.

8. In view of the aforesaid facts situation as appears from the materials relied upon by the petitioner and on perusal of the grounds of detention, we are of the considered view that the instances cited do not make out a case of disturbance of public order and in view of the dicta of the Hon'ble Supreme Court in the case of ***Yumman Ongbi Lembi Liema*** *(supra)* as well as of this Court in the case of ***Pradeep Sahu*** *(supra),* the order of detention dated 25.8.2012 under Annexure-1, confirmation of the same vide order dated 08.10.2012 under Annexure-5 and rejection of the representation by the Authorized Committee dated 11.03.2013 are hereby quashed. The petitioner be set at liberty forthwith provided his detention is not required in any other case.

Writ petition allowed.

2013 (II) ILR - CUT- 413

SANJU PANDA, J.

W.P.(C) NO.14764 OF 2007 (Dt.26.03.2013)

KAILASH CHANDRA SWAIN ……Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

INDUSTRIAL DISPUTES ACT, 1947 – S. 25-F

Illegal termination of service – Although normal rule is reinstatement with back wages but instead the Labour Court can award compensation.

In this case the workman was terminated from service without complying with the provisions of Section 25-F of the I.D. Act – Held, termination of petitioner's service being illegal the impugned award is set aside – Direction issued to O.P.1 to pay a sum of Rs.1,50,000/- as compensation to the workman within six weeks. (Paras 8,9)

Case law Referred to:-

2013 LLR 225 : (Asst. Engineer, Rajasthan Dev. Corp. & Anr.-V- Gitam Singh)

For Petitioner - M/s. Sashi Bhusan Jena, S. Behera, S.S. Mohapatra, A. Mishra, S. Soren & S. Das.
For Opp.Parties - Addl. Govt. Advocate.

S. PANDA, J. The petitioner has filed this writ petition challenging the award dated 2nd June, 2007 passed by the Presiding Officer, Labour Court, Bhubaneswar in Industrial Dispute Case No.30 of 2003 holding that the action of the management terminating his service is illegal and unjustified and he is entitled to the relief sought for.

2. The facts as narrated by the present writ petitioner-workman in the present writ petition are as follows:

The petitioner was working as a casual helper under the management of opposite party no.1 since 18th August, 1983. His service was terminated on 3rd August, 1994 without following the provision of Section 25-N read with Section 25-G of the Industrial Disputes Act (in short, "the I.D. Act"). Being aggrieved by the said action, the petitioner put-forth his grievance before the Asst. Labour Commissioner-cum-Conciliation Officer who initiated the conciliation proceeding between the workman and the management. During conciliation proceeding, the management agreed to reinstate him with continuity in service from 3rd August, 1994 fixing his seniority at Serial No.76 in the gradation list of 133 number of casual Helpers. However, the management did not reinstate the workman. As such, Conciliation Officer submitted failure report to the Government. Accordingly, a reference was made to the Tribunal by the Government. In the written statement, the management contended that reference under Section 10 of the I.D Act was not maintainable both on the facts and law as because the function of the management relates to public welfare function by the State. Therefore, the dispute between the management and the workman could not be termed as industrial dispute. The petitioner was not a workman within the

meaning of Section 2(s) of the I.D. Act as he was working as a casual helper since 3rd February, 1994 being engaged temporarily on need basis. As his service was no more required, he was discharged from 3rd August, 1994 and it denied that the petitioner was working as a casual helper since 18th August, 1983. The question of application of Section 25-F and Section 25-G of the I.D Act did not arise at all as he was not working for 240 days in a year prior to his termination. It further took a stand that during conciliation proceeding, there was an agreement under which it was agreed that the workman would be reinstated in his former post with effect from 3rd August, 1994 and the period from 3rd August, 1994 to 6th July, 2001 shall be treated as continuous service on "no work no pay" basis. The workman would get his wages on the prevailing rate of Minimum Wages with effect from 7th June, 2001 onwards and his seniority was fixed at serial number 76 of the gradation list. The management sent the said agreement to the Government of Odisha. However, the Finance Department declined to give concurrence to the terms of settlement. Therefore, the agreement reached during conciliation proceeding could not be given effect to. Accordingly, the action of the management in terminating the service of the workman is legal and justified.

3. On the above pleadings of the parties, the Tribunal framed two issues which are follows:

> "1. Whether the action of the management of Director, Printing, Stationary and Publication, Orissa, Madhupatna, Cuttack-10 in terminating the services of Sri Kailash Chandra Swain, Casual Helper with effect from 3.8.94 is legal and/or justified?
>
> 2. If not to what relief, the workman is entitled to?"

4. The Tribunal on analyzing the materials available on record held that there was employer and employee relationship between the management and the workman. The management is an industry. The dispute was industrial dispute between the management and the workman. Ext.1, the xerox copy of the experience certificate issued by the Establishment Officer of the management revealed that the workman was working as a 'Contractor Helper' during the period 18.8.1983 to 24.9.1988. Notwithstanding such a certificate, Ext.2 which was a tripartite settlement between the workman and the management during conciliation proceeding where the workman was a party and he himself made a complaint before the Conciliation Officer-cum-Assistant Labour Officer, Cuttack to the effect that he had been appointed by opposite party no.1 as a casual helper with effect from 3.2.1994 along with

others. In view of such admission, both the parties admitted that his service was terminated and he was disengaged from service with effect from 3.8.1994. He never worked for 240 days at any time prior to his disengagement. As he was not in continuous service, the management was not legally bound to give him any notice to pay any compensation when the management terminated the service of the workman. On the above findings, the Tribunal passed the aforesaid award.

5. Learned counsel for the petitioner submitted that the Labour Court did not consider the case of the petitioner in its correct perspective when the specific case of the workman was that he was continuing in the establishment since 18th August, 1983. During conciliation proceeding, the management had given the terms and conditions to settle the dispute and agreed to reinstate the petitioner. Since the Finance Department declined to give concurrence to the terms of settlement, the service of the petitioner was not regularized. Earlier, to regularize the service of the petitioner, opposite party no.1 directed him to appear before the interview on 10th January, 1988. Accordingly, the petitioner appeared in the interview. However, without regularizing the service of the petitioner, he was directed to continue as casual helper. While continuing as such, again management had given a direction to appear in the interview on 14th May, 1989 but the management appointed an outsider and terminated the petitioner to work as a casual helper with an assurance that the service of the petitioner shall be regularized. The petitioner had approached the Hon'ble Minister of Commerce and Transport, Odisha for regularization of his service. The Hon'ble Minister recommended the case of the petitioner for regularization on 25.9.1993. Again opposite party no.1 issued a letter to appear before the interview on 17.10.1993. In pursuance of such interview, the order of engagement of the management was issued on 3.2.1994 though the petitioner was working as such since 18th August, 1983. While the matter stood thus, the disengagement order was issued pursuant to the letter issued by opposite party no.1 in view of the Government in Commerce & Transport (Commerce) Department letters dated 30.3.1994 and 30.7.1994 issuing instructions to disengage the services of the excess casual employees beyond the sanctioned strength of 155 as on 31.12.1993 as it was not possible to pay excess casual employees after July, 1994 due to budgetary provision. The management disengaged only two persons, namely, Arunakanta Mohanty and the present petitioner though juniors to the present petitioner are continuing as casual helpers without following the principle of "first come last go and last come first go". Therefore, in the conciliation proceeding, the settlement was made to regularize the petitioner as described as above. However, the Labour Court did not consider all these

facts while passing the impugned award. As such, the impugned order is liable to be set aside.

6. Learned Addl. Government Advocate, however, supporting the impugned award submitted that since the petitioner was engaged as casual helper in February, 1994 and his service was terminated in August, 1994, he had only completed maximum six months of service. As he had not completed 240 days of continuous service in a year prior to his termination, the Labour Court has rightly passed the impugned award. Therefore, the impugned award does not warrant interference.

7. From the rival submissions of the parties and after going through the LCR, it appears that the contention of the petitioner that the workmen junior to him are continuing in service and his service was terminated without following the proper procedure appears to be correct as in the settlement the management admitted that the petitioner's seniority was at serial no.76 and the Government had issued instructions to disengage the services of the excess casual employees beyond the sanctioned strength as on 31.12.1993 as reveals from the letter dated 3rd August, 1994 issued by the opposite party no.1, vide Annexure-7. Accordingly, the management and the workman entered into a tripartite settlement to regularize the service of the petitioner on 7th June, 2001 as reveals from Annexure-8. The terms of settlement was recorded by the Conciliation Officer-cum-Assistant Labour Officer, Cuttack. However, as the Government in the Finance Department did not concur the said tripartite settlement, the same could not be given effect to. Further, the letter dated 20th July, 1993 issued by the Assistant Labour Commissioner, Cuttack to the Director, Printing Stationary and Publication, Odisha also reveals that the petitioner filed a representation complaining that his service was not regularized though he was working as a helper in the establishment since 18th August, 1983 and he had been interviewed twice for the post of Casual Helper but his case had not been considered. The Assistant Labour Commissioner further indicated in the said letter that in pursuance of the direction of the High Court of Orissa in OJC No.3045 of 1992, the management regularized the service of one Sarat Chandra Sahu as a Casual Labourer though the petitioner stood on a similar footing, his case was not considered. Therefore, the Assistant Labour Commissioner recommended the management to consider the case of the petitioner sympathetically and requested to intimate the matter to him. The letter also reveals that by that date the petitioner was continuing as a Casual Helper though his service was not regularized. The management has issued an engagement letter on 3rd February, 1994 and disengaged in August, 1994 to show that he was only working for six months which is not correct as it

appears on the face of the record. Therefore, the action of the management in terminating the petitioner is illegal and without complying with the provision of Section 25-F of the I.D Act and act of the management amounts exploitation of the workman.

8. The apex Court in the case of Asstt. Engineer, Rajasthan Dev. Corp. & Anr. V. Gitam Singh reported in **2013 LLR 225** has held that when the termination of a workman is held illegal, it can be said without any fear of contradiction that the Supreme Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of the Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Hence, the normal rule that the dismissed workman is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. The principles as relevant for granting relief of reinstatement when termination of workman is held to be illegal. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute. Now there is no such principle that for an illegal termination of service, the normal rule is reinstatement with back-wages, and instead the Labour Court can award compensation. The apex Court further held that the compensation, in lieu of reinstatement, should have been proper to a daily wager who has completed merely 240 days' service hence the Single Judge as well as the Division Bench of the High Court also erred in not considering that the reinstatement with back-wages is no longer a rule without exceptions. While granting a relief of reinstatement to a workman whose termination is held to be illegal, i.e., violative of Section 25F of the Industrial Disputes Act, 1947, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute.

9. in view of the above settled position of law, since the termination of the petitioner's service was illegal, this Court sets aside the impugned award dated 2nd June, 2007 passed by the Presiding Officer, Labour Court, Bhubaneswar in Industrial Dispute Case No.30 of 2003 and directs opposite party no.1 to pay a sum of Rs.1,50,000/- (rupees one lakh fifty thousand) as compensation to the petitioner-workman within a period of six weeks from today. The writ petition is accordingly allowed in part. No costs.

Writ petition allowed in part.

2013 (II) ILR - CUT- 419

SANJU PANDA, J.

W.P.(C) NOS.15667/2011 & 7952/2008 (Dt.26.04.2013)

KALYANI MOHANTY …….Petitioner

.Vrs.

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

SERVICE LAW – Anganwadi worker – Promotion – In view of Odisha Children and Women's Welfare Service Rules, 1989 as amended in 2007 the petitioner deserves to be promoted from the post of Anganwadi worker to the post of supervisor – Preparation of Gradation list by the authorities placing O.P.4 to 10 above the petitioner although they have passed matriculation after the petitioner – Gradation list challenged - O.P.2 & 3 have not produced the service records of the petitioner - Experience certificate issued by CDPO, Bramhagiri in favour of the petitioner Dt. 4.1.2008 reveals that the petitioner was working as Anganwadi worker from 30.10.1979 to 31.5.1993 as per acquaintance roll - There was no proceeding or any allegation against the petitioner and it cannot be said that she was engaged afresh in July, 1983 – Held, direction issued to O.P.2 & 3 to correct the service record of the petitioner by accepting her engagement as Anganwadi worker from 31.10.1979 instead of 21.7.1983 and correct the gradation list of the petitioner from Anganwadi worker to the post of supervisor. (Paras 15, 16)

For Petitioner - M/s. S.N. Satpathy & S. Mishra.
For Opp.Parties- M/s. S.K. Padhi (Sr.Advocate), M.Padhi, A. Das, B. Panigrahi, S.B. Dash, (for O.P.8)
M/s. S.K.Pattnaik, U.C.Mohanty, P.K.Pattnaik, D.Pattnaik, K.S.Pattnaik, (for O.Ps.4 & 5)
M/s. Prassan Kr. Nayak-1, P.Mohanty, M.K. Das, (for O.P.6)
M/s. Bibhuti Bhusan Swain, K.K. Gaya, J.Ray & S.P.Dash, (for O.Ps.7 & 9)

S. PANDA, J. Since the cause of action arises in both the writ petitions being one and the same, they were heard together and are being disposed of by this common judgment.

2. The petitioner in both the writ petitions challenges the action of the opposite parties in the matter of promotion to the post of Supervisor ignoring her seniority and promoting and placing opposite parties 4 to 10 above her.

3. The factual backdrops of the case are as follows:

The petitioner being matriculate and unemployed applied for the post of Anganwadi Worker and selected as such. Engagement order was issued by the Collector, Puri on 31.10.1979. She was engaged as Anganwadi Worker under the Child Development Project Officer, Brahmagiri. She worked as Anganwadi Worker at Palanka and Sahaspur Anganwadi Centres from 31.10.1979 to 31.5.1993. The petitioner discharged her duties with sincerity and efficiently and her service report was all through good. There was no break up service and no departmental proceeding was initiated against her. On 31.5.1983, she was transferred and posted at Tikarpada Anganwadi Centre under the Child Development Project Officer, Bhubaneswar which was at that time in Puri District. On 31.7.1983, she was posted at Nargada Anganwadi Centre under the urban area of Bhubaneswar Municipality. Thereafter, she was posted in different Anganwadi Centres under the rural area of Bhubaneswar with effect from 1983 to 2002. At the time of filing of the writ petition, she was working at Naragada Anganwadi Centre.

4. While the matter stood thus, a set of Rules were framed by the Government of Odisha in the Department of Women and Child Development which were called as the Orissa Children and Women's Welfare Service Rules, 1989. The said Rule was amended in 2007. As per the said amended Rules, the petitioner deserved to get for promotion to the post of Supervisor as she had the requisite criteria, i.e. seniority-cum-merit in service. The Child Development Project Officer, Bhubaneswar, in pursuance of the amended Rules, 2007, prepared a gradation list of Anganwadi workers of the district. She, for the first time, came to know that in the said gradation list, her date of engagement as Anganwadi Worker had been wrongly recorded as 21.7.1983 instead of 31.10.1979 and the names of juniors had been reflected above her. Finding the said mistake in the gradation list, she made a representation on 25.1.2008 to correct the gradation list and record her date of engagement as 31.10.1979 as revealed from Annexure-2. She also obtained an experience certificate from C.D.P.O, Brahmagiri on 4.1.2008, who after verifying the record had issued an experience certificate that she was working as an Anganwadi Worker from 31.10.1979 to 31.5.1993. It is stated that she had lost all her service records, appointment letters and other connecting documents in 1999 Super Cyclone. As such, she could not

produce the record before the Child Development Project Officer and requested to supply her copy of service records to establish her seniority in service. However, the CDPO on 28.1.2008 informed her that the documents could not be supplied to her as the same were eaten by white ants. She thereafter made another representation. However, without correcting the gradation list, promotion was given to the other persons from the post of Anganwadi Worker to the post of Supervisor on 5.5.2008 ignoring her seniority. She has also stated that opposite party no.5 was not qualified to be engaged as matric pass Anganwadi Worker in the scale of pay of Rs.175/- as she was appointed on 4.10.1982. She completed the "Madhyama" in Sanskrit (equivalent to HSC Examination) in the year 1999 in Regular Course. An Anganwadi Worker is to discharge her duty as full time and in such event how she could take admission in the course as regular students and attend the class. Therefore, the said certificate was obtained without due permission from the authority and by neglecting the full time duties. The authorities had not taken any action as such. Similarly, opposite party no.6 passed the matriculation in the year 1993. She was engaged as matric pass candidate on 4.10.1982 in the pay scale of Rs.175/-. However, the pay scale of non-matric Anganwadi Worker at the time of engagement was only Rs.125/-. Therefore, the authorities had not taken into consideration all those facts and engaged them as Matriculation Anganwadi Workers on 4.10.1982. Copy of the matriculation certificates and engagement orders are annexed to the writ petition as Annexure-8 series. The matriculation certificate reveals that she passed matriculation in September, 1993. In view of the above, the petitioner has challenged the promotion order of opposite parties 4 to 10.

5. A counter affidavit has been filed by the District Social Welfare Officer, Khurda. In paragraph-10 thereof, he has reiterated the fact regarding non-availability of the records as the same were eaten by white ants as reported by C.D.P.O, Bhubaneswar (Urban). However, at paragraph-1 of the said counter affidavit it is stated that the petitioner was engaged as Anganwadi Worker at Bhubaneswar (Urban) on fresh selection and she was not transferred from Brahmagiri ICDS Project to Bhubaneswar (Urban) ICDS Project. She was paid honorarium upto 31.5.1983 and her honorarium was held up for June, 1983 at Brahmagiri ICDS Project as per acquaintance roll. She has neither worked at Brahmagiri nor at Bhubaneswar (Urban) from 1.6.1983 to 20.7.1983 as she herself admitted that she had joined at Bhubaneswar (Urban) on 21.7.1983. Hence, her seniority was counted from her date of joining on 21.7.1983 as a fresh candidate as there was no provision for approval of Anganwadi Worker. The copy of the acquaintance roll of Brahmagiri ICDS Project for June, 2006 is annexed as Annexure C/2 to show that the honorarium of the petitioner, namely, Kalyani Mohanty was

held up for June, 1983. The said document reveals that the acquaintance roll had been checked in accordance with the Treasury Manual by the Drawing Officer. He had also reiterated that since the petitioner joined service on 21.7.1983, she was not senior to opposite parties 4 to 10. It was also stated that opposite party no.6 had passed HSC Examination in the year 1982. At paragraph-15 of the counter affidavit, a copy of the HSC Examination of opposite party no.6 is annexed as Annexure D/2 which reveals that she has passed HSC Examination in the year 1993.

6. From the said counter affidavit, it appears that the said counter affidavit has been filed by a responsible officer, i.e. District Social Welfare Officer without verifying all the documents.

7. So far as opposite party no.5 is concerned, it is only stated that she had passed the Madhayama Examination equivalent to HSC Examination. Therefore, she is eligible for promotion to the post of Supervisor.

8. Opposite party no.8 has also filed the counter affidavit taking a stand that the petitioner was not in continuous service from 31.10.1979 to 21.7.1983. As it reveals from the record that she was in continuous service from 31.10.1979 to 31.5.1983 and thereafter, she resigned from the said post and joined afresh on 21.7.1983. Therefore, the petitioner joining date i.e. 21.7.1983 was considered afresh as the date of engagement where opposite party no.8 was engaged on 8.10.1982. Hence, the gradation list was prepared correctly and interference is not necessary. It is further stated that the engagement of the petitioner in the year 1979 is baseless and is not supported by any document. Therefore, the claim of the petitioner is liable to be rejected.

9. On the above narration of facts, it appears that District Social Welfare Officer, Khurda filed acquaintance roll of the petitioner for the month of June, 1983, i.e., Annexure C/2 which reveals that the petitioner was working as Anganwadi Worker prior to that. Therefore, the plea of opposite party no.2 that all the service records of the petitioner were eaten by white ants is not accepted. The matriculation certificate of opposite party no.6 reveals that she appeared the matriculation examination in the year 1993 and the certificate thereof was issued to her. However, opposite party no.2 has stated in the counter affidavit that the petitioner had passed the HSC Examination in the year 1983 appears to be tale tell and the action of the authorities is to deprive the petitioner to get her past service.

10. Admittedly, in 1999 Super Cyclone, the costal belt of Odisha was badly affected. Therefore, the plea of the petitioner that she lost her all documents regarding certificates in that super cyclone is accepted.

11. It appears from the record that letter dated 31.7.1982 issued by the Government of India, Ministry of Social Welfare filed by opposite party no.2 reveals that an Anganwadi Worker is entitled to honorarium, distribute the equipment and materials to the anganwadi centre and discharge duty of literacy centres as per the advice of the Directorate of Adult Education/District Adult Education Officer. Mere procurement of equipment and materials for the anganwadi centre and the functional literacy centre is not enough. It must be ensured that the equipment and materials reach the anganwadi centres expeditiously. Special care should be taken to see that the place is selected in such a manner that children and women belonging to Scheduled Castes and Scheduled Tribes and other weaker sections of society can freely go and take the benefit of services at the anganwadi functional literacy centre. The said letter also stipulates that how trainings are to be given to the Anganwadi Workers and they have to select the beneficiaries of supplementary nutrition in case of children and enlistment of selected beneficiaries (both children and pregnant and nursing mothers) and also maintain the relevant Register and regarding treatment of minor ailments as mentioned in the guide book for Anganwadi Workers under Primary Health Care.

12. Similarly, anther letter dated 2.12.1987 was issued by the Under Secretary to the Government of India in the Ministry of Human Resource Department of Women and Child Development wherein the Central Government has given clarification regarding facilities given to the Anganwadi Workers under the ICDS Project. The said letter reveals that on 19.3.1985 the Ministry of Social Welfare issued a letter wherein it had been laid down that an Anganwadi Worker should be given the benefit of her experience as Anganwadi Worker while considering her to direct recruitment to the post of Supervisor. A letter was issued on 15.9.1986 whereby increased scales of honorarium had been prescribed for Anganwadi Workers with 5 years and 10 years experience as Anganwadi Workers. It was also laid down that an Anganwadi Worker shifts from one State to another State her experience in the first State as Anganwadi Worker is not counted in the second State for the purpose of fixation of honorarium, age relaxation etc. It is, therefore, clarified that an Anganwadi Worker should be given the benefit of her total experience as an Anganwadi Worker and her experience is to be cumulative in that post; rather than experience as Anganwadi Worker in any one particular State or Project. The State Government, Union Territories should therefore take into account the experience of an Anganwadi Worker in a previous ICDS Project and in other States as well, while considering her eligibility for appointment to the post of Supervisor and while fixation of the

scale of honorarium on her first appointment as an Anganwadi Worker in an ICDS Project (Emphasis supplied).

13. In view of the above clarification of the Central Government, it is crystal clear that the past service of an Anganwadi Worker is to be considered cumulatively while considering her case for the post of Supervisor.

14. As stated above, the Government of Odisha in Women and Child Development Department have framed a set of Rules under Article 309 of the Constitution of India, namely, Orissa Children and Women's Welfare Service Rules, 1989 for recruitment, promotion and filling up vacancies in junior grade of services by promotion. The said Rule was amended in the year 2007. For better appreciation, the said Rules are excerpted below:

> "The posts in Junior Grade of Service shall be filled up in the following manner.
>
> (a) Thirty per cent of the total number of vacancies arising in a recruitment year shall be filled up in accordance with Rule 7 by way of direct recruitment.
>
> (b) The remaining vacancies shall be filled up in accordance with the provisions of Rule 8 by way of selection in the following manner.
>
> (i) nor more than thirty per cent from Anganwadi Workers of the District and;
>
> (ii) remaining forty per cent of vacancies from amongst the lady village level worker (LVLW) of the district.
>
> Provided that in case of non-availability of sufficient eligible candidates for promotion by way of selection under Clause (4) the vacancies remaining unfilled during the year shall be filled up by way of direct recruitment."
>
> Rule 6(2) – Selection of candidates for direct recruitment under Clause (1) of Sub-clause (1) the selection from amongst the eligible Anganwadi Workers and Lady Village Workers under Clause (b) of Sub-Rule (1) to a post. In the junior grade of service shall be made through a selection committee consisting of;
>
> (a) Collector of the District - Chairman

(b) Chief District Medical Officer - Member

(c) District Welfare Officer - Member

(d) District Social Welfare Officer - Member Secretary

Amendment Rule 2007 (Rule-8) says that in order to be eligible for appointment to the cadre of junior grade of service by selection.

8(1)(a) - An Anganwadi Worker must have

(i) passed at least the H.S.C. or equivalent examination from Broad of Secondary Education, Orissa or equivalent Board, Council and

(ii) rendered on 1st day of January of recruitment year, minimum of 10 years of service as such

xxx xxx xxx

8(2) - A list of eligible candidates shall be prepared in accordance with Sub-rule (3) and placed before the selection committee for consideration.

8(3)(a) the appointment to junior grade service shall be made by a selection from Anganwadi Workers on the basis of seniority.

If Selection Committee finds any candidate not suitable, the same shall be recorded in proceeding of the meeting.

8(4)(b) The final list of Anganwadi Workers selected for appointment as Supervisors prepared on the basis of seniority and suitability in pursuance of Clause (a) of Sub-Rule (3) shall be submitted to the Collector for approval.

8(4)(c) The list shall remain valid for a period of one year from the date of such approval."

