G.S.SINGHVI, J & ASOK KUMAR GANGULY, J.

UNION OF INDIA & ORS.-V- NILA DIE.*

JANUARY 25 ,2010

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

Condonation of delay of 203 days – Cause of delay – File of the case was tossed between different functionaries of the Railway administration.

A decade and half ago this Court may have accepted such specious and ready made explanation offered by the officers of the State and its agencies and instrumentalities by judicially acknowledging red tapism and lethargy in the functioning of the Government and other public bodies but such an approach is not compatible with the time when people of the Country are demanding accountability of all concerned with the functioning of the public institutions – Held, explanation offered for the delay can not be treated as sufficient – Application for condonation of delay is dismissed.

(B) CONSTITUTION OF INDIA, 1950 – ART.136.

Special Leave Petition dismissed as barred by time – However this Court wanted to consider the case on merit.

In a case like the present one, the concerned officers should have suo moto apprised the respondent of her entitlement to get one member of her family employed in accordance with the policy of Railway Board – Held, order passed by the High Court is just and equitable and does not call for interference Under Article 136 of the Constitution - SLP is dismissed as barred by time as well as on merits – However petitioner shall pay cost of Rs.50,000/- to the respondent and provide employment to her son in terms of the order passed by the High Court.

For Petitioners – Mr.Vivek Tankha, A.S.G.
Mr. Harish Chandra, Sr.Adv.
Mr. S.Wasim A. Qadri, Adv.

For Respondents - None

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*Petition(s) for Special Leave to Appeal Civil No.3810/2010. From the judgment and order dated 03.03.2009 in OJC No.2411/2001 of the High Court of Orissa at Cuttack.

UPON hearing counsel the Court made the following

O R D E R

This is a petition by Union of India and two others for setting aside order dated 3.3.2009 passed by the division Bench of Orissa High Court in O.J.C. No.2411/2001 whereby it reversed the order of the Central Administrative Tribunal, Cuttack Bench (for short, 'the Tribunal') and directed the concerned authority of South Eastern Railway to provide suitable

employment to one of the family members of the respondent in accordance with the guidelines framed by the Railway Board.

The petitioners have also filed an application for condonation of 203 days delay in filing the Special Leave petition.

We have heard Shri Vivek Tankha, learned Additional Solicitor General who is assisted by Shri S.Wasim A. Quadri and carefully perused the record. In our view, the averment contained in the application for condonation of delay showing that the file of the case was tossed between different functionaries of the railway administration and the advocates does not furnish valid excuse for delayed filing of the special leave petition. A decade and half ago this Court may have accepted such specious and ready-made explanation offered by the officers of the State and its agencies and instrumentalities by judicially acknowledging red tapism and lethargy in the functioning of the Government and other public bodies but such an approach is not compatible with the time when people of the country are demanding accountability of all concerned with the functioning of the public institutions. Therefore, the explanation given by the petitioners for the delay of 203 days can not be treated as sufficient so as to warrant exercise of discretion by this Court in their favour under Section 5 of the Limitation Act and the application for condonation of delay is liable to be dismissed. As a sequel to that, the special leave petition is liable to be dismissed as barred by time.

Notwithstanding the above, we have thought it proper to consider the issue raised by the petitioners on merits. Undisputedly, the respondent is a member of Scheduled Tribe. Her land measuring 9.24 acres in Khata No.114/277 of Tikiri Village was acquired by the authorities of South Eastern Railway in 1986 for construction of Koraput-Rayagada Railway line. In terms of the policy framed by the Railway Board to provide employment to one member of the family of the land owner besides award of compensation, the respondent approached the concerned authority for appointment of her son as a casual labour. The name of her son was recommended by the special Land Acquisition Officer (Railways) Koraput vide letter dated 4.10.1991 for providing employment, but no action was taken by the competent authority on the said recommendation. The legal notice dated 23.8.1995 sent by the respondent through her advocate also did not yield any result compelling her to file an application under Section 19 of the Administrative Tribunals Act before the Tribunal. The learned Vice Chairman of the Tribunal who decided the original application noted that as per the decision taken in the meeting held between the Chief Minister of Orissa and Chief Engineer (Constructions), South Eastern Railway, 188 members of the families of land owners were to be provided job but, rejected the respondent' plea on a

wholly untenable ground that she had approached the Tribunal after 10 years of acquisition and as per the Railway Board's circular employment was to be given within two years.