15. In view of the above and since opposite parties 2 and 3 have not produced the service records of the petitioner and C.D.P.O., Brahmagiri had issued an experience certificate in favour of the petitioner on 4.1.2008 which

reveals that the petitioner was working as Anganwadi Worker from 31.10.1979 to 31.5.1993 as per the acquaintance roll and she had been shifted from one place to another ICDS Project as per the order of the authority and there was no proceeding or any allegation against the petitioner, it cannot be said that she was engaged afresh in July, 1983 and her engagement shall be counted from that date, i.e. 21.7.1983.

16. Accordingly, this Court directs opposite parties 2 and 3 to correct the service record of the petitioner by accepting her engagement as Anganwadi Worker from 31.10.1979 instead of 21.7.1983 and correct the gradation list of the petitioner from Anganwadi Worker to the post of Supervisor accordingly. The writ petitions are accordingly disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 426

SANJU PANDA, J.

W.P.(C) NO.18133 OF 2010 (Dt.05.07.2013)

ORISSA STATE HANDLOOM WEAVERS' CO-OPERATIVE SOCIETY LTD. …….Petitioner

.*Vrs.*

BHAGABAN ROUT …….Opp.Party

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

Disciplinary Proceedings – Opp.Party-employee did not allow the inquiry officer to proceed with the inquiry and created disturbances – Inquiry Completed in his absence – Report could not be furnished on the delinquent – Dismissal of employee after dispensing with inquiry – Due to the non-cooperation and overt act of the employee an FIR was filed and a G.R. Case is pending against him – Whether under such circumstances a further opportunity will be given to the petitioner to complete the inquiry from the stage when the Opp.Party-employee committed the overt act – Held, since the inquiry has been completed after following the prescribed procedure, the Opp.Party-employee

being a wrongdoer is not entitled to get any benefit due to his overt act – Impugned order passed by the Tribunal directing for fresh inquiry is set aside. (Para 10,11)

Case laws Referred to:-

1.AIR 1985 SC 1416 : (Union of India & Anr.-V- Tulsiram Patel)
2.AIR 1986 SC 555 : (Satyavir Singh & Ors.-V- Union of India & Ors.)
3AIR 1994 SC 1074 : (Managing Director, ECIL, Hyderabad, etc.etc.-V- A. Karunakar, etc. etc.)

For Petitioner - M/s. Santosh Ku. Pattnaik, U.C. Mohanty, D.P.Das, P.K.Pattnaik, D.Pattnaik & S. Pattnaik.
For Opp.Party - M/s. S.K. Sahoo, M. Mohapatra & B.B. Biswal.

S.PANDA, J. The petitioner has filed this writ petition challenging the order dated 15th September, 2010 passed by the Member, Cooperative Tribunal, Orissa, Bhubaneswar in Service Dispute No.10 of 2008.

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

The petitioner, a Cooperative Society, is registered under the Orissa Co-operative Societies Act, 1962. The basic function of the Society is to supply raw materials, provide assistance to the poor weavers of the State of Odisha through Primary Weavers' Cooperative Societies and market the handloom products of the weavers through sales centres established in Odisha and other places in the country. Opposite party was an employee of the Society in the cadre of Branch Manager. During the period 1998 to 2003, he was posted as the Officer-in-charge, Stock Dispatch. He was in charge of Legal Cell from 18.12.2001. Opposite party was transferred from that post vide order dated 6.11.2003 and did not hand over the complete charge to the reliever and remained absent unauthorisedly from 21.11.2003 for which the reliever had to take over charge in the presence of Executive Magistrate by breaking open the almirah during December, 2003. During inventory, it was detected that the opposite party, while working in the capacity as in-charge of stock dispatch and legal cell, failed to discharge the onerous duty. It is also pertinent to mention here that vigilance cases are pending against the opposite party for misappropriation of the fund which is also revealed from the special audit. The petitioner-Society initiated a disciplinary proceeding vide order dated 24.1.2004 on the allegation of misappropriation by unauthorized and illegal revaluation of stock at Kolkata Sales Depot and Durgapur Sales Depot. Miss Sumitra Behera, Special Officer in the office of the Director of Textiles was appointed as the enquiry officer who took up the

enquiry on 22.12.2004 on which date the Marshalling Officer submitted a list of documents and a list of witnesses. In course of enquiry, the witnesses of the petitioner-Society were examined and cross-examined. The documents which were proved by the witnesses were marked as Exts.1 to 47. During cross examination of the witnesses of the petitioner-Society, opposite party used unparliamentary language and disrupted the enquiry for which an FIR was lodged against the opposite party before Kharavel Nagar Police Station on 4.2.2006 by the Managing Director of the petitioner-Society. G.R. Case No.493 of 2006 is registered under Sections 294/448 IPC and the same is pending before the learned S.D.J.M., Bhubaneswar. On 19.4.2006, the petitioner-Society called upon the opposite party to appear before the Disciplinary Authority for personal hearing on 4.4.2006 and 28.4.2006 and submit his reply within fifteen days. The opposite party though received the said letter did not submit any report within the stipulated period. Therefore, the Managing Director of the Society passed the order on 22.6.2006 dismissing the opposite party from service and directed to recover a sum of Rs.2,20,260.60 from him individually and Rs.5,24,509.70 from him and one Sapan Kumar Kundu jointly. On receiving the order dated 22.6.2006, opposite party preferred an appeal before the appellate authority. The appellate authority after considering the appeal rejected the appeal by order dated 15.2.2007. Being aggrieved by the said order, the opposite party filed Service Dispute Case No.10 of 2008 before the Co-operative Tribunal Orissa challenging the disciplinary action taken against him on the ground that the reasonable opportunity of hearing was not given to him to defend the charges and that the enquiry report was not signed by the enquiry officer. The Tribunal, in order to decide the disputes between the parties, framed as many as five issues which are as follows:

> "1. Whether the plaintiff was provided opportunity to verify the relevant documents regarding charge before submission of his show cause?
>
> 2. Whether during enquiry adequate opportunity was provided to the plaintiff to cross-examine the witnesses examined by the Department and to adduce his own evidence?
>
> 3. Whether without supplying enquiry report the punishment was inflicted?
>
> 4. Whether the plaintiff in any manner was prejudiced during the enquiry?
>
> 5. To what relief?"

The petitioner-society, in order to establish its case, examined eight witnesses and exhibited a number of documents which were marked Exts.A to Z/3. Opposite party, in support of his case, examined himself as P.W.1 and exhibited the documents which were marked Exts.1 to 17. The Tribunal, on analyzing the evidence adduced by the parties, set aside the order of the disciplinary authority imposing punishment. The Tribunal also set aside the order passed by the appellate authority dismissing the appeal of the opposite party and directed for fresh inquiry from the stage it was closed by appointing another inquiry officer and giving opportunity to the opposite party and the management to adduce further evidence. Hence this writ petition.

3. Learned counsel for the petitioner submitted that in view of non-cooperation of the opposite party during disciplinary proceeding an ex parte inquiry was completed from 4.2.2006. Thereafter, though an inquiry report was supplied to the delinquent, he did not file his reply. The disciplinary authority following due procedure imposed the penalty which was not considered by the Tribunal. Therefore, the impugned order is liable to be set aside. In support of his submissions, he has cited the decisions of the apex Court in the case of Union of India and another v. Tulsiram Patel, **AIR 1985 SC 1416** and Satyavir Singh and others v. Union of India and others, **AIR 1986 SC 555**.

4. Learned counsel for the opposite party, however, supporting the order passed by the Tribunal submitted that the disciplinary authority had taken a vindictive attitude towards its employee and framed charges which were vague and baseless and some of the documents were also not supplied to the delinquent. Taking into consideration the same, the Tribunal has passed the order which need not be interfered with and the Tribunal has rightly directed to continue the inquiry from the stage it was closed. In support of his contention, he has cited a decision of the apex Court in the case of Managing Director, ECIL, Hyderabad, etc. etc. v. B. Karunakar, etc. etc., **AIR 1994 SC 1074**.

5. From the rival submissions of the parties and after going through the record, it appears that the disciplinary proceeding was initiated against the opposite party and during the said inquiry the opposite party did not allow the inquiry officer to proceed with the inquiry and tried to create disturbances. A discipline employee should have cooperated with the inquiry officer and if he has not received any document, he should have filed an application to get those document(s) to file his reply to the show cause.

6. In the present case, the opposite party has filed his reply to the show cause. At any point of time, he has not filed any application to get some documents which are necessary for his defence; rather during disciplinary

proceeding, he created disturbances without following the procedure and threatened the witnesses for dire consequences. He also did not allow the inquiry officer to proceed with the inquiry and due to his non-cooperative attitude and overt act, the Managing Director filed an FIR for which a G.R. Case is pending.

7. This Court has to consider whether under such circumstances, a further opportunity will be given to the petitioner to complete the disciplinary inquiry from the stage when the opposite party committed the overt act and whether being a wrong doer the opposite party is entitled to get that benefit.

8. The apex Court in ***Tulsiram Patel's*** case has held as follows:

> "It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to apply clause (*b*) of the second proviso because the word "inquiry" in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (*b*) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).
>
> It was next submitted that though clause (*b*) of the second proviso excludes an inquiry into the charges made against a government servant, it does not exclude an inquiry preceding it, namely, an inquiry into whether the disciplinary inquiry should be dispensed with or not, and that in such a preliminary inquiry the government servant should be given an opportunity of a hearing by issuing to him a notice to show cause why the inquiry should not be

dispensed with so as to enable him to satisfy the disciplinary authority that it would be reasonably practicable to hold the inquiry. This argument is illogical and is a contradiction in terms. If an inquiry into the charges against a government servant is not reasonably practicable, it stands to reason that an inquiry into the question whether the disciplinary inquiry should be dispensed with or not is equally not reasonably practicable.

Where a government servant is dismissed, removed or reduced in rank by applying clause (*b*) or an analogous provision of the service rules and he approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for the exercise of power of judicial review in matters where administrative discretion is exercised. It will consider whether clause (*b*) or an analogous provision in the service rules was properly applied or not. The finality given by clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (*b*) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of the reasons given by the disciplinary authority the court will not, however, sit in judgment over them like a court of first appeal. In order to decide whether the reasons are germane to clause (*b*), the court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a court-room, removed in time from the situation in question. Where two views are possible, the court will decline to interfere."

9. The apex Court in Satyavir Singh's case (supra) has held as follows:

> "The next point was that it was not alleged by the authorities that anyone was physically injured in the agitation. This is another argument which is difficult to understand. As held in Tulsiram Patel's case (AIR 1985 SC 1416) it will not be reasonably practicable to hold an inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails. It is, therefore, not necessary that the disciplinary authority should wait until incidents take place in which physical injury is caused to others before dispensing with the inquiry."

10. In view of the above position of law, since the disciplinary inquiry has been completed after following the prescribed procedure, the opposite party, being a wrong doer, is not entitled to get any benefit for his overt act.

11. Accordingly, this Court sets aside the impugned order dated 15th September, 2010 passed by the Member, Cooperative Tribunal, Orissa, Bhubaneswar in Service Dispute No.10 of 2008. The writ petition is allowed.

Writ petition allowed.

2013 (II) ILR - CUT- 432

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

W.P.(C) NO. 22654 OF 2010 (Dt.01.07.2013)

GIRISH CHANDRA MOHANTY .....Petitioner

.Vrs.

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

GOVERNMENT GRANTS ACT, 1895 - S.3 (3)

Settlement of land in favour of ex-army personnel – Petitioner applied for allotment of 5 acres of land under Rule 3(2) of the OGLS Rules – Procedure prescribed – Held, settlement of land in favour of Jawans can only be made available under the Government Grants Act, 1895 but not under the OGLS Act and Rules.

CONSTITUTION OF INDIA ,1950- ART-226

Application made under a wong provision of law – Duty of Court – Held, non-mention or wrong nomenclature of case can not disentitle a party to get his /her benefit.

Case laws Referred to:-

1.1994(II) OLR 149 : (Rajkishore Das-V- State of Orissa & Ors.)
2.2010(Supp.II) OLR 292 : (Mirza Siddik-V- State of Orissa & Ors.)
3.100(2005)CLT 661 : (Gopaldas Agrawal-V- State of Orissa & Ors.)
4.2010(1) OLR 723 : (Bata Krushna Nayak-V- State of Orissa & Ors.)
5.AIR 1958 SC 232 : (P. Balakotaiah-V- The Union of India)
6.AIR 1964 SC 1329 : (Hukamchand Mills Ltd.-V- State of Madhya Pradesh)
7.AIR 1977 SC 1146 : (The Vice-Chancellor, Jammu University & Anr.-V- Dushinant Kumar Rampal).

For Petitioner - M/s. P.K.Routray, B.G. Mishra, N.K. Deo, B. Routray & J.Bhuyan.
For Opp.Parties - Addl. Govt. Advocate.

Dr. B.R.SARANGI, J. Assailing the order dated 4.9.2010 passed by the Additional District Magistrate, Bhubaneswar in Lease Revision Case No. 815 of 1998 under Annexure-10, the present writ petition has been filed by the petitioner.

2. Petitioner's case in nutshell is that, he was a Flight Lieutenant in Air Force and participated in the external aggression and otherwise entitled to 5 acres of land free of premium ready for cultivation at Government cost. To that extent, he has relied upon the Government resolutions dated 14.5.1963 at Annexure-1, 11.4.1964 at Annexure-2, 7.7.1969 at Annexure-3 and on the basis of such Government resolutions, he made an application on 9.5.1967 for determining his eligibility to get such benefit as admissible to him. Accordingly, the Revenue Officer, Puri vide letter dated 19.9.1967 under Annexure-6 declared that the petitioner is entitled for concession granted by the State Government and accordingly, direction has been given to the Tahasildar, Bhubaneswar to take action immediately with communication to the Revenue Officer, Puri. In Annexure-7 such allotment has been made and R.O.R. has been issued in his favour, but in Annexure-8, he has been called upon to make payment towards reclamation cost for the lease land lying un-reclaimed and to produce the relevant documents for

verification on 25.9.1984. At this juncture, the Additional District Magistrate initiated Lease Revision Case No. 815 of 1998 under Section 7-A(3) of the Orissa Government Land Settlement Act, 1962 in short, "OGLS Act" and by order dated 28.7.1998, the Addl. District Magistrate set aside the settlement of the Government land in favour of the petitioner vide order dated 30.9.1978 passed in W.L.Case No.101 of 1968-69. Challenging the same, writ application bearing O.J.C.No.17101 of 2001 was filed and this Court by order dated 28.7.2003 quashed the order of the Additional District Magistrate in Lease Revision Case No. 815 of 1998 and directed for rehearing of the case once again. In compliance to the order of this Court, the Additional District Magistrate in Annexure-10 dated 4.9.2010 has come to a conclusion that the Tahasildar, Bhubaneswar has violated the statutory provisions in settling the case land in favour of the petitioner and acted beyond the jurisdiction vested in him and committed gross material irregularities and legal infirmities thereby he having no power, the order so passed is a nullity and non est in the eye of law, and accordingly, set aside the order of settlement passed in W.L.Case No.101/1968-69. Hence, the writ peetition.

3. The State has filed counter affidavit. In paragraph-6 thereof, it is specifically stated that the petitioner applied to the Tahasildar in the prescribed form as per Rule 3(2) of the Orissa Government Land Settlement Rules, 1974 only on 22.12.1975. Thus, it is evident that in between 6.9.1975 and 21.12.1975, there was no application pending with the Tahasildar, Bhubaneswar. The Tahasildar having no lease application, however, issued general proclamation inviting objections from the public to settle the case land in favour of the petitioner. In paragraph-9 of the said counter affidavit, it is specifically stated that the delegation of power to act under the Government Grants Act was only made on 2.8.1986 and it is further stated that the settled principle that the power, which is not specifically conferred, is specifically forbidden. Therefore, the delegated power, which is exercised by the Tahasildar in 1978 to settle the case land with the petitioner, is not sustainable in the eye of law and reiterated the fact that the land has been settled in favour of the petitioner under the OGLS Act and not under the Government Grants Act, 1895 and, therefore, the order so passed by the Additional District Magistrate is wholly and fully justified and the same cannot be quashed. Further, it is urged by the learned Addl. Government Advocate that since the petitioner submitted the application in the prescribed form under the OGLS Rules. The Tahasildar is estopped to grant the benefits under the Government Grants Act, 1895 as the land has been settled under the OGLS Act. So far as the contentions raised in Annexures-4 & 5 are concerned, no reply has been given in the counter affidavit.

4. Mr.Routray, learned counsel appearing for the petitioner specifically urged that the lease in favour of the petitioner was granted under the Government Grants Act, 1895 and therefore, the proceeding under Section 7-A(3) of the OGLS Act was incompetent and no jurisdiction was available to the Additional District Magistrate to pass the impugned order in Annexure-10. In support of his contention, he has relied upon the judgments in the case of **Rajkishore Das v. State of Orissa and others**, 1994(II) OLR 149, and **Mirza Siddik v. State of Orissa and two others**, 2010(Supp.II) OLR 292, wherein this Court has held that settlement of 5 acres of land in favour of an ex-army personnel was not made in accordance with the provisions of the OGLS Act, but the same was made under the lease principles read with the Government notifications which made special provision for special categories of personnel, who could not be treated on the same footing as private individuals and thereby the suo motu proceedings under Section 7-A(3) of the OGLS Act cannot be resorted to for examining the correctness or otherwise of the settlement made in favour of the jawan. A further question was raised that the action of the Additional District Magistrate is contrary to the provisions contained in Section 7-A(3) of the said Act and as such, the suo motu revision was barred by limitation. To that extent, reliance has been placed on the judgment of this Court in **Gopaldas Agrawal v. State of Orissa and others**, 100(2005) CLT 661 and **Bata Krushna Nayak v. State of Orissa and three others**, 2010(1) OLR 723, wherein this Court has already held that the revision under Section 7-A of the OGLS Act cannot be initiated after expiry of the period of 14 years as prescribed in the proviso to Section 7-A(3) and the order passed in such revision initiated beyond the period of 14 years cannot be sustained.

5. Pursuant to the order of this court, LCR was called for. On perusal of the same, it is found that the petitioner has submitted an application in Form-I under Rule 3(2) of the OGLS Rules addressed to the Tahasildar for settlement of the land under the OGLS Act on 18.12.1975, which was registered as Lease Case No. 101/68-69. The notice in the said lease case was issued to one “Guru Charan Mohanty” (Jawan) instead of the petitioner, namely, “Girish Chandra Mohanty”, which indicates that no notice has actually been served on the petitioner.

6. In view of the aforesaid facts and circumstances, the moot questions that arise for consideration are:

(i) whether the land settled in favour of the petitioner was under the Government Grants Act, 1895 or under the OGLS Act; and

(ii) whether the action taken by the Additional District Magistrate is justified or not.

7. While considering the above questions, it is apt to mention here that before commencement of the OGLS Act, the Government waste lands were being settled under the Executive instructions as well as customary practice and usage prevalent in various parts of the State. Therefore, in order to have uniformity of principles in the settlement of such lands, the OGLS Act was enacted in 1962. Section 3 of the OGLS Act prescribes the power to be exercised by the Government regarding settlement of the land. Sub-sections (2) and (3) of Section 3 prescribe the manner of settlement of Government land and the said two provisions are mandatory in nature. As regards sub-section (3), it is provided therein that settlement shall be made in order of priority; first, Co-operative farming societies formed by the agricultural labourers; secondly, landless agricultural labourers of the village in which the land is situate or of the neighbouring village, thirdly, ex-service men or members of the Armed forces if they belong to the village in which the land is situate, fourthly, raiyats who personally cultivate not more than one standard acre, and fifthly, in absence of any of the aforesaid four categories, on any other person. In the present case, the petitioner being a Jawan, it comes under sub-section (3) of Section 3 of third category. The legislative intention of having the aforesaid provision in the Statute is that Government waste lands should first go to those persons who actually need for their sustenance. No discretion is left with the Tahasildar to settle such lands with any other person over-looking the aforesaid mandatory provisions of the Act. Sub-Section (3) of Section 3 was inserted in the OGLS Act vide Orissa Act 5 of 1974. Therefore, pursuant to Annexures-4 & 5 on the basis of the application submitted on 9.5.1967, eligibility of the petitioner has been determined under the provisions of the Government Grants Act read with the lease principles and Government notifications vide Annexures-1 to 3 which made special provision for special categories of personnel like that of the petitioner.

8. From the LCR it is found that the petitioner filed the application on 18.12.1975 for allotment of land in a prescribed form under Rule 3(2) of the OGLS Rules, but his right to get settlement of land flows from Annexures-4 & 5 read with the Government notifications under Annexures-1 to 3 which made special provisions for special categories of personnel, who cannot be treated on the same footing as private individuals. If such right has accrued in favour of the petitioner, the same cannot be taken away merely because he made the application in the prescribed form under Rule 3(2) of the Orissa Government Land Settlement Rules for settlement of the land.

9. The Supreme Court in **P.Balakotaiah v. the Union of India**, AIR 1958 SC 232 has held that if the exercise of power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of power in question.

Similar view has also been taken by the apex Court in **Hukamchand Mills Ltd. V. State of Madhya Pradesh**, AIR 1964 SC 1329, which is followed in **The Vice-Chancellor, Jammu University and another v. Dushinant Kumar Rampal**, AIR 1977 Sc 1146, wherein the Supreme Court held as follows:

> "It is true that the order of suspension did not recite Statute 24(ii) as the source of power under which it was made, but it is now well settled, as a result of several decisions of this Court, that when an authority makes an order which is otherwise within its competence, it cannot fail merely because it purports to be made under a wrong provision of law, if it can be shown to be within its powers under any other provision: a wrong label cannot vitiate an order which is otherwise within the power of the authority to make."

10. In view of the aforesaid well settled principles of law, non-mention or wrong nomenclature of case cannot disentitle a party to get his benefit. In the present case, the Additional District Magistrate proceeded on erroneous footing by applying the provisions of OGLS Act, thereby, the order so passed suffers from error apparent on the face of record. The entitlement of the petitioner for settlement of the land pursuant to Annexures-4 and 5 is not disputed more particularly, it is the admitted case of the parties that he was serving as a Flight Lieutenant in Air Force and is otherwise entitled to the facilities available to the Jawans. The grant of concession available to an army personnel can only be made available under the Government Grants Act, 1895.

11. In view of the foregoing discussions, the impugned order dated 4.9.2010 passed by the Additional District Magistrate, Bhubaneswar in Lease Revision Case No. 815 of 1998 under Annexure-10 is quashed and the matter is remitted back to the Addl. District Magistrate to reconsider the same applying the provisions of the Government Grants Act, 1895 with regard to the concession granted in favour of the Jawans for settlement of the land read with the lease principle and Government notifications under Annexures-1 to 3 within a period of two months from the date of receipt of certified copy of this judgment.

12. In the result, the writ petition is disposed of with the aforesaid observation. However, there shall be no order as to costs.

Writ petition disposed of.

2013 (II) ILR - CUT- 438

B. N. MAHAPATRA, J.

C.R.P. NO. 18 OF 2009 (Dt.14.12.2012)

K. NAGAMANI .....Petitioner

.Vrs.

K. RAJESWARI & ORS. .....Opp.Parties

A. CIVIL PROCEDURE CODE, 1908 – S.115

Order passed U/s.144 C.P.C. for restitution of possession of the disputed property – Lower appellate Court confirmed such order passed by the trial Court – Order challenged in revision – Maintainability – Held, since the proceeding U/s.144 (1) C.P.C. is coming within the purview of "other proceeding" appearing in Section 115 C.P.C. the revision petition is maintainable. (Para 12)

B. CIVIL PROCEDURE CODE, 1908 – S.144

Application for restitution – O.P.1 to 6 being Plaintiffs filed suit against the petitioner and O.P.7 for eviction from the suit house – Suit decreed exparte and on execution suit house was delivered to the plaintiffs – Exparte decree having been set aside the petitioner filed application U/s.144 C.P.C. for restoration / re-delivery of the suit house – Application dismissed and confirmed by the lower appellate Court – Hence this revision – Held, impugned order passed by the lower appellate Court confirming the order passed by the trial Court is set aside. (Para 13,16)

Case laws Referred to:-

1.96(2003)CLT 39 : (Alok Kumar Bohidar & Anr.-V- Rajkishore Mathur & Anr.)

2.96(2003)CLT 762 : (Sitaram @ Mahendra Ghosh-V- Sri Antaryami Mohapatra &Ors)

3.96(2003)CLT 201(SC) : (Shiv Shakti Cooperative Housing Society,Nagpur- V- M/s. Swaraj Developers & Ors.)

For Petitioner - M/s. Sidhartha Mishra & M.N. Ray.
For Opp.Parties- M/s. D.R.Bhokta & N. Afreen
(for O.P.Nos.1 to 6).

B.N. MAHAPATRA, J. The petitioner has filed this Civil Revision Petition challenging the judgment dated 10.04.2009 passed by the learned District Judge, Koraput at Jeypore in F.A.O. No.58 of 2008 confirming the order dated 04.11.2008 passed by the learned Civil Judge (Senior Division), Jeypore in C.M.A. No.62 of 2007 rejecting the petition under Section 144, CPC filed by the present petitioner for restoration of possession of the suit house.

2. Facts giving rise to the present Civil Revision Petition are that opposite parties 1 to 6 as plaintiffs filed C.S. No.77/2003 in the Court of Civil Judge (Senior Division), Jeypore by impleading petitioner and opposite party No.7 as defendants to evict them from the suit house and for realization of arrear house rent and cost of litigation. The aforesaid suit was decreed ex parte on 26.03.2004 in favour of the plaintiffs. Thereafter, in E.P. No.8/2004, the delivery of the suit house was given to the plaintiffs/opposite parties 1 to 6. In the year 2006, the petitioner filed a petition under Order-IX, Rule 13, CPC in CMA No.1 of 2006 before the Trial Court to set aside the ex parte decree which was allowed on 20.11.2007 by setting aside the ex parte decree. Opposite parties 1 to 6 challenged the order of the Trial Court dated 20.11.2007 before this Court in CRP No.7 of 2008 in which the order of the trial court was confirmed. The Revision petitioner also filed a petition under Section 144, CPC before the learned Trial Court in CMA No.62 of 2007 praying for restoration / re-delivery of the suit house to the revision petitioner on the ground that the ex parte order, on the basis of which the plaintiffs/opposite parties 1 to 6 had got possession through the process of Court, was set aside. The Plaintiff-opposite parties 1 to 6 filed their counter challenging the entitlement of the revision petitioner to get re-delivery of the suit house on the ground that she was not the lessee under plaintiff/opposite party No.5, but the present opposite party No.7 (defendant no.1) who has allowed the revision petitioner/defendant no.2 to stay in the suit house is entitled to possession of the suit house. On 01.11.2008, after closure of the arguments, opposite party No.7 filed a memo through his Advocate that the plaintiff-opposite parties delivered possession of the suit house to opposite party No.7. Thereafter learned Trial Court rejected the petition under Section 144 CPC filed by the revision petitioner. Being aggrieved by the order of the Trial Court, the revision petitioner preferred appeal before the learned

District Judge by filing F.A.O. No.58 of 2008 and the learned Appellate Court vide its order dated 10.04.2009 confirmed the order of the learned Trial Court. Hence, the present Civil Revision Petition.

3. Mr.Sidhartha Mishra, learned counsel appearing for the petitioner submitted that the impugned orders are illegal and contrary to admitted documents on record. On 16.09.1999, opposite party No.5 through Sri M.Upendra Rao, Advocate had issued notice to the revision petitioner and opposite party No.7 and others to quit/vacate the suit house. Opposite party No.7/Defendant No.1, through his Advocate, Sri L.K.Panda, presently Advocate for the plaintiff-opposite party Nos.1 to 6 replied to the said notice that his client was in no way connected with the suit house in question and he never took the house on lease nor stayed therein at any time. Ch. Subhalakshmi clearly stated in her deposition in M.C. Case No.118/96 that her daughter K.Nagamani by paying Rs.20,000/- to G.Venketeswar Rao was in possession of the house for about last four years. Smt. Nagamani also claimed that she has paid Rs.50,000/- to G.Rama Devi, daughter of G.Satyabati on 30.03.1992 and was in possession of the house under lease. Therefore, it clearly goes to show that opp. party No.7 is in no way concerned with the house nor inducted sub-tenants. This reply of opposite party No.7 has been lost sight of by the learned Trial Court. The delivery of warrant in E.P. No.8 of 2004 which was returned back after execution contains the report of the Process Server to the effect that the revision petitioner was evicted from the suit house but not the opposite party No.7. Therefore, the Trial Court ought to have restored the suit house to the revision petitioner. The ex parte decree was set aside on the prayer of the petitioner which was opposed by opposite party No.7 who supported the plaintiff/opposite party Nos. 1 to 6. Opposite party No.7, in C.M.A. No.1 of 2006, the proceeding under Order-IX, Rule 13, CPC, submitted before the Court to reject the petition. Further case of revision petitioner is that she was in physical possession of the suit house prior to and on the date of eviction. Therefore, the revision petitioner should be put to possession, as she and opposite party No.7 are living separately on the basis of the order passed by the learned SDJM, Jeypore in M.C. No.118 of 1996. Concluding his argument, Mr. Mishra made prayer to allow the revision petition.

4. Mr.D.R.Bhokta, learned counsel appearing for opposite parties submitted that since the Civil Revision Petition arises out of the misc. case/interim application under Section 144, CPC, the same is not maintainable. According to the provision of Rule 431 of the G.R.C.O. (Civil) Volume-I, application under Section 144, CPC is to be registered as a misc. case. Placing reliance on the judgment of this Court in *Alok Kumar Bohidar*

and another Vs. Rajkishore Mathur and another, 96(2003) CLT 39, Mr.Bhokta submitted that the impugned order is an interlocutory one and registered as a Misc. Case. It is further submitted that all the proceedings registered as Misc. Case on the basis of miscellaneous application will come within the purview of interim proceeding as provided in the proviso to Sub-section (1) of Section 115 of the Code and those cannot be a matter of revision under Section 115, C.P.C. In support of his contention, he relied upon the decision of this Court in the case of *Sitaram @ Mahendra Ghosh V. Sri Antaryami Mohapatra and 18 others and other connected cases* 96 (2003) CLT 762. Placing reliance of the judgment of the Hon'ble Supreme Court in the case of *Shiv Shakti Cooperative Housing Society, Nagpur Vs. M/s Swaraj Developers & Ors*., 96 (2003) CLT 201 (SC), Mr. Bhokta submitted that the orders which are interim in nature cannot be a matter of revision under Section 115, CPC and therefore, the present Civil Revision Petition is not maintainable.

5. It was further submitted that opposite party No.7 was a tenant under Opposite Parties 1 to 6. The suit house was leased out to opposite party No.7 on 25.10.1993 and subsequently after few months opposite party No.7 brought the petitioner to the suit house and resided with her. Opposite party No.7 paid house rent till February, 2002 and failed to pay the house rent thereafter from the month of March, 2002 till filing of the suit. The plaintiffs issued a registered notice under Section 106 of T.P. Act on 20.05.2003 terminating the tenancy. Suit house was only leased out to opposite party No.7 vide agreement dated 25.10.2003 and the revision petitioner was allowed to stay with him as concubine. Maintenance case as well as G.R. Case is pending before the learned Courts below between the petitioner and opposite party No.7. The suit house was never leased out in favour of the revision petitioner. Under Section 115, CPC, the High Court cannot re-appreciate the evidence and cannot set aside the concurrent finding of the Courts below by taking different view on the evidence. The High Court is empowered only to interfere with the findings on the facts, if the same are perverse or there has been non-appreciation or non-consideration of material evidence on record by the Courts below. Simply because another view on the evidence may be taken is no ground for the High Court to interfere with its Revisional jurisdiction. In support of the above contention, Mr.Bhokta relied on the judgment of the Hon'ble Supreme Court in the case of *Yunis Ali (dead) through his Lrs. Vs. Khursheed Akram,* AIR 2008 SC 2607.

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

(i) Whether the present revision petition challenging the order dated 04.11.2008 passed by the Civil Judge (Senior Division), Jeypore in C.M.A. No.62 of 2007 as well as the confirming order of the learned District Judge, Koraput dated 10.04.2009 passed in F.A.O. No.58 of 2008, arising out of a petition filed under Section 144 CPC for restoration of possession, is maintainable?

(ii) If the civil revision petition is maintainable; whether the revision petitioner is entitled to the relief prayed for in the revision petition?

(iii) What order?

7. Question no.(i) is with regard to maintainability of the Civil Revision Petition. Challenging maintainability of the Civil Revision Petition, Mr. Bhokta, learned counsel contended that the impugned order is interim in nature which does not finally decide the lis and therefore, the same cannot be challenged by way of revision under Section 115 of the CPC. Placing reliance on the decision of this Court in *Sitaram @ Mahendra Ghosh v. Sri Antaryami Mohapatra and 18 others* (CRP No. 89 of 2002) *and other connected cases (supra)*, Mr. Bhokta submitted that the term "proceeding" must be proceeding of an equivalent status of a suit and does not include a proceeding arising in or out of a suit. Therefore, all the proceedings registered as Misc. Cases on the basis of miscellaneous application, be it for a temporary injunction, appointment of receiver, restoration of the suit, setting aside the *ex parte* decree will not come within the purview of the term "proceeding" as provided in the proviso to sub-Section (1) of Section 115 of the Code. Further, referring to the GRCO (Civil) Vol.-I Mr. Bhokta submitted that Rule 33 provides the list of miscellaneous jurisdiction cases in which application under Section 144 of CPC is included. Therefore, this case is not maintainable.

8. The contention of Mr. Mishra appearing for the revision petitioner is that an application for restitution made under Section 144, CPC is covered under the expression "proceeding" appearing in Section 115 of the CPC. Therefore, the civil revision petition is maintainable.

9. At this juncture, it is necessary to quote the relevant provision of Sec. 115 of the CPC.

> **"115. Revision**.- (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

Provided that the High Court shall not, under this section , vary or reverse any order made, or any order deciding an issue in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

10. The Hon'ble Supreme Court in the case of ***Siva Sakti Coop. Housing Society*** (supra) held as follows:–

"A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115."

Thus, if the impugned order is of interim in nature and does not finally decide the lis, the revision will not be maintainable.

11. In the instant case, petition made under Section 144 of CPC is for restitution of possession of disputed property. Sub-section (2) of Section 144, CPC reads as follows:-

"(2) no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section (1)."

Thus sub-section (2) debars a party from instituting any suit for the purpose of obtaining restitution or other relief which could be obtained by application under sub-section (1). A close look to sub-section (2) of Section 144, CPC makes it clear that an application made under Section 144, CPC for

restitution is a proceeding of equivalent status of a suit. In the instant case, had the order on the application under Sec. 144, CPC for restitution been made in favour of the petitioner, applying for revision that would have been finally disposed of the proceeding under Section 144. Merely because the application u/s.144, CPC is included under Rule 431 of GRCO (Civil) Vol. I which speaks of list of miscellaneous jurisdiction cases that will not improve the case of opp. parties for the reasons stated above. Nomenclature of a proceeding will not determine the nature and character of that proceeding for the purpose of Section 115, C.P.C.

12. In view of the above, this Court is of the opinion that proceeding under Section 144 (1), CPC for restitution is coming within the purview of "other proceeding" appearing in Sec. 115, CPC and therefore, the revision petition is maintainable.

13. Question no.(ii) is whether revision petitioner is entitled to the relief prayed in Civil Revision Petition.

Undisputedly, the suit for eviction was filed impleading opposite party No.7 and the revision petitioner as defendant Nos. 1 and 2 respectively. Case of plaintiff-opposite party Nos. 1 to 6 is that opposite party No.7 has already given re-delivery of possession. The Trial Court as well as the Appellate Court has not taken into consideration the fact that the suit for eviction was filed against the revision petitioner and opposite party No.7 where as re-delivery of the possession of the suit property was given to opposite party No.7 alone. Apart from that on 16.09.1999 opposite party No.5 through Sri M.Upendra Rao, Advocate had issued notice to the revision petitioner and opposite party No.7 and others to quit/vacate the suit house. Opposite party No.7/Defendant No.1 through his Advocate replied to the said notice as follows:-

> " My client is no way concerned with the house in question. My client never took the house on lease, nor stayed therein at any time. Ch.Subhalakshmi clearly stated in her deposition in M.C. Case No.118/96 that her daughter K.Nagamani by paying Rs.20,000/- to G.Venketeswar Rao is in possession of the house for about last four years.
>
> Smt. Nagamani also claims that she has paid Rs.50,000/- to G.Rama Devi, D/O. G.Satyabati on 30.03.92 and in possession of the lease.
>
> Therefore, it clearly goes to show that my client is no way concerned with the house nor inducted sub tenants."

The above reply has not been taken into consideration by the learned Trial Court as well as the Appellate Court while dealing with petitioner's application for restitution. This amounts to non-appreciation or non-consideration of the material evidence on record by the Lower Court. The Hon'ble Supreme Court in the case of *Yunis Ali (dead) through his Lrs. (supra)* held that the High Court is empowered to interfere with the findings of facts if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the Courts below.

14. As per the averments made in paragraph 8 of the revision petition, the petitioner was in physical possession of the suit land prior to her eviction and the petitioner and opposite party No.7 were living separately as per order passed by the SDJM, Jeypore in M.C. No.118/96. On the contrary, it is stated by opposite parties that Suit house is only leased out to opposite party No.7 vide agreement dated 25.10.2003 and the revision petitioner was allowed to stay with him as concubine. Maintenance case as well as G.R. Case is pending before the learned Courts below between the petitioner and opposite party No.7. The suit house was never leased out in favour of the revision petitioner.

15. In the fact situation, interest of justice would be best served if the possession taken by Defendant No.1 (opposite party No.7)-husband will be treated as constructive possession taken by defendant No.2-wife. This, however, will be subject to the final outcome of the original suit which shall be disposed of as early as possible, but not exceeding six months from today.

16. In the result, the Civil Revision Petition is allowed and the orders of the learned District Judge, Koraput and the learned Civil Judge (Sr. Division), Jeypore dated 10.04.2009 and 04.11.2008 respectively are set aside. No costs.

Revision allowed.

2013 (II) ILR - CUT- 445

B. N. MAHAPATRA, J.

M.A.C.A. NO. 679 OF 2009 (Dt.15.04.2013)

SUMITRA DEV & ORS. ……Appellants

.*Vrs.*

ISWAR CHANDRA SAMAL & ANR. ……..Respondents

MOTOR VEHICLES ACT, 1988 – S.140, 166.

Motor accident – Deceased was working as the helper in the offending Bus – Evidence shows that the front wheel axle was broken for which the Bus capsized and the deceased fell down and died – Tribunal held the accident was not taken place due to rash and negligent driving of the driver and dismissed the claim petition being not maintainable – Hence the appeal.

Held, due to the use of the offending Bus the deceased met with the accident and died and it is not correct to hold that the death of the deceased was not caused due to negligent driving of the driver – The claim petition is maintainable and needs fresh adjudication – Impugned order set aside and the matter is remanded to the claims Tribunal for disposal afresh. (Para 22)

Case law Relied on:-

2011 (2) TAC 396 (Gau.) : (Mafisuddin Khadim-V- National Insurance Co.Ltd.).

Case laws Referred to:-

1.2003 ACJ 716 : (Nain Dev.-V- Balwinder Singh)
2.2004(II) OLR (SC) 266 : (Deepal Girishbhai Soni & Ors.-V- United Insurance Co. Ltd., Baroda).
3.AIR 1977 SC 1248 : (Minu B. Mehta & Anr.-V- Balkrishna Ramchandra Nayan & Anr.)
4.1977 ACJ. 343 : (Pushpabai Purshottam Udeshi & Ors.-V-M/s. Ranjit Ginning & Pressing Co. & Anr.)
5.2001(1) TAC 649 (SC) : (Kaushnuma Begum & Ors.-V- New India Assurance Co. Ltd. & Ors.)
6.1998 (2) TAC 643 (SC) : (Samir Chand-V- M.D., Assam State Transport Corpn.).

For Appellants - M/s. B. Singh, P.B. Sinha, P.Bedi & R.R. Jena.
For Respondents – M/s. S.K. Swain, L.P. Swain & U.N. Sahoo-2 (R-2).

B.N.MAHAPATRA,J. This is an appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') filed by the claimant-appellants against the judgment dated 13.05.2009 passed by the Motor

Accident Claims Tribunal (First), Balasore (hereinafter referred to as "the Tribunal") in MAC Case No.27 of 2007.

2. The case of the claimant-petitioners before the learned Tribunal was that on 11.12.2006 while the deceased, Sashibhushan Dev, was proceeding from Joda to Barbil in a Bus bearing Registration No.OR-09-G-0993 in the capacity of helper of the said vehicle, the bus was suddenly capsized on the way near Baneikala Basti Road due to rash and negligent driving of the driver of the vehicle. As a result of such accident, the deceased sustained grievous injuries on his head, chest and other parts of his body and died at the spot. Subsequently, the body of the deceased was removed to Barbil hospital where post mortem examination was conducted. A police case was registered bearing Joda P.S. Case No.221 of 2006 against the driver of the vehicle for having caused the death of the deceased due to rash and negligent driving. Case of the claimant-petitioners was that since the accident took place due to rash and negligent driving of driver of the vehicle resulting death of the deceased, opposite parties are liable to pay compensation to the claimants. Further case of the claimants is that at the time of death of the deceased, he was 30 years old and was earning Rs.3,000/- per month and the claimants were dependants on his income. With these pleadings, the claimant-petitioners filed claim petition claiming compensation of Rs.4,00,000/-.

3. In absence of opposite party No.1-owner of the vehicle, the claim petition was heard ex parte.

4. The insurer- opposite party No.2 filed written statement and contested the claim of the appellant/petitioners denying the accident and involvement of the vehicle therein. While disputing the fact that the accident was due to rash and negligent driving of the driver of the vehicle, it was pleaded that the driver of the vehicle had no valid and effective driving licence and opposite party No.1-owner knowing fully well that the driver of the vehicle did not have valid driving licence had allowed him to ply the vehicle. Therefore, opposite party No.2-Insurance Company is not liable to pay any compensation. The Insurance Company also disputed the age, income and occupation of the deceased and denied their liability to pay the compensation.

5. On the basis of the pleadings of the parties, learned Tribunal framed the following issues:-

"(1) Whether there is any cause of action and is the case maintainable?

(2) Whether the deceased died in a Motor Vehicular accident due to rash and negligent driving of the driver of the offending vehicle bearing Regd. No.OR-09G-0993 on 11.12.2006?

(3) Whether the driver alleged to have been driving the offending vehicle was possessing valid driving licence at the time of accident?

(4) Whether the petitioners are entitled to get any compensation and if so from whom and to what extent?"

6. The claimants examined two witnesses, who were examined as P.Ws.1 and 2 and filed seven documents, which were marked as Exts.1 to 7. The Insurance Company has examined none as witness but produced one document on its behalf, which was marked as Ext.A.

7. After taking into consideration the oral as well as documentary evidence and rival contentions of the parties, the Tribunal came to the conclusion that the claimants had cause of action to maintain the claim case. It is further held by the Tribunal that though the deceased died at the spot due to the vehicular accident involving the offending vehicle, the accident was not due to the negligence of the driver of the vehicle. Placing reliance on a judgment in the case of *Nain Dev Vs. Balwinder Singh*, 2003 ACJ 716, the Tribunal further held that the claimant-petitioners are entitled to get a compensation of Rs.50,000/- from opposite party No.2 on account of principle of no fault liability as the vehicle was duly insured with opposite party No.2. With this finding, the Tribunal passed the impugned order directing respondent No.2-Insurance Company to pay an amount of Rs.50,000/- as compensation along with interest at the rate of 7% per annum from the date of filing of the claim petition, i.e., 12.02.2007 within two months from the date of passing of such order. The Tribunal further directed to keep Rs.40,000/- out of the compensation amount in a fixed deposit in any nationalized bank for a period of six years in the name of claimants and remaining amount of Rs.10,000/- to be paid by way of separate cheque to claimant-petitioner No.1. Hence, the present appeal.

8. Mr.Singh, learned counsel appearing on behalf of the appellants submitted that the Tribunal has committed grave error of law in holding that the death of the deceased was caused not due to negligent driving of the vehicle and, therefore, the claimants are entitled to get compensation of Rs.50,000/- as provided under Section 140 of the M.V. Act. The appellants preferred claim petition under Section 166 of the M.V. Act. Without any justifiable reason, the Tribunal illegally and arbitrarily awarded compensation under Section 140 of the M.V. Act. Mr. Singh further submitted that law is well-settled that when mechanical failure is pleaded, onus is on the driver

and the owner to satisfy the conscience of the Court that such mechanical failure of the vehicle has resulted not due to lack of care and caution on their part which they had to undertake from time to time to keep the vehicle in road-worthy condition. In other words, it must be proved as to what type of care was taken to make the vehicle roadworthy, how old the vehicle was, how much mileage the vehicle has covered and at what interval it was checked up or which was the last occasion when it was found fit and proper and by whom. Neither the owner nor the insurer has adduced any evidence to that effect. Therefore, it cannot be said that the accident was caused not due to the negligence of the driver of the vehicle. The Tribunal has committed gross illegality by ignoring the documentary evidence i.e., Exts. 1 and 2 on record, which clearly reveal that the vehicle was driven in a rash and negligent manner for which the accident was caused, whereafter charge-sheet has been submitted under Sections 279/304-B of I.P.C. against the driver of the vehicle. Concluding his argument, Mr.Singh submitted that this is a fit case where claim petition is maintainable under Section 166 of the M.V. Act and compensation should have been awarded under Section 168 of the M.V. Act.

9. Per contra, learned counsel, Mr.S.K.Swain, appearing on behalf of respondent-Insurance Company submitted that in absence of any supporting material on record, the Tribunal is justified to hold that the death of the deceased was not caused due to rash and negligent driving of the driver of the offending vehicle and the claimants are entitled to get compensation on the principle of no fault liability under Section 140 of the M.V. Act. Therefore, he prayed for dismissal of the appeal.

10. On the rival contentions raised by the parties, the only question that falls for consideration by this Court is whether the Tribunal is justified to hold that the death of the deceased was not caused due to negligent driving of the driver of the offending vehicle and the claimants are entitled to be awarded with compensation under Section 140 of the M.V. Act on account of principle of no fault liability as the claim petition under Section 166 is not maintainable.

11. Section 140(1) of the M.V. Act provides that where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles the owner of the vehicle shall, or as the case may be, the owners of the vehicles shall jointly and severally be liable to pay compensation in respect of such death or disablement. Amount of compensation payable under sub-section (1) is in accordance with the provisions of sub-section (2) of Section 140.

To claim compensation under sub-section (1), the claimant shall not require to plead and establish the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

The claim for compensation under sub-section (1) of Section 140 shall not be defeated by reason of any wrongful act or negligence or default of the person in respect of whose death or permanent disablement the claim has been made. The compensation awarded under Section 140 of the Act is in the nature of an interim award. Such payment of interim award or its acceptance is subject to final decision in the main claim case.

The owner of the vehicle who is liable to pay compensation as provided under sub-section (2) of Section 140 is also liable to pay compensation under any other law for the time being in force provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under Section 140 or under Section 163A of the M.V. Act.

12. Section 163A provides special provisions as to payment of compensation on structured formula basis. Under Section 163A of the M.V. Act specified class of persons whose annual income is up to Rs.40,000/- are covered. The owner of the motor vehicle or the authorized insurer shall be liable to pay, in the case of death or permanent disablement due to accident arising out of use of motor vehicle, compensation as indicated in the 2nd schedule to the legal heirs or the victim, as the case may be. In case of claim, for compensation under Section 163A, the claimant shall not be required to plead or establish that death or permanent disablement, in respect of which claim has been made was due to any wrongful act or negligence or default of the owner of the vehicle or vehicles concerned or of any other person.

13. While Section 140 and Section 163-A of the M.V. Act relate to claim on the basis of no fault liability, Section 166 of the Act provides for a complete machinery for laying a claim on fault liability.

Claims for compensation under Section 166 of the M.V. Act are required to be determined in terms of Chapter XII of the Act. The Hon'ble Supreme Court in the case of ***Deepal Girishbhai Soni and others vs. United Insurance Co. Ltd., Baroda,*** 2004 (II) OLR (SC) -266, held as under:

> "67. ...In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to Rs.40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act."

14. Undisputed facts are that the deceased died at the spot in the vehicular accident involving the offending vehicle while he was working in the capacity of a Helper in the said offending vehicle. The Tribunal on the basis of the evidence of PWs 1 and 2 came to a conclusion that the accident did not take place due to rash and negligent driving of the driver. The relevant portion of the finding of the learned Tribunal is extracted herein below:-

> "Petitioners in support of their case not only examined the wife of the deceased (P.W.1) but also independent witness (P.W.2). Admittedly, the wife of the deceased has not seen the accident and as such she is incompetent to speak under what circumstances the accident was taken place.
>
> Coming to the testimony of independent witness (P.W.2), he deposed that on 11.12.2006 at about 12 noon while Bus 'Soudagor' bearing Regd. No.OR-06 G-993 was going towards Barbil from Joda, the front wheel axle was broken for which the Bus was capsized. Consequently, the deceased fell down and sustained injuries and met spot death. Though there is no serious cross-examination to this witness, I should say his evidence discloses that the accident was not taken place due to rash and negligent driving of the driver, but on account of sudden breakage of the vehicle. According to him, the Bus was capsized for the reason that the front wheel axle was broken. If that be so, capsize of the Bus cannot be attributed to the negligence of the driver."

15. From the above, it reveals that P.W.2 in his evidence stated that the accident took place on account of sudden breakage of front wheel axle of the vehicle and the bus was capsized. Nothing reveals from the impugned order that the opposite party/respondent owner has proved that mechanical failure has resulted in the accident despite due care and caution taken by the owner and/or the driver from time to time to keep the vehicle in roadworthy condition. It has not been proved by any evidence as to what care was taken by the owner of the vehicle to make the vehicle roadworthy; how old the vehicle was? How much mileage had it covered and at what interval it was being checked or which was the last occasion when it was found fit and

proper and by whom. In the instant case, neither the owner nor the insurer has adduced any evidence to that effect.

16. At this juncture, it will be beneficial to rely on some of the judicial pronouncements of the Hon'ble Supreme Court and some of the High Courts.

17. The Hon'ble Supreme Court in the case of ***Minu B. Mehta and another Vs. Balkrishna Ramchandra Nayan and another*****,** AIR 1977 SC 1248 held as under:-

> "14. The burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden. In this case in the written statement all that is pleaded is that the axle brake ring of the lorry came out and the driver lost control of the motor lorry and that the defect can develop in a running vehicle resulting in the driver's losing control of the steering wheel. Though it was stated that all precautions were taken to keep the lorry in a roadworthy condition it was not specifically pleaded that the defect i.e. the axle brake ring coming out, is a latent defect and could not have been discovered by the use of reasonable care. This lack of plea is in addition to the lack of evidence and the fact that the defence set up has been rightly rejected by the Tribunal."