The Division Bench of Orissa High Court, on a consideration of the factual matrix of the case held that the Tribunal was not at all justified in dismissing the application filed by the respondent on the ground of delay ignoring the fact that in the first instance the competent authority had recommended the name of her brother and even though the mistake was rectified in 1991, action was not taken by the concerned authority for providing employment to her son. The High Court then considered the policy framed by the Railway Board and held that one member of the family is entitled to be employed as a matter of right.The relevant portions of the order passed by the High Court are extracted below: -

"4. It appears that notice under section 4(C) of the Land Acquisition Act was issued to the petitioner on 19.09.1987 vide Annexure-2. Notice under section 12(2) was issued to her on 24.3.1988 to appear before the Land Acquisition Collector on 20.04.1988 to receive compensation. From Annexure-6, the letter dated 04.10.1999 of the Special Land Acquisition Officer (Railway), Koraput addressed to the Chief Engineerr (Con.) S.E. Railway, Laxmipur, it appears that Ac.9.24 decimals of land belonging to petitioner was acquired for Koraput-Rayagada Railway Line but by letter dated 8.6.1989 the name of her brother was wrongly recommended for providing employment. When the petitioner approached the Special Land Acquisition Officer by filing a petition, the mistake was corrected and the name of her son was recommended. As the Railway authorities did not take any action, the petitioner served legal notice and thereafter after obtaining the certificate from the Land Acquisition Officer approached the Tribunal in 1996. In view of the aforesaid, the Tribunal was not right in holding that as the petitioner has not approached the Tribunal for the last 10 years, her claim for providing employment to her son was not maintainable.

5. Now it is necessary to see whether according to the guidelines of the Railway Board, the employment on rehabilitation in only given for the purpose of the work done on the acquired land or may also be some other place. In this regard, the petitioner has filed a copy of the letter of the Railway Board date 31.12.1982/01/01/1983 with the subject "appointment to Group'C' and 'D' posts on the Railways of members of families displaced as a result of acquisition of land for establishment of Projects." In paragraph 2 thereof, it has been provided that the Zonal Railways and Production Units and also project authorities may consider applications received from persons displaced on account of large-scale acquisition of land for projects on the Railways for employment of the displaced person, or his son/daughter or wife for employment in Group 'C' or Group IV posts in their organization

including engagement as casual labour and given them preferential treatment for such employment, subject to the following conditions:

"1. The individual concerned should have been displaced himself or the should be the son/daughter/ward/wife of a person displaced from land on account of acquisition of the land by the Railways for the Project.

2. Only one job on such preferential treatment should be offered to one family;

3. This dispensation should be limited to recruitments made from outside is direct recruitment categories and to the first recruitment of within a period of two years after the acquisition of land, whichever is later;

4. It must also be ensured that the displaced persons did not derive any benefit through the State Government in the form of alternative cultivable land etc; and

5. The person concerned should fulfill the qualification for the post in question and also be found suitable by the appropriate recruitment Committees, in the case of the Group 'C' posts for which recruitment is made through the Railway Service Commission, the Chairman or the Member of the Railway Service Commission should be associated in the recruitment.

In view of the above, it can not be said that the employment to a displaced person or any member of his family is confined only to the work which is to be done on the acquired land but it is liable to be provided anywhere within the zone and, therefore, we are of the opinion that one of the family members of the petitioner is entitled to get employment; more so when in the counter affidavit the opposite parties themselves conceded that they have provided employment to 188 persons of the displaced families then why the petitioner should be discriminated."

The petitioners have questioned the impugned order mainly on the grounds that the scheme for rehabilitation of the oustees has come to an end and that the application filed by the respondent was highly belated.