18. The Hon'ble Supreme Court in the case of ***Pushpabai Purshottam Udeshi and others Vs. M/s Ranjit Ginning and Pressing Co. and another***, 1977 A.C.J. 343 held as under :-

> "6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause

than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states: "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care. Applying the principles stated above we have to see whether the requirements of the principle have been satisfied. There can be no dispute that the car was under the management of the company's manager and that from the facts disclosed by P. W. 1 if the driver had used proper care in the ordinary course of things the car could not have gone to the right extreme of the road, dashed against a tree and moved it a few inches away. The learned counsel for the respondents submitted that the road is a very narrow road of the width of about 15 feet on either side of which were fields and that it is quite probable that cattle might have strayed into the road suddenly causing the accident. We are unable to accept the plea for in a country road with a width of about 15 feet with fields on either side ordinary care requires that the car should be driven at a speed in which it could be controlled if some stray cattle happened to come into the road. From the description of the accident given by P.W.1 which stands unchallenged the car had proceeded to the right extremity of the road which is the wrong side and dashed against a tree uprooting it about 9 inches from the ground. The car was broken on the front side and the vehicle struck the tree so heavily that the engine of the car was displaced from its original position one foot on the back and the steering wheel and the engine of the car had receded back on the driver's side. The car could not have gone to

the right extremity and dashed with such violence on the tree if the driver had exercised reasonable care and caution. On the facts made out the doctrine is applicable and it is for the opponents to prove that the incident did not take place due to their negligence. This they have not even attempted to do. In the circumstances we find that the Tribunal was justified in applying the doctrine. It was submitted by the learned counsel for the respondents that as the High Court did not consider the question this point may be remitted to the High Court. We do not think it necessary to do so for the evidence on record is convincing to prove the case of rash and negligent driving set up by the claimants."

19. The Hon'ble Supreme Court has rendered a decision in the case of ***Kaushnuma Begum and others Vs. New India Assurance Co. Ltd. and others***, 2001(1) T.A.C. 649 (S.C.), wherein the vehicle involved in the accident was a jeep. It capsized while it was in motion. The cause of capsize was attributed to bursting of the front tyre of the jeep. In the process of capsizing, the vehicle hit against one Haji Mohammad Hanif who was walking on the road at that ill-fated moment and consequently that pedestrian was crushed and subsequently succumbed to the injuries sustained in that accident. In that case, the Hon'ble Supreme Court held as under:-

"11. It must be noted that the jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. Negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of the use of motor vehicles. There are other premises for such cause of action.

12. Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? This question depends upon how far the Rule in Rylands v. Fletcher (1861-73 All ER (Reprint) 1) (supra) can apply in motor accident cases. The said Rule is summarised by Blackburn, J. thus :

"The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse

himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

20. The Hon'ble Supreme Court in the case of ***Samir Chand Vs. M.D., Assam State Transport Corporation***, 1998 (2) T.A.C. 643 (SC) held as under:-

"15. After going through the judgment of the High Court, we are of the view that the High Court was not right on facts that there was no negligence on the part of the owner or the driver of the bus especially when the appellant has specifically pleaded about the negligence which was accepted by the Tribunal in the light of the pleadings and of the evidence produced before it. The explosion took place inside the bus is an admitted fact and the usual police escort was not there. The High Court, except observing that there was no negligence, has not upset the finding of the Tribunal that the atmosphere during the period of accident was so polluted requiring care on the part of the conductor and driver of the bus. There cannot be any doubt that the accident arose out of the use of the motor vehicle justifying the claim of the appellant. We are satisfied with the assessment of the Tribunal in quantifying the compensation in a sum of Rs.1,20,000/- with interest at the rate of 12%."

21. The Gauhati High Court in the case of ***Mafisuddin Khadim Vs. National Insurance Company Ltd.,*** 2011 (2) T.A.C. 396 (Gau.) held as under:-

"22. As revealed from the record, there is nothing on record to find that the injured, who was driving the vehicle had any negligence or lapse on his part. Admittedly, the tree had suddenly fallen on the top of the vehicle and due to falling of the tree on the said vehicle, which was used by the appellant, the appellant sustained the injuries. Had he not used the vehicle at the relevant time, he would not have sustained the injuries. So, it can be held that he sustained the injuries only because, unfortunately, he had used the said vehicle. Therefore, he sustained the injuries during the course of the use of the vehicle aforesaid. In view of the above, considering the entire aspect of the matter and in the light of the principles laid down in the above cited decisions and the statutory provisions prescribed by the Motor Vehicles Act, I have no hesitation in holding that the claimant sustained the injuries while using the vehicle and as such the injuries sustained by him was caused due to

accident arising out of the use of the said vehicle. Therefore, the only conclusion would be that the claimant sustained the injuries in a vehicular accident.

23. In view of the above discussion, I am of the considered opinion that the learned trial Judge committed error by holding that the injuries sustained by the claimant, due to fall of a tree on the vehicle, did not amount to a vehicular accident. Accordingly, it is held that the vehicle used by the claimant met with an accident on the relevant date and as such the claimant sustained the injuries in a vehicular accident involving the said vehicle.

24. In view of the above discussion, there is sufficient merit in this appeal. Hence, the appeal is allowed. The impugned judgment and order is set aside and quashed. The matter is remanded back to the Motor Accident Claims Tribunal, Agartala for fresh disposal in the light of the above observation, after giving opportunities to both the parties. As the claim case relates to the year 2000, the learned Member, Motor Accident Claims Tribunal, West Tripura, Agartala is directed to dispose off the matter within a period of three months from the date of receipt of copy of this judgment and order."

22. In view of the above, this Court is of the opinion that the Tribunal is not correct in holding that the death of the deceased was not caused due to negligent driving of the driver of the offending vehicle. Hence, the claim petition filed under Section 166 of the Act, 1988 is maintainable and the same needs to be adjudicated afresh. From the impugned order, this Court finds that since the claim application of the appellant-petitioners for award of the compensation was rejected on the ground that there was no rash and negligent driving on the part of the driver, other issues relating to age and income have not been adjudicated by the learned Tribunal.

23. In the fact situation, the impugned judgment and order is set aside. The matter is remanded back to the Motor Accident Claims Tribunal (First), Balasore for disposal afresh in the light of the observation made above and keeping in mind the various judicial pronouncements cited hereinbefore after giving opportunity to both parties. Since the accident took place in the year 2006, learned Tribunal is directed to dispose of the matter within a period of four months from the date of receipt of a copy of this judgment.

24. In the result, the appeal is allowed to the extent indicated above.

Appeal allowed.

2013 (II) ILR - CUT- 457

S.C. PARIJA, J.

W.P.(C) NO. 5224 OF 2013 (Dt.29.07.2013)

JAGABANDHU BARIK ……..Petitioner

.Vrs.

SMT. KUMUDINI NAYAK …….Opp. Party

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 25(1)(V)

Election for the post of Sarpanch – Petitioner was elected – Disqualification for having three children after the cut off date, i.e., 18.04.1994 – Petitioner produced Ext.-A and Ext.-F showing that one child namely Smitarani is the daughter of his brother Jayadev Barik which was disbelieved and not accepted by the trial court – Opp. party filed entries in the School Admission Register and School Leaving Certificate to prove that petitioner is the father of Smitarani – Petitioner failed to adduce any evidence to rebut the same – Petitioner has not been able to establish that findings of fact recorded by the learned Trial Court are not based on any evidence or the findings are totally perverse – Held, no infirmity or illegality in the impugned judgement calling for interference by this Court.. (Paras,17,18)

For Petitioner - M/s. S.P.Mishra,S.Mishra,
S.K.Sahoo, A.K.Das, B.K.Panda,
B.S.Panigrahi, J.K.Mohapatra
For Opp. Party- M/s. Bhaktahari Mohanty, R.K. Nayak,
B.Das, T.K.Mohanty, P.K. Swain, M.Pal

S.C. PARIJA, J. This writ petition has been filed challenging the judgment dated 26.02.2013, passed by the learned District Judge, Jajpur, in G.P. Election Appeal No.01 of 2013, dismissing the same and confirming the judgment dated 04.01.2013, passed by the learned Civil Judge (Jr. Division), Jajpur, in Election Case No.03 of 2012, holding the petitioner disqualified for the post of Sarpanch of Mangarajpur Grama Panchayat and declaring the opposite party as the Sarpanch of the said Grama Panchayat.

2. The brief facts of the case as detailed in the writ petition is that the petitioner and the opposite party contested the election for the post of Sarpanch of Mangarajpur Grama Panchayat, which was held on 13.02.2012.

In the said election, after counting of votes, the petitioner was declared elected. The opposite party challenged the election of present petitioner in Election Case No.03 of 2012, before the Civil Judge (Jr. Division), Jajpur, mainly on the ground that the petitioner has three children after the cut-off date, i.e. 18.04.1994, namely, Smitarani Barik, Jyotismita and Bhakti Prasad, who were born on 10.04.2000, 20.05.2002 & 07.07.2009 respectively and therefore he is disqualified for being elected as Sarpanch, as per the provisions of Section 25(1)(v) of the Orissa Grama Panchayat Act, 1964 (the 'Act' in short). Accordingly, opposite party prayed for declaring the petitioner disqualified for the post of Sarpanch of Mangarajpur Grama Panchayat and to declare the opposite party as the elected Sarpanch.

3. The petitioner contested the case by filing objection and pleaded that the marriage between him and Manorama was solemnized on 08.03.2000 and out of their wedlock one daughter, namely, Jyotismita was born on 20.02.2002 and subsequently he was blessed with a son, namely, Bhakti Prasad on 07.07.2009. It was specifically pleaded by the petitioner that he has no third child as has been alleged and that Smitarani Barik is the youngest daughter of Jaydev Barik, who is his brother and that he had only got Smitarani Barik admitted in the school in the absence of his brother and had signed the admission register of the school as the guardian. It was pleaded by the petitioner that as he married Manorama on 08.03.2000, it was not possible for her to give birth to Smitarani on 10.04.2000. Accordingly, the petitioner prayed for dismissal of the election petition.

4. On the pleadings of the parties learned Trial Court framed as many as five issues for consideration, out of which Issue Nos.III and IV were the vital issues, which are as follows :

(III) Whether the Opp. Party has more than two children after the cut-off date i.e. 18.04.1994 and his nomination paper was improperly accepted by the Election Officer.

(IV) Whether the petitioner can be declared as the Sarpanch of Mangarajpur G.P. in place of O.P.

5. During trial of the case the present opposite party examined four witnesses and relied upon the documents marked as Exts.1 to 7 series. The present petitioner examined fourteen witnesses and relied upon the documents marked as Exts.A to L series.

6. Learned Trial Court after considering the evidence on record, both oral and documentary, came to find that the petitioner has more than two children after the cut-off date and therefore he is disqualified for the post of Sarpanch of Mangarajpur Grama Panchayat, as provided under Section 25(1)(v) of the OGP Act. As there were only two candidates in the election fray, learned Trial Court proceeded to declare the present opposite party as the Sarpanch of Mangarajpur Grama Panchayat, in place of the present petitioner.

7. Being aggrieved by the judgment of the Trial Court, the present petitioner moved the learned District Judge, Jajpur, in G.P. Election Appeal No.01 of 2013. The learned Appellate Court, after re-appreciating the evidence on record and considering the findings of the learned Trial Court, as recorded in the impugned judgment and the reasons assigned in support of the same, has come to hold that there is no infirmity or illegality in the impugned judgment of the Trial Court, so as to warrant any interference and has accordingly dismissed the appeal.

8. Learned counsel for the petitioner submits that the Trial Court erred in not accepting the documentary evidence under Exts.A, F, K, H and H/1, which clearly reveals that the petitioner was not the father of Smitarani Barik. It is further submitted that the learned Trial Court should not have accepted the entries in the school register under Exts.5, 5/a and 6, which does not conclusively prove that Smitarani is the daughter of the petitioner. It is further submitted that the appreciation of the oral evidence of the P.Ws.6, 7 & 8 by the learned Trial Court is improper and incorrect and therefore the conclusion arrived at by the learned Trial Court on the basis of such oral evidence is wholly erroneous and misconceived. Accordingly, a prayer has been made to quash the judgment of the Trial Court and the Appellate Court and dismiss the election petition filed by the opposite party.

9. Learned counsel for the opposite party submits that as the documents under Exts.5, 5/a & 6 are the admission register and school leaving certificate, which clearly shows that Smitarani Barik is the daughter of the present petitioner and Manorama, learned Trial Court has rightly relied upon the said documents in coming to hold that the petitioner has more than two children after the cut-off date and is therefore disqualified for being elected to the post of Sarpanch of Mangarajpur Grama Panchayat. It is further submitted that as the oral evidence of OPW-6, who is the wife of the present petitioner and OPW-8, who is the wife of Jayadev Barik, clearly goes to show that the petitioner and Manorama had two children by the year 2007

and admittedly the male child, namely, Bhakti Prasad Barik was born to the petitioner and Manorama in the year 2009, learned Trial Court has rightly appreciated the said oral evidence of OPWs-6 & 8 in coming to hold that the petitioner had more than two children after the cut-off date and is therefore disqualified for the post of Sarpanch, as provided under Section 25(1)(v) of the OGP Act.

10. On a perusal of the impugned judgment of the Trial Court it is seen that Ext.A is the information supplied by local ANM (OPW-13), under the RTI Act, which shows that Smitarani Barik, who was born on 10.04.2000 is the daughter of Jaydev Barik and Sukanti Barik. OPW-13 in her deposition has stated that she had supplied information under Ext.A to the present petitioner as per the direction of the Medical Officer of Bramha Barada PHC. She had obtained the information from the original immunization register maintained at Mangarajpur sub-centre. Ext.A has been issued on 31.03.2012. In her cross-examination, OPW-13 has stated that she has not provided the photocopy of the entry related to Ext.A and that the doctor had sent the letter to supply such information. OPW-14, who is the Medical Officer in charge of Madhusudan CHC, in his cross-examination has stated that he is the authorized officer and Public Information Officer under the RTI Act to provide any information related to health which is maintained by any person in the department under the jurisdiction of Madhusudan CHC. He further stated that any person desirous of obtaining any information in respect to any register maintained at Mangarajpur sub-centre, then he should apply before him.

11. Learned Trial Court referring to the document (Ext.A) and the deposition of OPW-13, has come to hold that the information given under Ext.A is not admissible as evidence because of the fact that same is not prepared by any public servant during discharge of the official duty. Learned Trial Court has further found from the order dated 05.10.2012 that the immunization register was produced but the present petitioner did not choose to prove the same and subsequently the Medical Officer (OPW-14) has deposed that the said register is not available at Mangarajpur sub-centre, as the same is damaged. Learned Trial Court has accordingly observed that though the register was produced before the Court on 05.10.2012 and OPW-14 was examined on 18.10.2012, how within such a short period of time the original register could be damaged has not been satisfactorily explained. Accordingly, the learned Trial Court has proceeded to hold that the information under Ext.A does not carry much value.

12. Coming to the Birth Certificate (Ext.F), it shows that Smitarani Barik is the daughter of Sukanti Barik and Jaydev Barik and her date of birth is 10.04.2000. The said Birth Certificate has been issued on 19.03.2012, which is also the date of registration of the birth of Smitarani vide serial No.0213. Learned Trial Court has come to hold that this document (Ext.F) having been prepared after filing of the election petition and during pendency of the proceeding, the same cannot be relied upon as evidence in favour of the present petitioner.

13. As regard the entries in the Live Birth Register of Dharmasala CHC for the year 2009 (Exts.K & K/1), learned Trial Court on verification of the original register has come to find that the digit '2' mentioned therein is found to be different in comparison to other entries were same digit '2' is mentioned. On perusal of that entry in the original register, learned Trial Court has also come to find that the same digit has been tampered with. Another Live Birth Register of Madhusudan CHC of the year 2001-02 (Ext.7) and the relevant entry vide serial No.843, dated 01.06.2002 (Ext.7/a) relates to birth of a female child of the petitioner, who was born on 20.05.2002. On perusal of the said register learned Trial Court has come to find that the order of birth has been mentioned as '2' in column no.19. The entry in the Live Birth Register (Ext.K/1), which is made after preparation of Ext.7/a, also indicates that the order of birth as '2'. Therefore, learned Trial Court has disbelieved the entry in the Live Birth Register (Ext.K/1), with regard to the order of birth, which appeared doubtful.

14. Learned Trial Court has considered the entries made in the Birth Report of the year 2009 of CHC Dharmasala (Ext.L) vis-à-vis the entry made in Ext.K/1 with regard to the order of birth. The doctor (OPW-12) has stated in his evidence that the entry in Ext.L is contrary to the entry made in Ext.K/1. Accordingly, learned Trial Court has come to hold that the genuineness of the entries in Ext.L is doubtful and therefore the same cannot be accepted.

15. Coming to the entries made in the School Admission Register (Ext.5/a) and the School Leaving Certificate (Ext.6) coupled with the admission by the petitioner in para-6 of his objection clearly goes to show that Smitarani is the daughter of the present petitioner and he has failed to adduce any evidence to rebut the same. Accordingly, learned Trial Court has relied upon Exts.6 and 5/a, which are found to be relevant and admissible in evidence.

16. As regard the oral evidence of OPW-6, who is the wife of the present petitioner, she has stated in her evidence that in the last election in 2007, she had filed her nomination for 'Samiti Sabhya' and in the nomination paper she had written that she had two children.

OPW-8, who is the wife of Jaydev Barik has stated in her evidence that they are staying together with the petitioner and that in the last Panchayat election, the wife of the petitioner (OPW-6) contested the election for 'Samiti Sabhya' and by then she had two children.

17. From the aforesaid oral evidence of OPWs-6 and 8, learned Trial Court has came to find that the wife of the petitioner has admitted in her evidence that she had two children by the year 2007. Further it is admitted that a male child, namely, Bhakti Prasad Barik was born to the petitioner and Manorama in the year 2009. Accordingly, on the basis of the oral and documentary evidence on record, learned Trial Court has come to find that Smitarani Barik is the daughter of the petitioner, who was born on 10.04.2000. The birth of other two children, namely, Jyotismita and Bhakti Prasad were on 20.05.2002 and 07.07.2009 respectively, which is admitted by both parties. Accordingly, learned Trial Court has come to hold that it is well established that the petitioner has more than two children after the cut-off date, i.e. 18.04.1994 and therefore he is disqualified for being elected or nominated as Sarpanch of Mangarajpur Grama Panchayat, as per Section 25(1)(v)of the OGP Act. Accordingly, the election of the petitioner as Sarpanch of Mangarajpur Grama Panchayat has been declared to be void.

As there were only two contesting candidates in the election and the petitioner was found to be disqualified, learned Trial Court has proceeded to declare the opposite party as Sarpanch of Mangarajpur Grama Panchayat.

18. On an analysis of the evidence on record, both oral and documentary, as discussed above, the findings recorded by the learned Trial Court cannot be faulted. It is well settled that in exercising power under Articles 226/227 of the Constitution, the High Court does not act as an appellate authority. It will not review or reweigh the evidence upon which the findings of the inferior court purports to be based, unless the findings are perverse or patently erroneous and de hors the factual and legal position on record.

19. In the present case, the petitioner has not been able to establish that the findings of fact recorded by the learned Trial Court are not based on any

evidence or the findings are totally perverse. This Court cannot re-appreciate the evidence nor can it substitute its subjective opinion in place of the findings of the Court below, unless such findings are shown to be so perverse or so unreasonable that no Court would have ever reached them.

20. For the reasons aforestated, I do not find any infirmity or illegality in the judgment of the Trial Court as well as the judgment of the Appellate Court, so as to warrant any interference in this writ petition. The writ petition being devoid of merits, the same is accordingly dismissed. No costs.

Writ petition dismissed.

2013 (II) ILR - CUT- 463

B. K. PATEL, J.

RFA NO. 9 OF 2006 (Dt.26.02.2013)

M.D., WESTERN ELECTRICITY SUPPLY CO. OF ORISSA LTD. BURLA & ORS. ……..Appellants

.Vrs.

RAIBARI CHHATRIA & ORS. ……..Respondents

LIMITATION ACT, 1963 – S.7

Death due to electric shock – Suit for compensation – Each of the heirs of the victim has an independent cause of action to claim compensation and none of them is competent to give discharge in respect of the right of other – Where one of such persons is under disability Section 7 of the Act would come in to play and extend the period of limitation for the entire body of co-heir who had a joint right to sue.

In this case accident took place on 11.4.1999 and suit being a suit for compensation based on torts should have been filed within one year from the date when the cause of action arose as per Article 72 of the Limitation Act but instead the suit was filed on 6.04. 2002 which is

barred by limitation – Held, since plaintiff Nos.2 & 3 were minors at the time of accident and plaintiff No.3 was minor at the time of institution of the suit, provisions of Section 7 of the Act would apply and suit can not be held to be barred by limitation. (Para 9)

For Appellants - M/s. B.C. Panda, S.Mishra, B.N. Das, J.N. Panda & L. Das.
For Respondents - M/s. Basudev Pujari & M.R. Nayak.

B.K. PATEL, J. This appeal is directed against the judgment dated 12.9.2005 passed by learned Civil Judge (Senior Division), Padampur in Money Suit No.3 of 2002 decreeing the suit and directing the appellants-defendants to pay compensation amount of Rs.2,60,000/- to respondents-plaintiffs on account of death of deceased Adhikari Chhatria due to electricity shock.

2. Plaintiffs, who are the widow and sons of the deceased, filed the suit against the WESCO, Bargarh and other officials under WESCO as defendants. Plaintiffs' case is that on 11.4.1999 at night, while returning to his village Charpali from Bijepur, the deceased, who was the only bread earner of the family, came in contact with 11 K.V. live electric wires hanging dangerously at three feet height from the ground surface, got electricity shock and died. Alleging negligence on the part of the defendants in maintenance of electricity lines at the prescribed height, plaintiffs claimed compensation of Rs.3.00 lakhs from the defendants.

3. Defendant No.4 filed written statement admitting that the WESCO is carrying on business of supplying electric energy throughout the western Orissa and denying plaintiffs' allegation that on 11.4.1999 the 11KV electric line was hanging at three feet height from the ground surface on the footpath due to negligence on the part of defendants in maintenance of electricity lines. The defendant no.4 also denied the claim made by the plaintiffs that the deceased was the only earning bread earner of his family and on his death the plaintiffs are thrown to starvation.

4. Considering rival pleadings the following issues were framed by the trial court :-

(1) Is there any cause of action to file the suit?

(2) Whether Adhikari Chhatria died of electrocution due to the negligence of the officers of the defendants-Corporation?

(3) Whether the plaintiff is entitled for the amount claimed?

(4) To what relief, if any, the plaintiff is entitled to?

5. Plaintiffs examined five witnesses P.Ws.1 to 5, including plaintiff nos. 1 and 2 as P.Ws. 1 and 2 respectively and relied upon documents marked Exts.1 to 12, of which Exts.5, 8,11 and 12 are certified copies of documents prepared in course of enquiry in U.D.G.R.Case No.31 of 1999 instituted in connection with death of the deceased. No evidence, oral or documentary, was adduced by the defendants.

6. On an appraisal of evidence on record, in answering issue no.2, the trial court held that the deceased died of electrocution due to negligence of the defendants. While answering issue no.3, it was held that the suit is not barred by limitation and the plaintiffs are entitled to receive compensation amount of Rs.2,60,000/-. Accordingly, issue nos.1 and 4 were also answered in favour of the plaintiffs.

7. In assailing the impugned judgment and decree it was submitted by the learned counsel for the appellants that alleged incident took place on 11.4.1999 whereas the suit was instituted on 6.4.2002, i.e., about three years after the cause of action took place. Therefore, it was contended, the suit is barred by limitation. According to learned counsel for the appellants the suit, being a suit for compensation based on torts, should have been filed within one year from the date when the cause of action arose in view of period prescribed under Article 72 of the Limitation Act (for short 'the Act'). It was argued that the court below illegally held the suit to have been filed in time by invoking provision under Section 7 of the Act. Secondly, it was argued that findings of the trial court with regard to issue no.2 that the deceased got electricity shock due to negligence of the defendants is not supported by evidence on record. Lastly, it was contended that the plaintiffs having not pleaded in the plaint that the deceased was working as a coolie or manual labour, the trial court was wrong in assessing the deceased's income at the rate of Rs.50/- per day.

8. In reply, learned counsel for the respondents contended that the trial court has assigned cogent reasons in respect of the conclusion arrived at in answering all the issues. It is in the evidence that plaintiff nos.2 and 3 were minors during the period of occurrence. Plaintiff no.3 was minor even at the time of institution of the suit. Therefore, in view of provisions under Sections 6 and 7 of the Act the trial court rightly held that the suit was not barred by limitation. Medical evidence of P.W.3, the doctor who conducted post-

mortem examination on the dead body of the deceased, leaves no room for doubt that the deceased died of electrocution. Witnesses to the occurrence have testified that electric line at the spot was hanging at a height of three feet from the ground level across the footpath leading to the deceased's village. In such circumstances, in absence of any rebuttal evidence it was rightly held that electrocution and consequential death of the deceased occurred due to negligence in maintenance of the electric line by the defendants. With regard to the assessment of quantum of compensation payable by the defendants it has been pleaded by the plaintiffs that the deceased was the only bread earner of the family. Evidence of P.Ws.1 and 2 to that effect has not been assailed in any manner. It is in the evidence of P.W.4 that the deceased was working as coolie or labour. The trial court has assessed the compensation amount on the basis of minimum wage of Rs.50/- as is required to be paid to a daily wage earner per day. Therefore, there is absolutely no infirmity in directing payment of compensation amount of Rs.2,60,000/-.

9. Article 72 of the schedule to the Act provides one year period of limitation for a suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being. In the present suit plaintiffs have not alleged violation of any statutory enactment in force. Article 113 of the Act provides three years period of limitation for any suit for which no period of limitation is provided elsewhere in the Schedule to the Act. Admittedly, in the present case the suit has been instituted within three years from the date of death of the deceased when the right to sue accrued to the plaintiffs. Be that as it may, description of age of plaintiff nos.1 and 2 to be aged about eighteen and twelve years respectively in the plaint has not been disputed by the defendants. Therefore, obviously plaintiff no.2 attained majority in the very year when the suit was instituted and plaintiff no.3 was still a minor at that time. Both plaintiff nos.1 and 2 were incurring legal disability to institute the suit during the period when the occurrence took place. Sub-Section (1) of Section 6 of the Act provides, *inter alia*, that where a person entitled to institute a suit is, at the time from which the prescribed period is to be reckoned, a minor, he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the Schedule. Section 7 of the Act provides, *inter alia*, that where one of several persons jointly entitled to institute a suit is under any disability to institute a suit, and a discharge cannot be given without the concurrence of such person, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. The trial court has referred to relevant judicial pronouncements

to conclude that each of the heirs of the victim of an accidental death has an independent cause of action to claim compensation. None of them is competent to give discharge in respect of the right of other. Where one of such persons is under disability Section 7 of the Act would come into play and extend the period of limitation for the entire body of co-heir who had a joint right to sue. Such settled legal principle was not disputed by the learned counsel for the appellants in any manner. In such view of the matter, under the facts and circumstances of the case, there is no infirmity in the finding of the trial court that plaintiff nos.2 and 3 being minors at the time of accident, provisions under Section 7 of the Act would apply for which the suit is not barred by limitation.

10. It is not disputed that Bijepur U.D.G.R. Case No.31 of 1999 was instituted in connection with the death of the deceased. Dead body of the deceased was subjected to inquest and post-mortem examination in course of enquiry into the case. Ext.5, Inquest Report; Ext.8, Final Form; Ext.11, Post-mortem Report and Ext.12, F.I.R. prepared in connection with U.D. G.R. Case No.31 of 1999 are on record. P.W.3 testified that he conducted post-mortem examination over the dead body of the deceased and found that cause of death of the deceased was due to electric current shock and burns on different parts of his body. Therefore, it stands establish that the deceased died of electrocution.

11. Not only P.Ws.1 and 2, who are plaintiff nos.1 and 2 respectively, but also P.W.4 stated that at the spot 11 K.V. live electricity wire was hanging at a height of three feet from the ground surface crossing the road leading from village Charpali to Bijepur. It is in the evidence of P.Ws.1 and 4 that after his death they went to the spot and found that the live electricity wire had touched the neck of the deceased. Thus, it is evident that live electricity wire was hanging at a dangerously low level on the road itself. The defendants, who are responsible for supply of electricity and maintenance of electricity line, have not offered any explanation for not taking care to ensure that the electricity line was secured at a safe height. Therefore, the only inference is that the defendants were neglected in maintaining the electricity line as a result of which the electricity line was hanging on the road at a height of three feet only from the ground level. Hence, there is no infirmity in the finding of the trial court in answering issue no.2 that deceased died of electrocution due to negligence of Electricity Company and its officers.

12. Plaintiffs' assertion in the plaint that the deceased was the only bread earner of the family consisting of the plaintiffs has not been denied in the written statement nor has the assertion of P.Ws. 1,2 and 4 to that effect in

their evidence been assailed in course of cross-examination. P.W.4 stated that the deceased was working as Coolie or labour. It was strenuously contended in course of argument by the learned counsel for the appellants that there being no specific pleading in the plaint that the deceased was working as a Coolie, evidence of P.W.4 to that effect is liable to be ignored. Even if such contention is accepted, evidence adduced by the plaintiffs to the effect that the deceased was the only bread earner of the family remains unshaken. Income of the deceased has been assessed at Rs.50/- per day as was payable as minimum wage to a daily labour. Considering the fact that the deceased died at the age of 35 years, trial court has calculated that the deceased would have earned Rs.3,60,000/- at least during the next 20 years but for his premature death. Allowing deduction of Rs.1,00,000/- towards expenses of the deceased himself trial court has assessed loss of dependency of the plaintiffs due to death of the deceased to be Rs.2,60,000/-. Such assessment of compensation does not at all appear to be unreasonable or exorbitant. Plaintiffs have rightly bee held to be entitled to the amount to which they have been deprived of due to death of the deceased.

13. Before concluding it may be observed that in course of argument learned counsel for the appellants made an attempt to raise certain technical objections like want of verification on the consolidated plaint by plaintiff no.2 upon attaining majority in assailing the impugned judgment. Appellants are instrumentalities of a welfare State. Death of the deceased has been established to have been occurred due to their negligence in proper maintenance of electricity lines. Therefore, such technical objections are uncalled for to defeat the claim which is required to be considered compassionately on humanitarian ground. Appellants being instrumentalities of the State ought to have made an effort to settle the plaintiffs' claim on their own outside the Court, instead of compelling them to be entangled in a protracted litigation for more than a decade.

14. In view of the above discussion, there is no merit in the appeal which is liable to be dismissed. Accordingly, the appeal is dismissed with cost. The impugned judgment and decree are confirmed.

Appeal dismissed.

2013 (II) ILR - CUT- 469

B. K. NAYAK, J.

CRLMC. NO.1476 OF 2009 (Dt.17.10.2012)

AMBIKESH MOHAPATRA & ORS. ……..Petitioners

.Vrs.

LAXMIPRIYA MANNA ……..Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.210 (1)

Magistrate shall stay the proceeding of a complaint case only when he is satisfied or it is made to appear to him that a police investigation in relation to the offence which is the subject matter of complaint is in progress.

In this case complaint petition reveals that the complainant requested police but the police instead of taking action instructed her to approach the Court directly for which the complaint case was filed – There is no allegation that the police accepted the F.I.R. and proceeded with the investigation or having registered the case delayed the investigation – So the order passed by the learned S.D.J.M. Dt.8.9.2006 that the complainant informed the police officer and accordingly a report from the OIC concerned should be called for and adjourned the case from date to date awaiting police report was wholly unjustified and shows non-application of mind by the learned S.D.J.M. - Held, Section 210 Cr.P.C. has no application in the present case and there is no infirmity in the impugned order taking cognizance for interference by this Court..

For Petitioner - M/s. Samir Ku. Mishra
For Opp.Parties- M.s. Sabita Tula

Heard learned counsel for the petitioners, learned counsel for the opposite party.

Perused the records.

Order dated 24.12.2008 passed by the learned S.D.J.M., Balasore in ICC No.387 of 2006 taking cognizance of offences under sections 420,424,465,466,468,506/34 of the Indian Penal Code has been assailed by four of the accused persons, in this application under section 482 of the Code of Criminal Procedure.

The main ground of challenge raised by the learned counsel for the petitioners is that on filing of the complaint case, learned S.D.J.M., Balasore vide his order dated 08.09.2006 being satisfied that a police investigation was going on in respect of the complaint of the complainant-opposite party called for a report from the O.I.C. concerned and adjourned the case from time to time awaiting such police report, but in spite of non-submission of police report he proceeded with enquiry vide his order dated 09.05.2008 and ultimately took cognizance by the impugned order which is in violation of the provisions contained in Section 210, Cr.P.C. and therefore the cognizance be quashed.

The second ground of attack is that even assertions made in the complaint petition and the statements of the witnesses recorded during enquiry do not make out a prima facie case as besides the statements, there was no other material before the learned S.D.J.M. for his prima facie satisfaction about the forgery etc. relating to offences under sections 465,466,468 of the Indian Penal Code.

Learned counsel for the opposite party-complainant on the other hand contends that Section 210 Cr.P.C. has no application to the present case inasmuch as there was no material before the magistrate for his prima facie satisfaction that a police investigation is going on in respect of the complaint case and therefore orders passed from time to time by the learned S.D.J.M. awaiting police report is wholly misconceived. The process calling for police report has only delayed disposal of the complaint lodged by the opposite party.

Section 210 Cr.P.C. runs as under :

> "**210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence**-(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.
>
> (2) If a report is made by the Investigating Police Officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the

complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

It is evident from sub-Section (1) of Section 210 Cr.P.C. that the Magistrate shall stay the proceeding of a complaint case only when he is satisfied or it is made to appear to him that a police investigation in relation to the offence which is the subject mater of complaint is in progress.

The complaint petition in the instant case, copy whereof has been annexed as Annexure-1, reveals that the complainant requested the Police Officers i.e. I.I.C., Balasore as well as the Superintendent of Police, Balasore to take action against the accused persons, but the Police authorities instead of taking any action on her request instructed her to directly approach the court for which the complainant was compelled to file the complaint case. There is no allegation of any sort that the police accepted the F.I.R. of the complainant and proceeded with the investigation or having registered the case delayed the investigation. Therefore, the order of the learned S.D.J.M. dated 08.09.2006 to the effect that the complainant informed the police officer and accordingly a report from the OIC concerned should be called for and adjourning the case from date to date awaiting such police report was wholly unjustified and was the outcome of complete non-application of mind by the learned S.D.J.M. Section 210 Cr.P.C. has no application in the present case. Therefore, the first ground urged by the learned counsel for the petitioners is rejected.

With regard to the submission that no prima facie case is made out, it is found that the allegation in the complaint petition goes to show that subsequent to the marriage of the complainant with accused-petitioner No.4, Sujit Kumar Giri there was torture and ill-treatment of the complainant on the ground of demand of dowry and that subsequently the said accused entered into a bigamous marriage with accused-petitioner No.2, but prepared notarial documents and other LIC papers etc. indulging in forgery in order to show that the marriage of the petitioner Nos. 2 and 4 were prior to the marriage of opposite party with petitioner No.4-Sujit Giri. The submission of the learned counsel for the petitioners that there is no other material with regard to proof of forgery or fabrication of documents except the statements of the

complainant and the witnesses examined during enquiry is of no consequence as because at the stage of cognizance the magistrate has to reach only a prima facie satisfaction about the commission of offences and not to scrutinize the evidence to find out whether the evidence is sufficient for the purpose of conviction. The accused-petitioners will get ample opportunity during trial to show that there was no forgery or fabrication of documents.

In the light of the discussions made above, I find no infirmity in the order of cognizance. Therefore, the CRLMC is dismissed.

Application dismissed.

2013 (II) ILR - CUT- 472

B. K. NAYAK, J.

CRLREV. NO. 474 OF 2012 (Dt.04.01.2013)

DASRATHI RANA & ANR. ……..Petitioners

.*Vrs.*

STATE & ANR ……..Opp.Parties

S.C. & S.T. (P. A.) ACT, 1989 – 3 (1) (i) (ii) (x)

Quashing of order taking cognizance U/s.3 (i) (i) (x) of the S.C. & S.T. (P.A.) Act, 1989 and U/ss. 341, 294, 323 506, 34 I.P.C.

In this case the informant, a member of Schedule Caste being engaged as a Tahali (messenger) by the villagers went to the house of the petitioner asking them to come to the village meeting and to give festival chanda and it is alleged that the petitioner No.1 abused him in obscene language saying him as "Pana", his Caste name and petitioner No.2 instigated petitioner No.1 to assault and petitioner No.1 dealt two slaps to the informant threatending him to kill.

The allegations do not satisfy the ingredients of the offences U/s.3 (1) (ii) (x) of the SC & ST (P.A.) Act but there is no infirmity for the offences under which cognizance taken under different sections of

I.P.C.- Held, cognizance taken against the petitioners U/s.3(1)(i)(ii) (x) of the SC & ST (P.A.) Act is quashed - Trial shall proceed only in respect of the offence under the Indian Penal Code.

For Petitioner - M/s. Amit Prasad Bose
For Opp.Parties - M/s. S.Mishra

Heard learned counsel for the petitioners and learned counsel for the State.

Though the informant (O.P.2) entered appearance through his counsel, none appears on his behalf at the time of hearing.

The order dated 21.6.2011 passed by the S.D.J.M., Athgarh, in C.T.No.166/2011 taking cognizance of offences under Sections 341, 294, 323, 506, 34 I.P.C. & Section 3(i)(ii)(x) of the S.C. & S.T. (P.A.) Act, 1989 and issuing process against the petitioners has been assailed in this Revision.

The prosecution allegation as per the F.I.R. lodged by the informant before the I.I.C., Khuntuni P.S., is that the informant, Mandara Mallick, a member of Scheduled Caste, was engaged as a Tahali (messenger) by the villagers and being sent by the villagers, he went to the house of the petitioners at about 8 p.m. on 30.3.2011 and asked petitioner no.1, Dasarathi Rana, to come to the village meeting and give festival chanda whereupon petitioner no.1 abused him in obscene language addressing him as “Pana”, his caste name. At that time petitioner no.2, who happens to be the daughter of petitioner no.1, came out of the house and instigated petitioner no.1 to assault the informant and also abused the informant saying “Mandara Pana to munha bahuta badhigalani”. Thereafter petitioner no.1 dealt two slaps to the informant and threatened to kill him. At that time, the Grama Rakhi, Rabindra Naik, came to the spot and rescued him.

The contention of the learned counsel for the petitioners is that the statement of the Grama Rakhi-Rabindra Naik reveals that by the time he arrived at the spot, the occurrence was already over and the informant was only crying on the spot and being asked, he described the occurrence to him, and therefore, no offence under Section 3(1) (x) of the S.C.& S.T. (P.A.) Act can be said to have been prima facie committed, as alleged. The insult or annoyance was not caused in public view. It is also his submission that Clauses (i) and (ii) of Sub-Section (1) of Section 3 of the S.C. & S.T. (P.A.) Act cannot also be said to be attracted as because no allegation making out offences as defined in those two Clauses has been made.

Learned counsel for the State, on the other hand, submits that since there is allegation of insulting the informant, who is a member of Scheduled Caste, by taking his caste name, the offence is squarely covered under Clause (x) of Sub-Section (1) of Section 3 of the S.C. & S.T. (P.A.) Act.

Clauses (i), (ii) and (x) of Sub-Section (1) of Section 3 of the S.C.& S.T. (P.A.) Act are extracted hereunder :-

"3. Punishment for offences of atrocities-(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe

(i) forces a member of a Scheduled Caste or a Scheduled Tribe to drink or eat any inedible or obnoxious substances;

(ii) acts with intent to cause injury, insult or annoyance to any member of a Scheduled Cste or a Scheduled Tribe by dumping excrete, waste matter, carcasses or any other obnoxious substances in his premises or neighbour hood ; and

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view.

The allegations made by the informant in the F.I.R. and in his statement before the Investigating Officer, as seen above, apparently do not satisfy the ingredients of the offences described in Clauses (i) and (ii) of Sub-Section (1) of Section 3 of the S.C.& S.T. (P.A.) Act, as none of the acts described in those Clauses has been alleged to have been done by the petitioners. As it appears from the statement of the informant in his F.I.R. as well as the statement given to the Police and from the statement of the witness, Rabindra Naik (Grama Rakhi), the said witness arrived at the spot after the occurrence was over only to find the informant crying on the spot. This otherwise means that the occurrence had already been over before arrival of the witness on the spot, and therefore, any insult etc. to the informant by the petitioners cannot be said to be made in public view. Therefore, the offence under Clause (x) of Sub-Section (1) of Section 3 of the S.C. & S.T. (P.A.) Act cannot be said to have been made out for want of the necessary mensrea of the offence.

So far as the offences under the I.P.C., for which cognizance has been taken with the aid of Section 34, I.P.C., I find no infirmity therein. Accordingly, this Crl. Revision is partly allowed and the cognizance taken against the petitioners of the offences under Clauses (i), (ii) & (x) of Sub-

Section (1) of Section 3 of the S.C. & S.T. (P.A.) Act is quashed. Trial shall proceed only in respect of the offences under the I.P.C., for which cognizance has been taken.

It is stated by the learned counsel for the petitioners that in the meantime the case has been committed to the Court of Sessions. It is therefore directed that copy of this order being produced before the Sessions Court, the Court shall do the needful in accordance with law.

Revision partly allowed.

2013 (II) ILR - CUT- 475

B. K. NAYAK, J.

CRLREV NO. 570 OF 2005 (Dt.07.02.2013)

KRUSHNA BISOI .....Petitioner.

.Vrs.

DHANESWARI BISOI & ANR. .....Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.401

Offence U/ss. 450 and 376 I.P.C. – Acquittal of the accused by the trial Court – Finding of the trial Court regarding the age of the victim based on no evidence – Examination of the father of the victim was illegally dispensed with who is competent to tell about the age of the victim – Trial Court failed in discharging its duty as required under law, causing miscarriage of justice – Lower revisional Court rightly set aside the order of acquittal directing retrial by examining the father of the victim and arranging medical examination of the victim for determination of her age at the time of occurrence – Held, impugned revisional order calls for no interference. (Para 8)

Case laws Referred to:-

1.(2010) 46 OCR 202 : (Gangadhara Samal-V- State of Orissa & Ors.)
2.AIR 1973 SC 2145 : (Akalu Ahir-V- Ramdeo Ram).

3.AIR 1962 SC 1788 : (K.Chinnaswamy Reddy-V- State of Andhra Pradesh & Anr.)
4.(1990)3 OCR 625 : (Surendra Barik-V- Gurubai Nayak & Ors.)
5.(1988)1 OCR 15 : (Sri T.Krishna Rao-V- Sri T.V.Satyanarayan).

For Petitioner - M/s. M.K.Mishra, P.K.Das, S.Senapati, L.Mishra, B.K. Mishra, J.Panda.
For Opp.Parties - M/s. M. Mohanty, J.Dash, M.R. Pradhan. (for Opp.Party No.1).
Addl. Standing Counsel (for Opp.Party No.2).

B.K.NAYAK, J. This revision has been filed challenging the order dated 26.07.2005 passed by the learned Sessions Judge, Koraput at Jeypore in Criminal Revision Petition No.13 of 2005, setting aside the judgment and order of acquittal passed by the learned C.J.M.-cum-Assistant Sessions Judge, Jeypore in Criminal Trial No.27 of 2003 (C.T. No.340 of 2003) and remanding the case back to the trial court for re-trial by examining the father of the victim and for arranging medical examination of the victim by the doctor for determining the age of the victim at the time of occurrence and to take any other evidence which may throw light on the age of the victim at the time of occurrence.

2. The petitioner faced trial in the aforesaid C.T. Case No.27 of 2003 for commission of offences under Sections 450 and 376 of the I.P.C. On consideration of evidence on record, the trial court came to the conclusion that sexual intercourse by the accused with the victim was with the consent of the latter. While assessing the evidence with regard to the age of the victim, the trial court took into consideration the evidence of victim's mother (P.W.2) and came to the conclusion that the mother of the victim having married at the age of 16 years and 3 to 4 years whereafter her eldest daughter was born and that the victim was possibly the eldest daughter and that the mother being 40 years old the victim would be around 20 years of age by now and would be more than 16 years old at the time of occurrence. Therefore, the trial court acquitted the accused-petitioner of the charges.

3. The acquittal order was challenged by the prosecutrix before the learned Sessions Judge, Koraput, Jeypore in Criminal Revision No.13 of 2005. It was urged that the father of the victim was examined by the Investigating Officer and that the trial court wrongly allowed the prayer of the prosecutor to dispense with the examination of the father of the victim, who is competent to tell about the age of the victim. It was also pointed out that

the ossification test of the victim could not be done at the relevant time as she was then pregnant, but at present ossification test can be done in order to determine the age of the victim at the relevant time of occurrence. Both the contentions, found favour with the learned Sessions Judge, who allowed the revision, set aside the order of acquittal and remanded the matter to the trial court for taking evidence of the father of the victim and any other relevant evidence and also conducting medical examination of the victim for determining her age on the date of the occurrence.

4. Learned counsel for the petitioner submits that where two views were possible the view taken by the trial court should not be lightly interfered with or substituted by the appellate or revisional court by re-appreciating the evidence and in the instant case, the trial court having taken a reasonable view it was not open to the revisional court to set aside the order of acquittal and to remand the case back for retrial.

5. Learned counsel for opposite party no.1 (Prosecutrix) relying on the decision of this court reported in ***(2010) 46 OCR-202: Gangadhara Samal v. State of Orissa & Ors.*** submits that the revisional jurisdiction should be exercised for directing re-trial of the case inter alia where evidence sought to be produced by the prosecution was wrongly shut out, or where material evidence was overlooked.

6. With regard to the scope of revision against an order of acquittal this court in the decision reported in ***(2010) 46 OCR-202: Gangadhara Samal v. State of Orissa & Ors*** held as follows :

> "The scope of revision against an order of acquittal is very limited. It has been held by the Apex Court in the case of **Akalu Ahir v. Ramdeo Ram;** AIR 1973 SC 2145 that on revision by a private complainant, the High Court is not entitled to reappraise the evidence for itself as if it is acting as a Court of appeal. It is trite law that revisional jurisdiction should not be exercised by the High Court for directing retrial of the case, unless, there is flagrant miscarriage of justice resulting from want of jurisdiction of the Trial Court to try the case, or where evidence sought to be produced by the prosecution was wrongly shut out, or where the Court below wrongly held the evidence to be inadmissible, or where material evidence was over looked. Reference in this regard can be made to the judgment of the Apex Court in the case of **K. Chinnaswamy Reddy v. State of Andhra Pradesh & Anr.,** AIR 1962 SC 1788 and the

decision of this Court in the case of **Surendra Barik v. Gurubai Nayak & Ors.;** (1990) 3 OCR 625.

7. The present case is not one of mere appreciation or re-appreciation of evidence but one relating to the question whether the prosecution evidence was shut out wrongly by declining to examine the father of the victim girl, whose evidence was relevant with regard to the age of the victim. It also appears that the finding of the trial court regarding age of the victim appears to be wholly perverse and not supported by evidence. Age of the victim has been assessed to be more than 16 years on the date of occurrence considering the age of the victim's mother (P.W.2) which was said to be 40 years on the date of her deposition in court. In the heading of the deposition P.W.2 is stated to be aged about 40 years, which cannot be accepted as evidence as such with regard to her age. Even assuming she was 40 years of age on the date of her deposition on 15.03.2004, in her evidence in chief she has not specifically stated about the age of the victim girl. Her cross-examination reveals that she has three daughters. Nothing has been elicited to ascertain where the victim was her 1st, 2nd or 3rd daughter. She has further stated that she was 16 years of age at the time of her marriage and three to four years thereafter her eldest daughter was born. She does not remember how many years thereafter, the second daughter and 3rd daughter were born. From this evidence, the trial court has simply presumed that the victim was her eldest daughter and therefore jumped to the conclusion that at the time of occurrence the victim was above 16 years of age. Hence, the finding of the trial court with regard to age of the victim was wholly perverse. This is more so, because the trial court has also ignored from consideration the evidence of the victim herself, who has been examined as P.W.1 and stated that she is the second daughter of her parents.

Coming to the question of shutting out evidence, it is an admitted fact that the victim's father, Gobardhan Bisoi was a charge-sheet witness and admittedly the petition of the prosecutor to dispense with his examination was allowed by the trial court mechanically without any application of mind as to the importance and relevance of his evidence. His statement to the police reveals that on the date of his examination by the I.O. the victim was aged about 15 years. It is clear that the trial court without applying its judicial mind wrongly dispensed with the evidence of the father of the victim which was very important from the point of view of the prosecution. This court in the case reported in ***(1988) 1 OCR 15: Sri T.Krishna Rao v. Sri T.V.Satyanarayan***, where the trial court failed to make sincere attempt to call the victim's mother as a witness, the court allowed the revision by setting

aside the order of acquittal and remanded the case to the trial court for re-trial. In doing so, this Court took note of another decision reported in ***AIR 1958 Ori. 92 :Raghunath Paramanik v. State***, in which it is observed as follows :

> " … It is the duty of the Sessions Judge trying a man for his life to see that all material witnesses summoned to give evidence are examined and if any such witnesses are absent, to adjourn the case and to take coercive step for their attendance. The trial cannot be said to be a fair trial if the attendance and examination of the witnesses is not insisted upon and the trial of the case is closed simply with a remark that the conduct of the absenting witness shows a lack of responsibility or that the Sessions Judge was pleased to direct proceedings for contempt against the witnesses. This should follow the compelling of the attendance of the witness and not be a substitution for his absence."

8. Having come to the conclusion that the finding of the trial court was based on no evidence and that important evidence from the side of the prosecution was shut out illegally and improperly and the trial court failed in discharging its duty as required under law, which has caused miscarriage of justice, the impugned revisional order calls for no interference. The CRLREV is accordingly dismissed.

Revision dismissed.

2013 (II) ILR - CUT- 479

B. K. NAYAK, J.

CRL.REV. NO.554 OF 2012(Dt.02.07.2013)

K.TIRUMALESWAR RAO @ TIRUMALA ……..Petitioner

.*Vrs.*

STATE OF ORISSA …….Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – Ss.173 (8) & 386

"Further investigation" – Appellate Court while hearing an appeal can also exercise its revisional power for directing " further investigation", if the situation so demands in the ends of justice.

In this case the petitioner was facing trial U/s.307 I.P.C. before the trial Court – Prosecution filed a petition to take cognizance of the offence U/s.302 I.P.C. after the death of the victim but the trial Court failed to exercise its power and jurisdiction to direct further investigation – This fact came to the knowledge of the appellate Court who is in seisin of the Criminal Appeal and it directed for "further investigation" only with regard to the cause of death of the victim which must be deemed to be in exercise of suo moto power of revision – Held, there is no infirmity in the order of the lower appellate Court directing further investigation with regard to the cause of death of the victim.

Case laws Referred to:-

1.(2008)5 SCC 413 : (Ramachandran-V- R. Udhaya Kumar & Ors.)
2.(2009)6 SCC 346 : (Rama Chaudhary-V- State of Bihar)
3.(2004)5 SCC 347 : (Hasanbhai Valibhai Qureshi-V- State of Gujarat)
4.(2013)54 OCR(SC)561 : (Vinay Tyagi-V- Irshad Ali @ Deepak & Ors.)
5.(2006)7 SCC 296 : (Popular Muthiah-V- State represented by Inspector of Police)

For Petitioner - M/s. L. Samantray, B. Pradhan, R.L. Pradhan, G. Das, J. Samantaray, G,Das.
For Opp.Party - Addl. Standing Counsel.

B.K.NAYAK, J. Order dated 07.07.2012 passed by the learned Additional Sessions Judge-Special Judge, Vigilance, Jeypore in Criminal Appeal No.34 of 2011 (Criminal Appeal No.43 of 2008) directing the I.I.C., Jeypore Town Police Station/Investigating Officer to further investigate into the matter relating to the death of the victim, K. Deepa and submit his report has been assailed in this criminal revision by the accused.

2. The facts leading to the passing of the impugned order are as follows

The accused-petitioner faced trial in C.T. Case No.44 of 2006 in the court of the learned C.J.M-cum-Assistant Sessions Judge, Jeypore for commission of offence under Section 307 of the I.P.C. on the allegation of pushing his wife (the victim) from a running train on 22.04.2006 as a result of

which she sustained serious injuries and her right hand and right leg were amputated. The petitioner was ultimately convicted by the trial court for the offence under Section 307 of the I.P.C. Challenging such conviction and sentence the petitioner filed Criminal Appeal No.34 of 2011 (Criminal Appeal No.43 of 2008), which is pending before the learned Additional Sessions Judge-Special Judge, Vigilance, Jeypore. During the pendency of the trial before the trial court, the victim succumbed to her injuries while undergoing treatment, as a result of which a report was lodged by the uncle of the victim before the I.I.C. Jeypore Town Police Station on 16.06.2007 indicating that the victim succumbed to the injuries while undergoing treatment. It was also indicated in the said report that the case relating to the occurrence was pending before the C.J.M.-cum-Assistant Sessions Judge, Jeypore in C.T. Case No.7 of 2006 against the accused for commission of offence under Section 307 of the I.P.C. On receipt of such report the IIC Jeypore Town Police Station registered PS U.D. Case No.19 of 2007 and directed ASI to enquire into the same. On the same day, during course of enquiry, inquest was held over the dead body followed by post-mortem examination. The Enquiring Officer (ASI) sought for the opinion of the doctor conducting post mortem examination about the cause of the death of the deceased, particularly as to whether the amputation of the right hand and the right leg of the victim from shoulder joint and hip-joint respectively led to prolonged illness and whether the death was the result of the injuries becoming septic. The doctor opined that the amputation could lead to prolonged illness and septic which could be sufficient to cause death in course of time. Upon receipt of opinion of the doctor the Enquiring Officer submitted final report in the U.D. Case stating that the cause of death of the victim, K. Deepa was due to septicaemia, as a consequence of prolonged illness. The said report was accepted by the learned C.J.M., Jeypore on 18.02.2008 and the U.D. case was closed accordingly. The above fact was also intimated by the IIC of the Jeypore Town Police Station to the trial court vide his letter dated 22.12.2007 enclosing therewith a copy of the post-mortem report and inquest report for information and necessary action. The impugned order further reveals that the letter of the IIC dated 22.12.2007 and the copies of the post mortem report and inquest report and the opinion of the doctor are available in the trial court case record, but the trial court appears to have not taken note or cognizance of the same and nothing has been mentioned about the same in the order sheet of the trial court records. It further transpires that the prosecution filed a petition dated 04.02.2008 before the trial court stating the aforesaid facts with a prayer to take cognizance of the offence under Section 302 of the I.P.C. The trial court, however, without considering whether on the basis of such petition charge would be altered, rejected the petition vide his order dated 13.03.2008 on the ground that he

had no jurisdiction to take cognizance after commitment of the case, more so since no further report was filed by the Investigating Officer under Section 173 (8) of the Cr.P.C. The trial court thereafter proceeded with the trial and convicted the appellant for the offence under Section 307 of the I.P.C. and such conviction order was challenged by the accused-petitioner before the appellate court.

3. In the appellate court two petitions, one by the prosecution and the other by the accused, were filed on 02.07.2012. The prosecution in its petition prayed for admitting the post-mortem report and the inquest report of the victim as additional evidence. The accused-petitioner in his petition prayed for directing the I.I.C., Jeypore Town Police Station to produce bed head ticket of the victim relating to her treatment in S.D. Hospital, Jeypore. While the prosecution urged that the death of the victim was the direct result of the injuries sustained by her during occurrence that led to the amputation, the argument on behalf of the appellant-petitioner was that the bed head ticket of the victim would reveal that she was suffering from malaria fever and died of the same.

4. On considering the petitions, the Additional Sessions Judge, Vigilance, Jeypore in paragraph-8 of the impugned order has observed as under :

> "8. If the allegation of the prosecution is found to be true, it would entail passing of appropriate orders as per law regarding disposal of the present appeal. But if the contention of the accused-appellant is found to be correct then the present appeal shall have to be considered on its own merits. Either way, further investigation as envisaged under Sec. 173(8) of Cr.P.C. is necessary. Therefore, I am of the considered opinion that ends of justice would be best served if, pending disposal of the present appeal, further investigation is conducted into the matter. The question of accepting additional evidence can also be considered only after knowing the result of such further investigation. However, the petition filed by the accused-appellant can be allowed at this stage as only a document is to be called for."

5. With the aforesaid observation, the Additional Sessions Judge, while keeping the petition filed by the prosecution pending, allowed the petition filed by the accused-petitioner and directed the I.I.C., Jeypore Town Police Station to produce the bed head ticket of the victim from the S.D. Hospital, Jeypore relating to her treatment prior to her death and also to investigate into the matter relating to the death of the victim and submit his report within a month from the date of passing of the order.

It is the order in so far as it relates to the direction to the I.I.C., Jeypore Town Police Station to make further investigation and submit his report which is impugned in this revision.

6. The learned counsel for the petitioner submitted that though the appellate court has the power to accept additional evidence and direct production of the same, it has no power to direct further investigation as has been done in the present case and, therefore, the direction for further investigation should be set aside.

The learned State Counsel, on the other hand, submitted that in view of the prosecution allegation that materials have come forth in the U.D.Case that during the pendency of the trial of the accused, the victim died and that her death was the result of the injuries and amputation of right hand and right leg arising out of the occurrence, the petitioner would be tried for the offence under Section 302 of the I.P.C. and, therefore, the direction of the court below to the IIC Jeypore Town Police Station to investigate into the cause of death of the victim cannot be said to be beyond his jurisdiction and power and therefore, the impugned order does not suffer from any infirmity.

7. There is no dispute over the proposition that even after submission of the report under sub-section (2) of Section 173 of the Cr.P.C., the investigating police officer can make 'further investigation' if required under Section 173 (8) of the Cr.P.C., as distinguished from 'reinvestigation' or 'fresh investigation'. The apex Court in the decision reported in ***(2008) 5 SCC 413 : Ramachandran v. R. Udhaya Kumar and others*** has held as follows:

> "**7.** At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation. This was highlighted by this Court in *K. Chandrasekhar v. State of Kerala.* It was, inter alia, observed as follows: (SCC p.237, para 24)
>
> "24. the dictionary meaning of 'further' (when used as an adjective) is 'additional; more; supplemental'. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we

have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports- and not fresh report or reports- regarding the 'further' evidence obtained during such investigation."

8. In the decision reported in ***(2009) 6 SCC 346 : Rama Chaudhary v. State of Bihar***, the apex Court explaining the meaning of the expressions 'further investigation,' 'fresh investigation' or 'reinvestigation' held as follows :

"**17.**From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of the police report under sub-section (2) on completion of the investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "further" is additional, more, or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether."

In explaining the need for further investigation the Court relied upon its earlier decision reported in ***(2004) 5 SCC 347: Hasanbhai Valibhai Qureshi v. State of Gujarat*** and observed as under :

"**19.** As observed in *Hasanbhai Valibhai Qureshi v. State of Gujarat* the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of the investigating agency for further investigation should not be tied down on the ground of mere delay. In other words

"the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice". (SCC p.351, para 13)

9. The Supreme Court in a recent decision reported in ***(2013) 54 OCR (SC) 561: Vinay Tyagi v. Irshad Ali @ Deepak & Ors*** considering a large number of previous decisions and held in paragraph-28 of the judgment that the Magistrate before whom a report under Section 173(2), Cr.P.C. is filed, is empowered in law to direct 'further investigation' and require the police to submit a further or a supplementary report.

However with regard to 'fresh investigation' or 'reinvestigation' or 'de novo investigation' it held as under :

> "**33.** At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct 'further investigation', 'fresh' or '*de novo'* and even 'reinvestigation'. 'Fresh', '*de novo',* and 'reinvestigation' are synonymous expressions and their result in law would be the same. The Superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior Courts very sparingly and with great circumspection."

10. In the case of ***Popular Muthiah v. State represented by Inspector of Police: (2006) 7 SCC 296***, the apex Court considered the question whether a High Court while exercising appellate power in terms of Sections 374(2), 386 and 391 of the Cr.P.C. can direct further investigation. Answering the question the court held as under :

> "**26.** Section 386 of the Code of Criminal Procedure provides for the power of the appellate court. Indisputably, stricto sensu in terms thereof the appellate court cannot direct a person to stand trial. Its jurisdiction is specified thereunder.
>
> **27.** While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a significant one being that the High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when an application therefor is filed but also suo motu. It is not in dispute that suo motu power can be exercised by the High Court while exercising its revisional jurisdiction. There may not, therefore, be an embargo for the High Court to exercise its extraordinary inherent jurisdiction while exercising other jurisdictions in the matter. Keeping in view the intention of Parliament, while making the new law the emphasis of Parliament being " a case before the court" in contradistinction from "a person who is arrayed as an accused before it" when the High Court is seized with the entire case although would exercise a limited jurisdiction in terms of Section 386 of the Code of Criminal Procedure, the same, in our considered view, cannot be held to limit

its other powers and in particular that of Section 482 of the Code of Criminal Procedure in relation to the matter which is not before it."

11. The appellate power of the Sessions court is not distinct from the appellate power of the High Court as both the courts exercise such power in terms of Sections 374, 386 and 391 of the Cr.P.C. Similarly, both the High Court and Sessions Judge have concurrent powers of revision under Section 397 of the Cr.P.C., which can be exercised suo motu. The High Court's power of revision under Section 401 of the Cr.P.C. is also mutatis mutandis exercisable by the Sessions Judge in terms of Section 399 of the Cr.P.C.

12. In the case at hand evidently the victim has died while undergoing treatment of her injuries including amputation of some limbs arising out of the occurrence, during the pendency of the trial of the petitioner for commission of offence under Section 307 of the I.P.C. It is the contention of the prosecution that the post-mortem report and the doctor's opinion prima facie suggest that death of the victim resulted out of the injuries sustained by her during the course of occurrence. In case it is so, the accused-petitioner will be liable for the graver offence of murder punishable under Section 302 of the I.P.C. At the same time, the contention of the defence was that the bed head ticket of the victim regarding her treatment in the S.D. Hospital suggests that she suffered from malaria fever and died of the same. In such scenario, it is necessary that there shall be further investigation in order to find out whether the death of the victim resulted in ordinary course of nature arising out of the injuries sustained by her during the very same occurrence, for which the petitioner has already been convicted under Section 307 of the I.P.C., or it was for any other reason.

13. Although the power of the appellate court under Section 386 of the Cr.P.C. does not envisage directing for further investigation, as has been held by the apex Court in ***Popular Muthiah*** (supra), while considering an appeal, revisional power can also be exercised for directing 'further investigation' if the situation so demands for the ends of justice. It is not in dispute that the I.I.C., Jeypore Town Police Station intimated the trial court about the cause of death of the victim as per the post-mortem report and the opinion of the doctor and at that time it was not at all taken note of by the trial court. Even a petition specifically filed by the prosecution thereafter before the trial court praying to take cognizance of the offence under Section 302 of the I.P.C. was rejected by the trial court on the ground that there was no further report by the Investigating Officer under Section 173(8) of the Cr.P.C. The trial court has ample power to direct further investigation when allegedly the death of the victim was as a result of the injuries sustained by

her in the occurrence. Admittedly, the trial court failed to exercise its power and jurisdiction to direct further investigation though justice so demanded. This fact having come to the knowledge of the appellate court, who is in seisin of the criminal appeal, it directed for 'further investigation' only with regard to the cause of death of the victim, which must be deemed to be in exercise of suo motu power of revision.

14. In the aforesaid analysis, this Court finds no infirmity in the order of the lower appellate court directing further investigation with regard to the cause of death of the victim. Accordingly, the CRLREV lacks merit and is, therefore, dismissed.

Revision dismissed

2013 (II) ILR - CUT- 487

S.K.MISHRA, J.

W.P.(C) NO. 13315 OF 2013 (Dt.02.07.2013)

SURESH KUMAR AGRAWAL ……..Petitioner

.Vrs.

BINODINI @ BIMALA BHUE & ORS. ……..Opp. parties

CIVIL PROCEDURE CODE, 1908 – O-39, R-1 & 2

Interlocutory injuction – Discreationary relief – Two Courts below have gone against a party – Interference of this Court should not be made lightly.

In this case petitioner does not have a prima facie case in his favour – Since Op. 1 to 3 are litigating before the Revenue Authorities for the last twenty years, the balance of convenience lies in favour of Op. 1 to 3 and the Petitioner will not sustain irreparable injury if injuction is not issued in his favour – Held, this Court stays its hand from interfering with the concurrent orders passed by the Courts below. (Paras 15,16,18)

Case laws Referred to:-

1. 2007(1) OLR-52 : (State of Orissa, through Collector, Sundargarh & Anr. -V- Daitari Sahu & Ors.)
2. 1984(1) OLR-40 : (Paramananda Pradhan & Anr.-V- Palau Sahu & Ors.)
3. 104(2007) CLT 719 (SC) : (Heinz Italia& Anr.-V- Dabur India Ltd.)
4. (2003) 6 SCC 675 : (Surya Dev Rai -V- Ram Chander Rai & Anr.)

For Petitioner - M/s. Manoj Ku. Mishra, T.Mishra P.K.Das & J.Sahoo
For Opp. Parties - M/s. N.K.Sahu, B.Swain & S.K.Sahoo

S.K.MISHRA,J. The petitioner has assailed, in this writ petition, the judgment dated 07.5.2013 passed by the learned District Judge, Bargarh in F.A.O. No.9/2009 in dismissing the appeal and thereby confirming the order dated 23.10.2009 passed in I.A. No.11/2009 arising out of C.S. No.62 of 2009 of the court of Civil Judge (Sr. Division), Bargarh whereby the original court dismissing the petition under Order 39, Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "Code" for brevity).

2. The land in question was recorded in the name of Dukhu Pradhan in Hamid Settlement in the year 1923 under Khata No.193 containing Plot No.247/3380 and Plot No.99 and other plots of Mouza – Bargarh. The plaintiff claimed that there was an exchange by the order passed by the Deputy Commissioner in Revenue Case No.1/10 of 1933-34 and Plot No.247/1 measuring an area of Ac.0.50 decs. was recorded in the name of Dukhu Pradhan under Khata No.70 of Mouza-Bargarh. In the year 1945 the Gauntia namely Manbodh Das had executed a Chirastayee Rayati Patta in favour of predecessor in interest of the petitioner, namely, Parashram Agrawal on 14.6.1945 in respect of Plot No.247/1 (Ac.0.47 dec.) out of Ac.0.50 dec. and Plot No.247/3380 measuring an area of Ac.0.40 dec. in total Ac.0.87 dec. of Mouza – Bargarh.

3. The Hal Plot Nos.4446,4449 and 4445 of Khata No.2525 of Mouza – Bargarh were settled in the name of the father of opposite parties 2 and 3 and husband of opposite party no.1 in V.P.A. Case No.1/1967-68 under the Village Police Abolition Act, 1964(hereinafter referred to as the "V.P.A.Act" for brevity). Accordingly, in the earlier settlement the R.O.R. was prepared in the name of the predecessor in interest of opposite party nos.1 to 3. The case was contested by the father of the petitioner by filing objection contending, inter alia, that Chirastayee Rayati Patta in respect of the suit land was in his favour and he is in peaceful possession over the suit land in question.

4. The Hal Plot No.247/1 corresponds to Major Settlement Plot No.4446, Plot No.4449 recorded in the name of Sana Jhankar the predecessor in interest of opp.party nos.1 to 3. Hall Settlement Plot No.247/3380 corresponds to Major Settlement Plot No.4450(Ac.0.29 decs.), Plot No.4452 (Ac.0.11 dec.) under Khata No.761 of Mouza – Bargarh stands recorded in the name of Parashrsram Agrawal.

5. The petitioner claims that the Chirastayee Rayati Patta executed in favour of the father of the petitioner in respect of the suit land was prior to the enactment of Orissa Estate Abolition Act, 1951, the Orissa Offices of Village Police (Abolition) Act, 1964 and the Orissa Land Reforms Act, 1960. So it is asserted that the O.E.A. Act does not affect the Rayati Patta in favour of the petitioner. Therefore, it is alleged that the settlement of suit land in favour of Haribhajan Jhankar in V.P.A. Case No.1/1967-68 was without jurisdiction and subsequent settlement R.O.R. does not confer any right, title, interest in favour of said Haribhajan Jhankar and others.

6. In the year 1987 the said Haribhajan Jhankar initiated O.L.R. Case No.104/1987 before the Sub-Collector, Bargarh under Section 23-A of Orissa Land Reforms Act, 1960 (hereinafter referred to as the "O.L.R. Act" for brevity). The Sub-collector allowed the application vide his order dated 31.3.1989 and ordered that the land be restored to the possession of the predecessor in interest of the opposite party nos.1 to 3. The said order was challenged by the father of the petitioner before the learned Addl. District Magistrate, which was registered as O.L.R. Appeal No.19/1989. The said appeal was allowed in part on 5.9.1990 declaring the father of the petitioner as the rightful owner in possession of M.S. Plot Nos.4446 and 4449. The order of the A.D.M. was challenged before the Collector, Bargarh in O.L.R. Revision No.1/1991 filed by the father of the petitioner and O.L.R. Revision No.3/1991 filed by Haribhajan Jhankar.

The learned Collector dismissed the O.L.R. Revision No.1/1991 and allowed O.L.R. Revision No.3/1991 vide common order dated 16.1.1995. The said order of the Collector was challenged before this Court in O.J.C. No.1281 of 1995 which was dismissed on 31.10.2008. Thereafter a Writ Appeal bearing No.229/2008 was filed, which was also dismissed on 14.3.2011. Against the said order dated 14.3.2011 a Special Leave Petition bearing No.16451 of 2011 was preferred before the Hon'ble Supreme Court, which was disposed of by granting liberty to the appellant to file a Review Petition. Accordingly a Review Petition bearing No.275/2011 was filed and the same is still pending before this Court.

7. At this juncture, the petitioner filed an application before the learned Sub-Collector, Bargarh for recovery of the land in question. Therefore, the petitioner filed a civil suit as described earlier for declaration of right, title, interest, confirmation of possession and perpetual injunction. In that suit, he filed an interim application bearing I.A. No.11/2009 of the court of Civil Judge (Sr. Division), Bargarh which was heard and disposed of by learned Civil Judge (Sr. Division) on 23.10.2009 rejecting the prayer of the petitioner for grant of interim injunction against the opposite party nos.1 to 3 and the State of Odisha. The petitioner preferred an appeal before the learned District Judge, Bargarh, which was registered as F.A.O. No.9/2009. The said F.A.O. was disposed of on 7.5.2013. The learned District Judge after elaborate discussion of the facts of the case came to the conclusion that the order of injunction would amount to restraining the statutory authority from exercising the statutory power. Further, he found no prima facie case in favour of the petitioner. He further held that neither balance of convenience leans in favour of the petitioner nor he would suffer irreparable loss. Hence, the appeal was dismissed. Against such concurrent findings of facts, the present writ petition is filed by the petitioner.

8. The opposite party nos.1 to 3 have appeared waiving notice and this Court took up the case for final disposal at the stage of admission.

9. In course of hearing, Mr. Mishra, learned Senior counsel, appearing for the petitioner submitted that the order passed by the Revenue Court in O.L.R. Act is without jurisdiction and as per the ratio laid down in the case of ***State of Orissa, through Collector, Sundargarh and another V. Daitari Sahu and others***; 2007(1) OLR-52, the civil court has the jurisdiction to pass appropriate order. He also relied upon the case of ***Paramananda Pradhan and another V. Palau Sahu and others***; 1984(1) OLR-40 and it was contended that the civil court has jurisdiction to entertain the suit in respect of the schedule land. It is further submitted by the learned counsel for petitioner that the claim of the petitioner is that the land has been settled in favour of his predecessor in interest has not been decided by any of the courts under the O.L.R. Act and that contention raised by the petitioner has to be adjudicated in the suit and, therefore, the civil suit is maintainable and the petitioner is entitled to the relief of temporary injunction in this case.

10. Mr. Sahu, Learned counsel appearing for opposite party nos.1 to 3, on the other hand, supported the findings recorded by the learned Judge exercising the original jurisdiction as well as the learned Judge exercising the appellate jurisdiction.

11. It is settled principles of law that the exclusion of the jurisdiction of the civil court is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if the jurisdiction is so excluded, the civil courts would have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedures.

12. In this case, it is not disputed that the land in question has been recorded in the name of the predecessor in interest of opposite party nos.1 to 3. It is also not disputed that opposite party nos.1 to 3 belong to the Scheduled Tribe category. Section 67 of the O.L.R. Act provides for the bar of the jurisdiction of the civil court. It reads as follows:-

> "67.Bar of jurisdiction of Civil Courts – Save as otherwise expressly provided in this Act, no Civil Court shall have jurisdiction to try and decide any suit or proceedings so far as it relates to any matter which any officer or other competent authority is empowered by or under this Act to decide."

13. Therefore, there is explicit exclusion of the jurisdiction of the civil court. However, the civil court has jurisdiction to the limited extent to see whether the Tribunals or authorities under the Act have acted in conformity with the fundamental principles of judicial procedures.

14. In this case, the Sub-Collector directed for restoration of the land in question to the petitioner predecessor in interest. The appellate court as provided under the Act modified the same. The Revisional Court thereafter restored the order of the Sub-Collector. The petitioner's predecessor in interest challenged the same before this Court and this Court as per the judgment passed on 31.10.2008 in O.J.C. No.1281 of 1995 rejected the claim of the petitioner. An appeal was preferred and the Division Bench in W.A. No.229/2008 dismissed the appeal filed by the predecessor in interest of the petitioner and confirmed the judgment passed by the learned Single Judge in O.J.C. No.1281/1995. The S.L.P. filed by the petitioner in the Supreme Court has also been dismissed as withdrawn. Though a Review Application is pending and this Court fails to appreciate, how the authorities not acted in conformity in the fundamental principles of judicial procedures.

15. Learned counsel for the petitioner contended that the claim of the petitioner that the land has been recoded in the name of the petitioner's father by Stitiban Rayati Patta has not been considered by the courts under the O.L.R. Act. However, it is trite law that once the lands were settled in

the name of a Village Police Officer (Jhankar) it create a new right in favour of the person in whose name the same has been settled. So any Patta issued by the Gountia prior to that suit extinguished. Therefore, this Court finds that the petitioner does not have an arguable case in his favour. Thus, this Court comes to the conclusion that the petitioner does not have a prima facie case in his favour. Since the opposite party nos.1 to 3 are litigating before the Revenue Authorities for the last twenty years, the balance of convenience lies in favour of the opposite party nos.1 to 3 and the petitioner will not sustain any irreparable injury if injunction is not issued in his favour.

16. Additionally, it is seen that in the case of ***Heinz Italia & Another V. Dabur India Ltd***.; 104(2007) CLT 719 (SC), the Supreme Court has held that an interlocutory injunction under Order 39 Rules 1 and 2 of the Code is in the nature of a discretionary relief and that interference should not be made when two Courts have gone against a party.

17. In the case of ***SURYA DEV RAI V. RAM CHANDER RAI AND OTHERS***; (2003) 6 Supreme Court Cases 675, the Supreme Court while dealing with the powers of the High Court under Articles 226 and 227 of the Constitution of India has observed that certiorari under Article 226 of the Constitution is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction – by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

The Supreme Court, in that case, further held that the supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

The Supreme Court summerised that be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

18. It is not the case of the petitioner that the learned Civil Judge (Sr. Division), and the learned District Judge, Bargarh do not have the jurisdiction to pass the orders which have been assailed in this writ petition. There is no allegation that it has exceeded its jurisdiction. What the learned counsel for the petitioner argued is mixed question of law and fact and it is not manifest and apparent on the face of the record. That being so, this Court stays its hand from interfering with the orders passed by the courts, both of original jurisdiction and appellate jurisdiction.

19. The writ petition is, therefore, dismissed. The pending Misc. Cases are also dismissed.

Writ petition dismissed.

2013 (II) ILR - CUT- 493

C. R. DASH, J.

W.P.(C) NO.16511 OF 2012 (Dt.01.05.2013)

ANITA KUMARI PANDA & ORS. .....Petitioners

.*Vrs.*

CONTROLLER OF EXAMINATIONS, C.H.S.E.., ODISHA & ANR. .....Opp.Parties

EXAMINATION – Political science paper in +2 Arts – Flying Squad detected malpractice in respect of 11 students but recommended for cancelling the result of 164 Candidates – Notification cancelling the result challenged.

In this case 30 pages of incriminating materials were found from one of the windows of the examination Centre which might have thrown by one of the students or some of the students of that hall – It does not justify mass malpractice – Examination Committee has not properly applied its mind either to the report of the Flying Squad or to the facts and circumstances of the case while taking the drastic action – Held, impugned notification relating to cancellation of Political science paper is quashed except 11 candidates who were found to be resorting to malpractice – Result of other students except those 11

candidates be published within four weeks – Action be taken against those 11 students in accordance with law. (Para 9)

Case law Relied on :-

2006(II) OLR 774 : (Indira Gandhi Mahila Mahavidyalaya & Anr.-V-The Council of Higher Secondary Education, Orissa & Ors.)

Case laws Referred to:-

1.81(1996) CLT 133 : (Esther Pamali Jena-V- Council of Higher Secondary Education Orissa & Ors.)

2.AIR 2000 SC 1039 : (Chirman, J & K. State Board of Education-V- Feyaz Ahmed Malik & Ors.).

For Petitioners - M/s. Satya Sundar Das & J.K. Dehury.

For Opp.Parties - M/s. S.R.Das & S.R. Pati (for O.P.2)
M/s. A.K. Bose & P.K. Das (for O.P.1).

C.R. DASH, J. The petitioners are some of the students of Draupadi Junior College At/P.O. Gumuda, District – Rayagada. They were amongst the 164 students, who had appeared in Annual +2 Examinations of 2012 conducted by the Council of Higher Secondary Education, Orissa ("C.H.S.E." for short). Examination for the paper of Political Science in +2 Arts was held on 14.03.2012. At about 10.20 A.M. the Flying Squad of C.H.S.E. arrived at the Examination Centre in Draupadi Junior College. Four rooms were accommodating all the 164 students of the college. The Flying Squad, which remained at the examination centre till 10.50 A.M., detected malpractice in respect of 11 students, as detailed in their report and found the atmosphere in the examination centre disturbing. They recommended for scratching of the sitting in respect of Political Science paper in +2 Arts held on 14.03.2012. On the basis of the report of the Flying Squad and the recommendation, the Notification vide Annexure-1 was issued awarding '00' marks, i.e. cancellation of results of Political Science paper in +2 Arts of that centre. The petitioners have challenged the Notification vide Annexure-1 and have further sought for publication of the results in Political Science paper by proper evaluation of the answer scripts as per their performance and to issue them with revised mark-sheets for the purpose of higher studies.

2. The Principal of the College (opp. party no.2) has filed counter affidavit controverting all the allegations and has specifically averred that

proper gate-checking was done before commencement of the examination on the aforesaid date and only 11 (eleven) students were found to be resorting to malpractice by the Flying Squad at the time of examination.

3. The C.H.S.E. has filed counter affidavit and it has specifically been averred in the counter affidavit that the Flying Squad has given written report along with incriminating materials collected from the examination hall and has recommended for cancellation of the sitting in Political Science paper held on 14.03.2012, giving reasons for the recommendations in the report. It has been reported by the squad members that the general condition around the examination centre was disturbing and outsiders were present inside the examination hall. It is further reported by the Flying Squad that the Invigilators were abettors to the malpractice and majority of the candidates were involved in such malpractice. The Centre Superintendent was also indifferent and was an abettor to the malpractice. There was no gate-checking, as a result of which plenty of incriminating materials were found inside the examination halls.

4. Learned counsel for the petitioners submitted that the report of the Flying Squad is omnibus in nature and only 30 (thirty) sheets of incriminating materials were seized by them from one of the windows of an examination hall, which were annexed to the report. Further it is submitted that only 11 students were found to be resorting to malpractice, and for those 11 students all the 164 students, who are mostly tribals, cannot be made to suffer.

5. Learned counsel for the C.H.S.E. on the other hand submits that this Court should not substitute its opinion in place of the opinion of the Examination Committee which has taken into consideration diligently the report of the Flying Squad and, in view of such, the prayer of the petitioners must be rejected.

6. Learned counsel for the petitioners relied on the case of **Indira Gandhi Mahila Mahavidyalaya and another *vrs.* The Council of Higher Secondary Education, Orissa and two others,** 2006 (II) OLR – 774 [also 103 (2007) CLT 395] , wherein the Division Bench of this Court has held thus:-

> "Law is well settled that the examining authorities while taking drastic step of canceling the examination must be satisfied that the examination conducted in the centre was not in accordance with the norms prescribed and that vast majority of the students were adopting malpractice which was not practicable for the Squad to detect. It is relevant to note here that in the prescribed format the Flying Squad in Col.16 has specifically stated that malpractice in

respect of 12 cases, as referred to above, was detected and reported. In Col.17 the Squad reported that there was no misbehaviour of candidates. In Col.19 to the question whether the Centre Superintendent was co-operative, the Squad has answered 'yes' whereas in the special report the answer is otherwise.

In the aforesaid view of the matter, the Council on the basis of such a report of the Flying Squad, as discussed above, could not have taken the decision for cancelling the examination of all the 76 candidates appearing from the Centre. Such decision by the Council was taken without application of mind and on a casual approach to the matter. Had the Council scrutinized the report of the Flying Squad in its proper perspective, it could not have taken such a drastic step in canceling the examination of all the 76 examinees. However, in view of the specific report as against 12 candidates as mentioned in the report of Squad and referred to in this order, their cases have to be dealt with in accordance with law and appropriate decision need be taken. The decision of the Council for canceling the entire examination being not sustainable is quashed except in respect of the 12 candidates booked for malpractice."

Learned counsel appearing for the C.H.S.E. on the other hand has relied on another decision of a Division Bench of this Court in the case of **Esther Pamali Jena *vrs.* Council of Higher Secondary Education, Orissa and others,** 81 (1996) C.L.T. 133, wherein the Hon'ble Court has held thus :-

"An examination is held to assess the depth of knowledge of a candidate in a particular subject for which he or she appears. The essence of the examination is that the worth of every person is appraised without any assistance from an outside source. Resort to malpractice takes away the scope of making an objective assessment of the merit of the candidate."

The Division Bench of this Court, in the aforesaid case, considered the report of the Flying Squad in respect of Annual Higher Secondary Examination, 1995 held in the centre of City Women's College, Thoria Sahi, Cuttack in respect of two papers, i.e. English-1 and English-2 and concurred with the view of the Examination Committee so far as cancellation of the examination is concerned, as this Court was convinced that the candidates had resorted to mass malpractice.

7. Learned counsel for the C.H.S.E. relied on another decision of Hon'ble the Supreme Court of India in the case of **Chairman, J. & K. State**

Board of Education *vrs.* Feyaz Ahmed Malik and others, A.I.R. 2000 SC 1039, wherein Hon'ble Supreme Court has held that in matters concerning campus discipline of educational institutions and conduct of examinations, the duty is primarily vested in the authorities in-charge of the institution, and in such matters Court should not try to substitute its own views in place of the concerned authorities nor thrust its views on them.

8. In the present case, the Flying Squad Report is produced by learned counsel for the C.H.S.E., a copy of which should be kept on record. From the said report it is found that the Flying Squad remained in the examination centre for about 30 minutes. They have reported that the general condition around the examination hall was disturbing; the Centre Superintendent was not co-operative; the Invigilators were abetting malpractice; majority of the candidates were involved in malpractice and the Centre Superintendent was indifferent to the malpractice. At the same time, the report is indicative of the fact that police protection was sought for, gate-checking was done before commencement of the exam and 30 pages of incriminating materials relating to Political Science subject were found from the windows of the exam hall when the members of the Flying Squad entered into the exam centre, which were thrown by the examinees. It is further found from the report that only 11 candidates were found to be resorting to malpractice.

9. A reading of the Flying Squad Report in its entirety shows that only 30 pages of incriminating materials of Political Science subject were detected and only 11 students were found to be resorting to malpractice. There were 164 students in the entire centre, but, except the aforesaid 30 pages of incriminating materials no other materials were found by the Flying Squad. 30 pages of incriminating materials were found from one of the windows of one of the examination halls out of the four halls. Only for those 30 pages of incriminating materials, which might have thrown by one of the students or some of the students of that hall, 164 students appearing in the examination from the entire centre could not have been held liable, in as much as the opinion of the Flying Squad so far as other aspects are concerned, are more subjective than objective. General discipline in an examination centre, which may be a matter of control by the authority concerned, is quite different from mass malpractice.

In the present case, the examination paper in question has been cancelled on the basis of mass malpractice. 164 students have come to suffer by such a decision; but to justify mass malpractice only 30 pages of incriminating materials have been seized, which can be taken as materials towards objective satisfaction to deduce a conclusion.

Regard being had to all the aforesaid facts and circumstances, I am constrained to hold that the Examination Committee has not properly applied its mind either to the report of the Flying Squad or to the facts and circumstances of the case while taking a drastic decision of canceling the Political Science paper so far as the examination centre, i.e. Draupadi Junior College, Rayagada is concerned. In the premises as aforesaid, the Notification vide Annexure-1 relating to cancellation of Political Science paper of +2 Arts Annual H.S. Examination 2012 as held in the centre of Draupadi Junior College, Rayagada is quashed except those 11 candidates as mentioned in the report of the Flying Squad, who were found to be resorting to malpractice. The results of all other students except those 11 students, as mentioned in the report of the Flying Squad, be published within a period of four weeks from the date of production of a certified copy of this order. So far as those 11 students, whose names or Roll Number find mention in the report of the Flying Squad, action in accordance with law may be initiated against them. The writ petition is accordingly disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 498

B. K. MISRA, J.

CRLA. NO. 154 OF 2004 (Dt.24.04.2013)

SUDHAKAR NAYAK & ANR. ……Appellants

.Vrs.

STATE OF ORISSA … …..Respondent

N.D.P.S. ACT, 1985 – S. 20(b) (ii) (c)

Conviction U/s.20 (b) (ii) (c) N.D.P.S. Act – Conviction challenged on the ground that P.W.4 having conducted search, seizure and arrested the appellants should not have proceeded with the investigation in order to ensure fair play and impartiality – No provision in the Criminal Procedure Code as well as in the N.D.P.S. Act which precluded the seizing officer from taking up the investigation – No

material to show that the prosecution against the appellants was initiated as a result of any malice on the Part of P.W.4 – Held, appellants are not entitled to an order of acquittal. (Para 12)

Case law Referred to :-

(2004) 5 SCC 223 : (State represented by Inspector of Police, Vigilance & Anti-Corruption, Tiruchirapalli, T.N.-V- V.Jayapaul).

For Appellants - M/s. D. Nayak, Mr. R.K. Pradhan,
Mr. U.R. Jena, Mr. S.K. Mohanty,
Sk. Zafarulla, Mr.S.K. Das,
Mr. B.P. Mohapatra.
For Respondent - Mr. D.K. Misra,
Addl. Govt. Advocate.

B.K. MISRA, J. The two appellants having been convicted by the learned Special Judge-cum-2nd Additional Sessions Judge, Berhampur under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'N.D.P.S.Act') and directed to undergo rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- each in default to further undergo rigorous imprisonment for two years in 2(a) C.C. Case No. 4 of 2003 (N) have preferred this appeal.

2. The case of the prosecution is that on 9.3.2003 at about 8 A.M. the Sub-Inspector of Excise (E.I.&E.B.) Berhampur (P.W.4) found both the appellants coming from old bus stand and proceeding towards Khallikote College via the Telephone Bhawan carrying one fertilizer bag and a V.I.P. Attache. The S.I. of Excise (E.I.&E.B.) Berhampur Sri Prafulla Kumar Patnaik (P.W.4) and his staff who were patrolling in the said area suspecting the movement of the appellants detained them by disclosing their identity. P.W.4 expressed his desire to take search of the appellants and their belongings as the appellants to his querry disclosed that they were carrying 'Ganja' in the fertilizer bag as well as the V.I.P. Attache. P.W.4 gave his personal search to the appellants and when took search of the fertilizer bag found the same to have contained 'Ganja'. Similarly, Ganja was also detected in the V.I.P. suitcase when the same was opened after appellant Sudhakar Nayak handed over the key of the said V.I.P. suitcase to P.W.4. On taking weighment of the Ganja which were there in the V.I.P. suitcase it weighed 11 Kilogram and 500 grams and the Ganja which were therein the fertilizer bag on weighment became 9 Kilogram and 800 grams. Since the appellants could not produce any authority in support of such possession of the

contraband articles which they were carrying, those were seized at the spot and the fertilizer bag containing Ganja as well as the V.I.P. suitcase were also sealed with paper seal after obtaining the signatures of the witnesses and the appellants thereon. The contraband articles as well as the V.I.P. Suitcase and the fertilizer bag were also sealed with the personal brass seal of P.W.4, which was handed over to P.W.2 after the sealing was completed. The two appellants along with the seized contraband excise articles were produced before the learned Special Judge, Berhampur on 9.3.2003 and as per the direction of the learned Special Judge, Berhampur, the S.D.J.M., Berhampur collected samples from the seized contraband articles and the samples were sent for chemical examination in course of the investigation by P.W.4. After completion of investigation, P.R. was submitted against the two appellants under Section 20(b)(II)(C) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "N.D.P.S. Act") to stand their trial.

3. The plea of the two appellants was that of complete denial of seizure of any Ganja from their possession and it is their further plea that they had come to Berhampur from their village in a bus and were caught by excise police along with four others at 'Puruna' bus stand (Old Bus Stand). It is also their further plea that they had singed on different papers being directed by the excise officers and the four persons who were also caught along with them were let off by the excise staff.

4. The prosecution in order to establish its case against the two appellants examined five witnesses in all and of them P.Ws. 1 and 2 were the two independent witnesses to the search and seizure of Ganja. P.Ws. 3, 4 and 5 are the officers of the excise department and of them P.Ws. 3 and 4 spoke about the search and seizure of Ganja from the possession of the accused-appellants whereas P.W.5 was examined to speak regarding the safe custody of the contraband excise articles which were kept in the Malkhana of the Excise Department which was in his charge on 9.3.2003. The two appellants declined to examine any witness in their defence.

5. The learned Special Judge, Berhampur formulated the sole point for determination i.e. "whether the accused persons were found in conscious possession of 21.3 Kilograms of Ganja".

6. Mr.D.Nayak, learned counsel appearing for the appellants in course of his argument while taking me through the evidence on record contended that the appellants in this case are entitled to an order of acquittal as the learned Special Judge failed to take note of the defects which the Investigating Officer committed during search and seizure of the alleged Ganja and it was also very strenuously urged that when P.W.4 had effected

the alleged seizure of Ganja from the two appellants he should not have been the I.O. and for that reason the order of conviction as has been recorded by the trial court cannot be sustained in the eye of law. It was also contended that the learned Special Judge placed too much reliance on the evidence of P.Ws. 1 and 2 who are the stock witnesses for the department and the learned Special Judge completely over looked the admission of P.W.2 in that regard.

Besides that the learned counsel for the appellants contended that since the statutory provisions of law with regard to safe custody of the Ganja has not been observed, the possibility of tampering with the contraband articles and implantation cannot be ruled out and, therefore, when there appear a needle of suspicion about the safe custody of the alleged contraband excisable articles after seizure the appellants cannot be held guilty of the charge and the order of conviction is bound to be set aside.

7. Mr. D.K. Mishra, learned Addl. Government Advocate appearing for the State contended that the findings recorded by the learned Special Court, Berhampur while convicting the appellants and awarding sentences are completely justified, in view of the overwhelming evidence on record and therefore the present appeal having no merit should be dismissed.

8. I have perused the evidence on record in minute detail. P.Ws.1 and 2 are the two independent witnesses for the prosecution and it is their consistent evidence that in their presence the two appellants while coming towards the Telephone Bhavan from the old Bus stand carrying one Attache (M.O.II) and a gunny bag (M.O.I) were detained by the Excise Officers and on being asked by the said officials the appellant confessed to have kept Ganja in M.Os.I and II. It is also their consistent evidence that they gave their personal search to the Excise Officer but nothing incriminating could be found. It is also their evidence that from M.O.I, 9 Kilogram and 800 grams of ganja was recovered and from M.O.II, 11 Kilogram and 500 grams of ganja was recovered. P.Ws 1 and 2 deposed that the contraband articles were seized and seizure list was prepared and thereafter those were also sealed with the personal brass seal of the Excise Officer which was handed over to Bhaskar Sabat (P.W.2). Bhaskar Sabat who has been examined as P.W.2 also in his evidence admitted that the contents of M.Os. I and II were weighed in their presence by procuring the weighing machine from a nearby shop. He also deposed that the ganja which were there in the gunny bag and Attache after weighment were put inside the gunny bag and Attache and were sealed with the personal brass seal of Excise Babu. The Excise Babu gave the brass seal used for sealing both the Attache and gunny bag to him under a zimanama marked Ext.4.

9. P.W.4 was the S.I. of Excise, Intelligence Bureau, Berhampur on 9.3.2003 and it is his evidence that while performing patrol duty at Old Bus Stand, Berhampur around 8.00 A.M. on 9.3.2003 near the Telephone Bhawan he found appellant Sudharkar coming with a "Jari bag" (gunny bag, M.O.-I) and appellant Sarat Chandra Naik was carrying a blue colour V.I.P. Attache (M.O.-II) and while they were proceeding towards Khallikote College, Berhampur on suspicion he detained them. P.W.4 also deposed that when he asked the appellant as to what they were carrying in M.Os. I and II, they admitted that they have kept 'Ganja' in M.Os. I and II. The evidence of P.W.4 further discloses that the appellants could not produce any authority in support of such possession of Ganja and accordingly he served notice on the two appellants to take search of M.Os. I and II and he has proved the notice issued to the appellants as Ext.1. The further evidence of P.W.2 shows that the two appellants when agreed to be searched by him, search of M.Os. I and II were taken. It was also the evidence of P.W.4 that the appellant Sudharkar handed over the key of the V.I.P. Attache to him with which he opened the Attache (M.O.II). P.W.4 also deposed that when he took weighment of the contents of M.O.II i.e. 'Ganja' the same weighed 11 Kilogram and 500 grams. Similarly, when he took weighment of the contents of M.O.I (Ganja), the same weighed 9 Kilogram and 800 grams. P.W.4 deposed that when he burnt a small quantity of Ganja which were there in M.Os. I and II, the smoke emitted the smell of Ganja and from the colour, texture and from his specialized training he was sure that the contents of M.Os. I and II were 'Ganja' and accordingly he seized them in presence of the witnesses vide seizure list Ext.3. P.W.4 deposed that he sealed M.Os. I and II by affixing paper seal and by using his personal brass seal. P.W.4 also deposed that he handed over his personal brass seal after sealing M.Os.I and II to P.W.2 under a properly executed zimanama by P.W.2, (Ext.4). P.W.4 also deposed that on the very same day he produced the two appellants as well as the articles seized before the Special Judge, Berhampur and since that was a holiday being Sunday as per the orders of the learned Special Judge, Berhampur he produced the seized articles before the S.D.J.M., Berhampur on 10.3.2003 to draw samples and to send them for chemical examination. P.W.4 also deposed that he produced the seized articles before the S.D.J.M., Berhampur and the S.D.J.M., Berhampur drew two samples each weighing 50 grams from M.Os. I and II and sent the same along with his forwarding report to the Deputy Drugs Controller, Bhubaneswar. The said forwarding letter of the learned S.D.J.M., Berhampur has been proved as Ext.8 by P.W.4 and the chemical examination report received from the Deputy Drugs Controller, Bhubaneswar has been proved as Ext.10. P.W.4 deposed that he examined the accused persons and recorded their statements and he had sent the letter regarding search,

seizure and arrest of the accused persons to his immediate superior and he has proved the copy of the said letter as Ext.12. P.W.3, the Excise Constable has categorically stated about the seizure of contraband Ganja from the possession of the appellant and his evidence is consistent with the evidence of P.W.4 and P.W.s. 1 and 2. P.Ws. 1 to 4 have been cross-examined by the defence at length but nothing could be elicited from their mouth to disbelieve the factum of search and seizure of 'Ganja' from the possession of the appellants in this case. On the other hand, the substratum of the case of the prosecution that contraband Ganja which the two appellants were carrying in M.Os. I and II were recovered from their possession and the appellants were carrying such contraband excise articles without any authority has totally remained unshaken. There is nothing on record to disbelieve the evidence in that regard. It is true that P.W.2 has admitted that he was a witness in a case under the N.D.P.S. Act and also in a case relating to seizure of liquor in another case but that cannot be a ground to disbelieve the evidence of P.W.2 as his evidence reveals that he has depicted the true incident i.e. the factum of seizure of contraband excisable articles from the possession of the two appellants on 9.3.2003 morning. Taking also the worst view that evidence of P.W.2 should not be believed but there is nothing on record to disbelieve the evidence of P.Ws. 1, 3 and 4 and it is not known as to why P.Ws. 1, 3 and 4 would speak falsehood against the two appellants with whom they had no axe to grind.

10. P.W.5 was the I.I.C. (E.I. & E.B.), Southern Division, Berhampur. P.W.5 deposed that he was in-charge of Malkhana of the Department at the relevant time and he produced the Malkhana Register before the court during evidence and he has proved the entry No.5 in the said Mal Register with regard to the mal item in P.R. No. 170 of 2002-03 which was proved as Ext.13. He has also proved his endorsement in the register with regard to Ext.13 as Ext.13/1. It is also the evidence of P.W.5 that the mal item seized in P.R. No. 170 of 2002-03 were sent to court on 9.3.2003 which was received back on the same day. Ext.7 is the extract of the order of the Special Judge, Berhampur to show that direction was given by him to S.D.J.M., Berhampur in forwarding the samples to the State Drugs Testing Research Laboratory, Bhubaneswar and Ext.8 is the forwarding letter of the S.D.J.M., Berhampur which shows that the brass seal impression of the S.D.J.M., Berhampur was affixed to the forwarding report. Ext.10, the chemical examination report shows that two sample packets marked X and Y in P.R. No. 170 of 2002-03 was received on 12.3.2003 by the Deputy Drugs Controller, Bhubaneswar and the seals on the sample packets were intact and identical with the specimen brass seal impression given on the forwarding memo. Ext. 10 shows that the samples sent for chemical

examination were found to be Ganja/cannabis as defined under Section 2(iii) (b) of the N.D.P.S. Act, 1985. Thus, there are ample materials on record which unerringly shows that the appellants were in conscious possession of contraband articles, namely, Ganja which they were in possession without any authority.

11. The contention of the learned counsel for the appellants that the prosecution is bound to fail since P.W.4 himself having conducted search, effecting seizure and arresting the appellants should not have proceeded with the investigation in order to ensure fair play and impartiality. I am unable to accept the said contention of the learned counsel for the appellants in view of the trite law that there is nothing in the provisions of the Criminal Procedure Code as well as in the N.D.P.S. Act which precluded the seizing officer from taking up the investigation. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition in the matter. In that context, we can profitably refer to a decision of the Hon'ble Apex Court reported in ***(2004) 5 SCC 223, State represented by Inspector of Police, Vigilance and Anti-Corruption, Tiruchirapalli, T.N. Vrs. V. Jayapaul***.

12. In the instant case as I have already discussed above there is no material to show that the prosecution against the appellants was initiated as a result of any malice on the part of the Seizing Officer, P.W.4, who is also the investigating officer. The question of malafide exercise of power assumes significance only when the criminal prosecution is initiated on extraneous considerations and for an unauthorized purpose. The dominant purpose of registering the case against the appellants was to have an investigation done into the allegations contained in the F.I.R. and in the event of there being sufficient material in support of the allegations to present the charge sheet before the Court. There is no material to show that the dominant object of registering the case was the character assassination of the accused persons or to harass and humiliate them. Therefore, the contention of the learned counsel for the appellants that P.W.4 being the informant should not have investigated into the case and the present prosecution cannot stand and appellants are entitled to an order of acquittal falls to the ground.

13. Now coming to the question of awarding sentence on the appellants I find that while convicting the appellants for the offence under Section 20(b)(ii)(C) of the N.D.P.S. Act, the learned Special Judge-cum-Additional Sessions Judge, Berhampur imposed the minimum sentence of imprisonment for 10 years and imposed Rs.1,00,000/- as fine in default of payment of fine each of the appellants to undergo further rigorous

imprisonment for two years each. It is seen that the two appellants, who were young boys are uterine brothers when the offence was committed and they were 20 to 25 years old. The appellants have already spent 10 years in prison. Besides that they would also pay fine of Rs.1,00,000/- each. Therefore, directing them to undergo rigorous imprisonment for two years for non payment of fine of Rs.1,00,000/- appears to be somewhat excessive. Therefore, while maintaining the order of conviction of the appellants and the sentence directing them to undergo rigorous imprisonment for 10 years each and to pay fine of Rs.1,00,000/- each, the default sentence for non payment of fine is reduced to six months from that of two years. With the aforesaid modification of the default sentence imposed on each of the appellants, the appeal stands dismissed.

Appeal dismissed.

2013 (II) ILR - CUT- 505

B. K. MISRA, J.

W.P.(C) NO.181 OF 2011 (Dt.02.05.2013)

BATAKRUSHNA SETHY & ORS. .....Petitioners

.Vrs.

MUKTILATA KAR & ORS. .....Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-7, R-11 (d) r/w Section 12 Court Fees Act.

Suit for declaration filed in 2007 – Court fee exempted as plaintiffs are "Dhoba" by Caste – During trial plaintiff No.5 deposed that he adopted Christianity in the year 1984 – He became a Christian within the meaning of Paragraph-3 of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956 and he cannot be deemed to be a member of the Scheduled Caste – So even if plaintiff No.5 produced a Caste Certificate issued by a Revenue Officer showing that he belongs to Scheduled Caste has lost its validity – Held, direction issued by the trial Court to the plaintiff to pay Court fee on the valuation of the suit calls for no interference by this Court.

(Paras 5,6)

Case law Referred to:-

(2010) 2 SCC 114 : (Dalip Singh-V- State of Uttar Pradesh & Ors.).

For Petitioners - M/s. Sanatan Das, M.K. Sahu, S. Mohapatra.
For Opp.Parties - M/s. A.K. Panda, (for O.Ps.5 to 10)
M/s. R.Ray, B.N. Mishra, B.N. Das, (for O.P.1 to 4)
Sri A. Mohanty,A.G. (for O.P.12 & 13).

B.K.MISRA,J. Challenging the order passed by the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack in Civil Suit No.30 of 2007 dated 16.11.2010 and 17.12.2010 vide Annexures-6 and 9 respectively, the writ petition has been filed by the present petitioners, who are the plaintiffs in the said Suit.

2. The petitioners as plaintiffs have filed a suit for declaration of their right of easement over the 'A' Schedule land described in the plaint and also further declaration that the opposite parties (defendants) have no manner of right, title and interest over the suit schedule 'A' property and to restrain them permanently from changing the nature and character of the suit land and not to prevent the plaintiffs-petitioners to use the suit land as their path way etc. The suit was valued at Rs.3,11,000/-, but since because the plaintiffs-petitioners claimed to be scheduled castes, (DHOBA) prayed for exemption of court fees which was allowed by the court below. The opposite parties (defendants) in the said Suit entered appearance and have filed their written statement. When pleadings were complete and issues were settled, hearing of the suit was taken up. The present petitioner no.5 who is also plaintiff no.5 in Civil Suit No.30 of 2007 tendered his evidence and in his cross-examination he deposed that in the year 1984 he adopted Christianity and started living in a rented house at Mission Road, Cuttack. When P.W.1, namely, the petitioner-plaintiffs no.5 deposed in court on oath that he is a Christian since 1984, opposite party nos.1 to 4 (Defendants) filed a petition under Section 12 of the Court Fees Act read with Order-7, Rule-11 (d) of the Civil Procedure Code on 17.3.2010 praying the Court therein to recall the order of exempting the petitioner-plaintiffs from paying the court fees and to direct the plaintiffs to pay Court Fees within a stipulated period failing which the plaint should be rejected. The present petitioners filed their objection to such prayer of defendant nos.1 to 4. The learned court below heard the parties and passed the impugned order on 16.11.2010 (Annexure-6) directing the present petitioner-plaintiffs to pay Court Fees of Rs.10,635/- as per the valuation given in the plaint and recalled the order dated 22.1.2007

wherein the petitioner-plaintiffs were exempted from paying court fees. Simultaneously, the court below gave seven days time to the petitioner-plaintiffs to pay court fees failing which the plaint would be rejected. Thereafter, the petitioner-plaintiffs took time for payment of the court fees. Ultimately, on 4.12.2010 a petition was filed by the plaintiffs to recall and modify the order dated 16.11.2010. The said prayer was rejected by the learned court below on the ground that if the petitioner-plaintiffs were aggrieved by the impugned order under Annexure-6 they can challenge the said order before a higher forum. Those orders of the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack under Annexures-6 and 9 are under challenge in this writ petition.

3. I have heard learned counsel appearing for the respective parties including learned Advocate General, who appeared for the State. Learned counsel appearing for the petitioners in this case contended that the evidence of P.W.1 during his cross-examination simply shows that in 1984 he adopted Christianity but that cannot amount to professing Christianity by the petitioner No.4. It was contended that when the petitioner-plaintiffs are 'Dhoba' by caste they are not required to pay any Court fees and the impugned order at Annexure-6 be set aside. It was also contended that since in the written statement the opposite party-defendants did not raise at all the point that the petitioner-plaintiff No.5 is a 'Christian', the defendants are estopped from questioning the same in a later part of the proceeding.

4. Learned counsel appearing for the contesting opposite party-defendants resisted the contention raised by the learned counsel for the petitioner-plaintiffs. The learned Advocate General argued with vehemence that when the petitioner-plaintiffs with a view to defraud the State claimed exemption from payment of Court fees even though before filing of the suit the petitioner-plaintiff No.5 has changed his religion and converted himself to a Christian, the petitioner-plaintiffs are bound to pay the Court fees in the suit. It was also contended by the learned Advocate General that parties should come to Court with clean hand and the tendency to hoodwink the Court should be curbed with an iron hand and the Court should not view the matter lightly as by such type of unhealthy practices valuable Court's time is being wasted when the dockets are over loaded. The learned Advocate General by placing reliance on a judgment of the Apex Court as reported in ***(2010) 2 SCC 114, Dalip Sing –v- State of Uttar Pradesh and others*** contended that "those who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, are not entitled to any relief, interim or final". The learned counsel appearing for the other opposite parties contended that when the opposite party-defendants came to know

that petitioner-plaintiff No.5 has embraced Christianity and when the point involved is a question of law, estoppel has no role to play and accordingly it was argued with vehemence that the writ petition should be dismissed with exemplary cost.

5. I have gone through the entire case record. There is no dispute that the petitioner-plaintiff No.5 in his cross-examination in C.S. No. 30 of 2007 deposed that he adopted 'Christianity' in the year 1984. Admittedly the suit has been filed by the petitioner-plaintiffs in 2007 i.e. by then petitioner-plaintiff No.5 was a Christian having changed his religion in the year 1984. When petitioner-plaintiff No.5 deposed that he adopted Christianity in 1984 that means he changed his religion to Christianity and he choose to live so by renouncing his original religion and for all practical purposes he became a Christian. When petitioner-plaintiff No.5 became a Christian within the meaning of Paragraph-3 of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956 and professes Christianity i.e. a religion different from the Hindu or a Sikh religion he cannot be deemed to be a member of the Scheduled Caste. The said provision reads as follows:-

> "3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste."

6. Thus, even if the petitioner-plaintiff No.5 produced a caste certificate issued by a Revenue Officer showing that he was a Scheduled Caste i.e. Dhoba by caste the same has lost its validity when he changed his religion from Hinduism to Christianity. The learned Civil Judge (Sr.Divn.)1st. Court, Cuttack in the impugned order at Annexure-6 directed the plaintiffs to pay the court fees on the valuation of the suit given by the plaintiffs by recalling its earlier order in exempting the plaintiffs from paying the Court fees. Direction was also given to the petitioner-plaintiffs to deposit the required Court fees within seven days failing which the plaint would be rejected and the suit was posted to 23.11.2010 for payment of Court fees and for further hearing. It is an admitted fact that on 23.11.2010 the petitioner-plaintiffs prayed for two weeks time to deposit the Court fees which was allowed and the matter was adjourned to 4.12.2010 as a last chance directing for payment of Court fees. When the matter was taken up on 4.12.2010 the plaintiffs produced caste certificates which was obtained on 1.12.2010 in Misc. Case Nos. 1388 and 1389 of 2010 showing that the petitioner-plaintiffs 1 and 3 are Scheduled Castes as they belong to 'Dhoba' community. When the direction of the Court is to pay Court fees on entire valuation of the suit which was calculated at Rs.10,635/- and when the petitioner-plaintiff No.5 in

his evidence on oath before the Court deposed that he is deposing for himself and also on behalf of other plaintiffs being duly authorized and since the petitioner-plaintiff No.5 claims to have joint interest over the suit properties along with the other plaintiffs the question of proportionate payment of Court fees does not arise at all. Besides that when the petitioner-plaintiffs had accepted the orders of the Court when they were asked to pay the Court fees and sought for time twice they cannot turn around and claim that they are not to pay any Court fees as they belong to 'Dhoba' by caste especially when the petitioner-plaintiff No.5 admits that he adopted Christianity in 1984. After going through the impugned orders at Annexures-6 and 9, I do not find any infirmity in those orders calling for any interference by this Court in exercise of certiorari jurisdiction.

7. Accordingly, the present writ petition being devoid of merit stands dismissed.

8. Before parting with the case, I am of the firm view that the present case is a fit case where the Collector, Cuttack shall cause an enquiry with regard to the caste certificates issued to Batakrushna Sethy, Lingaraj Sethy and Chitaranjan Sethy who are petitioner Nos. 1, 3 and 5 in this case, vide Misc. Certificate Case Nos. 1389 and 1388 of 2010 and in Misc. Case No. 275 dated 20.10.1981 respectively and take appropriate steps in consonance with the instructions of the Government in Scheduled Tribe and Scheduled Caste Development Department letter No. 25286 dated 16.8.1989. Copy of this order be furnished to the learned Advocate General for onward communication to the Collector, Cuttack for appropriate action.

9. Since the matter has been delayed much the learned Civil Judge (Sr.Divn.) 1st Court, Cuttack is to proceed with the Civil Suit No. 30 of 2007 without any further delay and the parties are directed to co-operate with the Court so that the suit would be disposed of as expeditiously as possible, preferably within a period of six months.

The interim order passed in Misc. Case No. 136 of 2011 stands vacated.

Writ petition dismissed.

2013 (II) ILR - CUT- 510

DR. A.K.RATH, J.

MACA NO. 718 OF 2009 (Dt.24.07.2013)

BRANCH MANAGER,
BAJAJ ALLIANZ GENERAL
INSURANCE CO. LTD. …….. Appellant

.Vrs.

KUMARI PODHA & ORS. ……Respondents

MOTOR VEHICLES ACT, 1988 – S. 147

Motor accident – Death of labourer while working in the offending tractor-trolley – Whether extra premium is required to be paid to cover the risk of labourer travelling in the tractor-trolley – Held, a tractor fitted with trolley is a goods carriage and as per section 147(1) of the M.V.Act, 1988 no extra premium is required to be paid to cover the liability of such a labourer. (Paras, 08)

Case laws Referred to:-

1. 2009 (II) OLR 982 : (Divisional Manager, Oriental Insurance Co.Ltd. -V- Minka Munda & 2 Ors.)
2. AIR 2001 SC 1419 : (New India Assurance Co.Ltd.-V- Kamala & Ors.)

For Appellant - M/s. A.A.Khan & S.K.Mishra
For Respondents - M/s. K.C.Nayak,P.R.Routray, P.K.Kar & A.Sahoo

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Dr. A.K.RATH,J. Insurer is the appellant. It challenges the award dated 23.05.2009 passed by the learned Addl. District Judge & 3rd MACT, Boudh in MACT Case No. 13 of 2008, whereby and whereunder the learned tribunal awarded compensation of Rs. 2,52,800/- and directed the insurer to pay the same along with interest at the rate of 6% per annum from the date of filing of claim application till the date of realization.

2. Bereft of unnecessary details, the short fact of the case of the respondents 1 to 4, who are claimants before the tribunal, is that the deceased Sankar Podha was working as a labourer in a tractor and trolley bearing registration no. OPR 12A 5531 & 5532 respectively. On 25.04.2008 at about 3.00 A.M. while he was travelling from Landreju to Boudh in the said vehicle, due to rash and negligent driving of the driver of the vehicle, he fell down from the tractor and was run over by the trolley, as

a result of which he succumbed to injuries on the spot. Thereafter the claimants, who are the legal heirs and dependants of Sankar Podha filed an application under Section 166 of the M.V.Act, before the Additional District Judge & 3rd M.A.C.T., Boudh.

3. Pursuant to issuance of notice, opposite party no.1, insurer of the offending tractor-trolley, entered appearance and filed the written statement denying its liability. Opposite party no. 2, owner of the offending vehicle, also filed a written statement denying liability.

4. On the inter-se pleadings of the parties, learned tribunal stuck three issues. To prove the case, the claimants had examined three witnesses and seven documents were exhibited on their behalf. On behalf of opposite party no. 1 three documents were exhibited. Opposite party no. 2 exhibited one document.

5. On a thorough analysis of the evidence, both oral and documentary and the pleadings of the parties, learned tribunal came to hold that the accident occurred due to rash and negligent driving of tractor-trolley bearing registration no. OPR 12A 5531 & 5532 respectively. Having held so, the learned tribunal awarded an amount of Rs. 2,52,800/-(rupees two lakhs fifty two thousand eight hundred).

6. Assailing the award, Mr. A.A.Khan, learned counsel appearing for the appellant submitted that since the deceased was travelling as an unauthorized passenger in the tractor-trolley,the learned tribunal committed manifest illegality and impropriety in saddling the liability on the insurer. He further submitted that since the driver of the offending vehicle did not have a valid and effective driving licence at the time of accident, the insurer is exonerated its liability. Mr. Khan further submitted that since the offending vehicle was a transport vehicle and the driver of the vehicle was having a licence to drive non-transport light motor vehicle tractor, he was not authorized to drive the said vehicle. The learned counsel appearing for the claimants supported the award.

7. In course of hearing, learned counsel for the appellant produced the temporary permit issued by the Secretary, Regional Transport Authority, Phulbani, Kandhamal and R.C.Book. These documents were marked as Exhibit-A/1 and B/1 respectively before the learned tribunal. On a perusal of the temporary permit, it is evident that the offending vehicle was a goods carriage vehicle. Clause -12 of the said permit provides that the vehicle may carry four mazdoors for loading and unloading of goods besides the driver. It

further provides that not more than six persons in all including the driver shall be carried in vehicle and the number of persons carried in the cabin of the vehicle shall not exceed the number records in the registration certificate. The registration certificate shows that the seating capacity of the vehicle was one. Taking a cue from the R.C.Book, Mr. Khan submitted that since the seating capacity of the vehicle was one and the deceased was travelling as an unauthorized passenger, the insurer is exonerated from the liability. Though the submission of Mr. Khan at a flash appears to be attractive, but on scanning of the documents this Court finds that the submission is billabong. Clause-12 of the terms and conditions of the permit provides that the vehicle may carry four mazdoors for loading and unloading of goods and that the number of persons carried in the cabin of the vehicle shall not exceed the number records in the registration certificate. In a cabin of a tractor one person is permitted, i.e., the driver. It is the common knowledge that the labourers used to travel in the trolley

8. As regards the plea of the insurer that no extra premium having been paid to cover the risk of the labourer travelling in a tractor-trolley, the same is erroneous and misconceived. A tractor fitted with trolley is a goods carriage and as per Section 147(1) of the M.V.Act, no extra premium is required to be paid to cover the liability of such a labourer. An identical question came up for consideration before this Court in the case of the **Divisional Manager, Oriental Insurance Co.Ltd. v. Minka Munda and two others**, 2009 (II) OLR 982. This Court held as follows:

> "As regard the plea of insurer that no extra premium having been paid to cover the risk of a labourer travelling in a tractor-trolley, the same is erroneous and misconceived. A tractor fitted with a trolley is a goods carriage and as per Section 147(1) of the M.V. Act, no extra premium is required to be paid to cover the liability of such a labourer carried in a goods vehicle."

9. The residual question to be decided is as to whether the driver of the offending vehicle was having a valid and effective driving licence at the time of accident. Though driving licence of the driver was exhibited as Exhibit-C/1, but the learned tribunal did not delve in to that aspect of the matter. Even if the driver of the offending vehicle did not have a valid and effective driving licence at the time of accident, the claimants will not suffer for that. In the case of **New India Assurance Company Limited v. Kamala and others**, AIR 2001 SC 1419, their Lordships held that the insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the

insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid licence. The ratio of the said case applies with full force to the facts of the present case.

10. As a sequel, the award passed by the learned tribunal is confirmed. The matter is remitted back to the learned tribunal to decide the issue regarding validity of the driving licence of the driver. The appellant is directed to deposit the entire award amount with interest before the learned tribunal within three months. After deposit of the award amount the learned tribunal shall decide the issue as indicated above after affording opportunity to the insurer and insured for which no notice is required to be issued to the claimants. No costs.

Appeal disposed of.

2013 (II) ILR - CUT- 513

DR. B. R. SARANGI, J.

CRL MC No. 413 OF 2005 (Dt.02.08.2013)

BRAJA KISHORE DAS AND ORS. ……Petitioners

.Vrs.

STATE OF ORISSA …….Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S. 482

Quashing of order taking cognizance – Offence U/s 498-A I.P.C and Section 4 of the D.P Act – Petitioners are inlaws of the deceased and trial against them was split up – Since the husband being the main accused has already been acquitted after a full-fledged trial, Continuance of Criminal Proceedings against the petitioners would be an abuse of the process of Court, especially when there is bleak possibility of any conviction – Held, the impugned proceeding against the petitioners in the split up trial is quashed. (para,7)

Case laws Referred to:-

1. (2007) 37 OCR 150 : (Namita Nayak@Namita Kumar Nayak & Anr.-V-State of Orissa)
2. (2008) 41 OCR 233 : (Aditya Kumar Rath-V-State of Orissa)
3. (2011) 48 OCR 289 : (Chirantan Sahu-V-State of Orissa)
4. (2011) (I) OLR 1052 : (Surendra Kumar@Surendra Routray-V-State of Orissa)
5. (2005) AIR SC 268 : (Central Bureau of Investigation-V-Akhilesh Singh)
6. (2005) (II) OLR 386 : (Kanhu Behera-v-State of Orissa)
7. (2006) 35 OCR 151 : (Santosh Kumar Maity-V-State of Orissa)
8. (2006) 35 OCR 171 : (Upendra Sahoo@Upendra Kumar Sahoo-V-State of Orissa)
9. (1988) AIR SCC 709:Madhavrao Jiwajirao Scindia and Ors.-V-Sambajirao Chandrrojirao Angre and Ors.

For Petitioner - M/s. D. P. Dhal, B.B. Mishra, A. Rath
P. K. Routray & R. Rout
For Opp. Party - M/s. S.K. Zaffrulah, Addl. Standing Counsel

DR. B.R.SARANGI, J. The order dated 24.12.1993 passed by the learned J.M.F.C., Soro in G.R. Case No. 300 of 1992 taking cognizance of the offences under Section 498-A and Section 4 of D.P. Act in Annexure-2, is sought to be quashed in the present CRLMC.

2. The prosecution case, in short, is that in 1985 the daughter of the informant had married to accused Umesh Ch. Das. At the time of marriage the informant had given a cash of Rs.5,000/-, 8 tolas of gold etc., but could not comply with the demand of one Godrej Almirah, for which his daughter was subjected to ill-treatment by the petitioners, who are her in laws. On 30.05.1992 the informant had gone to his daughter's house on the occasion of "Sabitri Amabasya" where he learnt that his daughter along with her baby aged about seven months have died. Later he came to know from the neighbours of the accused persons that they killed his daughter and the baby by pouring petrol. So, the informant reported the matter at Soro Police Station. Police conducted investigation and after completion of the same, submitted charge-sheet against the petitioners and one Umesh Ch. Das, the husband of the deceased under Section 498-A/304-B of I.P.C. and Section 4 of D.P. Act. On receipt of the charge-sheet, the learned J.M.F.C., Soro took cognizance of the offence under Sections 498-A/304-B/34 of I.P.C. and Section 4 of D.P. Act. against the petitioners and the said Umesh Ch. Das by order dated 24.12.1993 in G.R. Case No.300 of 1992.

3. Challenging the said order of cognizance Umesh Ch. Das, the husband of the deceased filed a criminal revision before the learned Sessions Judge, Balasore, who on analysis of materials available on record, by order dated 11.07.1995 set-aside the order of cognizance so far as it relates to Section 304-B of I.P.C. However, he confirmed the order of cognizance as regards cognizance under Section 498-A of I.P.C. and Section 4 of D.P. Act. The trial against the petitioners and Umesh Ch. Das was split up by the learned J.M.F.C., Soro vide order dated 29.04.99. Accordingly, learned J.M.F.C. framed charges against Umesh Ch. Das under Section 498A of I.P.C. and Section 4 of D.P. Act. After charges were framed, the learned Magistrate proceeded with the trial. In the trial since the prosecution miserably failed to bring home the charges levelled against Umesh Ch. Das acquitted him of the charges vide judgment dated 04.12.2001 endorsing the case as a mistake of fact. The main contention of the petitioners, who are the in laws is that because of the acquittal of Umesh Ch. Das, the husband of the deceased, who is alleged to be the main accused by revisional order clearly indicative/suggestive to make it evident that there is absolutely no material to make out an offence under Section 498-A/304-B of I.P.C. and Section 4 of D.P. Act against them. Therefore, the petitioners seek for quashing of criminal proceeding against them.

4. Mr. D.P. Dhal, learned counsel appearing for the petitioner To substantiate this contention relied upon the judgments reported in ***Namita Nayak @ Namita Kumari Nayak & another Vrs. State of Orissa: (2007) 37 OCR 150, Aditya Kumar Rath Vrs. State of Orissa: (2008) 41 OCR 233, Chirantan Sahu Vrs. State of Orissa: (2011) 48 OCR 289 & Surendra Kumar @ Surendra Routray Vrs. State of Orissa: 2011 (I) OLR 1052*** and vehemently urged that since the main accused has already been acquitted by following trial, no useful purpose will be served to continue with the proceeding in respect of the petitioners as it will amount to abuse of the process of Court.

5. Before going into the merits of the case, the law governing the field is to be examined. In ***Central Bureau of Investigation Vrs. Akhilesh Singh*** *reported in AIR 2005 SC 268=2005 (I) OLR SC 354=(2005) 30 OCR (SC) 201* the Supreme Court has held that that when the main accused has already been acquitted of the trial the continuation of the criminal proceedings against the other accused would be an abuse of the process of law, especially when there is bleak possibility of their conviction. In ***Kanhu Behera Vrs. State of Orissa,*** *2005(II) OLR 386* it has been held that quashing of cognizance is an inherent power under Section 482 Cr.P.C. and can be invoked to quash the order of cognizance involving non-

compoundable offences where the principal accused has already been acquitted after a full-fledged trial and continuance of the criminal proceeding against the petitioners would be undoubtedly abuse of the process of Court. In ***Santosh Kumar Maity Vrs. State of Orissa,*** *(2006) 35 OCR 151****, Aditya Kumar Rath Vrs. State of Orissa,*** *(2008) 41 OCR 233****, Chirantan Sahu Vrs. State of Orissa:*** *(2011) 48 OCR 289* the proceeding against the petitioner who has been shown as absconder in the charge sheet was quashed since the son had faced trial and had been acquitted and therefore, it was held that no purpose exists for continuance of trial. Similar view has also been taken in ***Upendra Sahoo @ Upenda Kumar Sahoo v. State of Orissa,*** (2006) 35 OCR 171 in which this Court has quashed the criminal proceeding. Further, in ***Madhavrao Jiwajirao Scindia and others v. Sambajirao Chandrojirao Angre and others***, AIR 1988 SC 709, the apex Court has held that where in the opinion of the Court, the chance of ultimate conviction is bleak and no useful purpose is likely to be served by allowing the criminal proceeding to continue, the Court may while taking into consideration of the special facts of the case also quash the proceeding.

6. The judgment in *Surendra Kumar @ Surendra Routray* (supra), the fact of which case is akin to the case in hand, where the offence alleged to have been committed is one under Sections 498-A/304-B/306/34 IPC and 4 of the D.P. Act against all the accused persons including the in laws and husband of the deceased Nandini. Against the husband, Narendra the case was split up and S.T. case No. 46 of 2007 continued. Since he was acquitted by the learned Addl. Sessions Judge, Jajpur on 28.03.2008, in that case in laws were before this Court and on considering the facts and circumstances of that case, this Court held that when the main accused has already been acquitted in the trial, continuance of the criminal proceedings against the in-laws, would be an abuse of the process of law especially when there is bleak possibility of any conviction.

7. Considering the aforesaid judgments relied upon by the learned counsel for the petitioners and the law laid down by the apex Court, I am of the considered view that the continuance of the criminal proceeding against the present petitioners, who are the in-laws of the deceased, would be an abuse of the process of law, especially when there is bleak possibility of any conviction and, therefore, the ends of justice would be best served if the proceeding in the split up trial is quashed. Accordingly, the proceeding in G.R. Case No.300 of 1992 pending in the court of learned J.M.F.C., Soro is hereby quashed. The CRLMC is accordingly allowed.

Application allowed.