In our opinion, neither of the grounds put forward by the petitioners can be made basis for upsetting the direction given by the High Court because they have not produced any evidence before this Court to show that the name of the respondent's son had not been recommended in 1991 for providing employment in accordance with the policy of the Railway Board. It is most unfortunate that instead of adopting a sympathetic and humane approach qua a woman belonging to Scheduled Tribe, who was deprived of the only source of livelihood in the name of public interest, the functionaries of the State administration and South Eastern Railway treated her with utter contempt and deprived her son of the legitimate right to be employed as per the policy of the Railway Board. In a case like the present one, the concerned officers should have suo moto apprised the respondent of her entitlement to get one member of her family employed in accordance with

the policy of Railway Board, ensured that the paper formalities are completed without delay and, thereafter, issued necessary order but, as is usual, everyone in the administration appear to be out to deprive the respondent, who, as mentioned above, belongs to Scheduled Tribe of her legitimate right. This is a sad commentary on the functioning of the State apparatus. The Directive Principles of State Policy enshrined in Part IV of the Constitution obligates the State and its functionaries to take all possible measures for ameliorating the conditions of Scheduled Caste, Scheduled Tribe and other weaker sections of the society so that the promise made to the people on 26th January, 1950 can be fulfilled but when it comes to implementation of the legislative and executive measures intended to benefit that class of the society, those involved in the operation of bureaucratic system, at times, make all out efforts to deprive the have-notes of their legitimate dues.

In our considered view, the order passed by the High Court is most just and equitable and does not call for interference under Article 136 of the Constitution.

With the above observations, the special leave petition is dismissed as barred by time and also on merits. The petitioner shall pay cost of Rs.50,000/-. This amount shall be paid to the respondent within a period of eight weeks. Within that period, the petitioners must provide employment to the son of the respondent in terms of the order passed by the High Court. A report showing compliance of this direction shall be filed in the Court within nine weeks and the Registry shall list the matter before the Court after ten weeks.

Special leave petition is dismissed.

2010 (I) ILR-CUT- 431

TARUN CHATTERJEE, J & AFTAB ALAM, J.

BHARAT SANCHAR NIGAM LTD. & ANR. -V- SHRI DHANURDHAR CHAMPATIRAY.*

DECEMBER 11,2009.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – SEC.11.(6) (8).

Appointment of arbitrator – Arbitral agreement – If one party demands appointment of arbitrator and the other party does not appoint any arbitrator within thirty days of such demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files application U/s.11 seeking appointment of an arbitrator before the High Court.

In the present case High Court appointed an arbitrator U/s.11(6) of the Act, but failed to take into consideration the qualification required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator as contained U/s.11(8) of the Act.

Held, impugned order set aside and matter remanded to the High Court for fresh decision.

Case law Relied on:-

2008 (10) SCC 240 : (Northern Railway Administration, Ministry of Railway -V- Patel Engineering Company Ltd.).

Case laws Referred to:-

1.(2006) 2 SCC 638 : (Punj Lloyd Ltd.-V-Petronet MHB Ltd.).
2.(2000) 8 SCC 151 : (Datar Switchgears Ltd.-V-Tata Finance Ltd. & Anr.)
3.(2007) 5 SCC 304 : (Ace Pipeline Contracts Pvt.Ltd. -V-Bharat Petroleum Corporation Ltd.).
4 .2007 (7) SCC 684 : (Union of India -V- Bharat Battery Manufacturing Co.Pvt. Ltd.).

For Appellant –
For Respondent –

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*CIVIL APPEAL NOS.8230 OF 2009. (Arising out of SLP© NO.8218 of 2007).

TARUN CHATTERJEE, J.

1. Leave granted.

2. These appeals by special leave have been filed against the orders dated 5th of January 2005 in A.R.B.P. Nos.11, 12, 17, 18 and 28 of 2005 passed by the High Court of Orissa whereby the High Court had appointed Sh. Bibhudhendra Mishra, a Senior Advocate of the Orissa High Court as the sole arbitrator on the application of the respondent filed under Section 11 (6) of the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the Act"). Since the parties and the subject matter of the dispute are the same,

we have clubbed all these appeals and the same are being decided analogously by this common judgment to avoid any confusion.

3. The relevant facts leading to the filing of these appeals as emerging from the records may be briefly stated as follows :

The parties herein entered into a contract pursuant to distinct notices inviting tender by BSNL (in short 'the appellant') for the work of construction of 4 Nos. of Type-II, 2 Nos. Type-III and 1 No. of Type-IV Staff Quarters at Bhanjanagar of vertical extension to combined building at Aska of 3 Nos. of Type III, 3 Nos. of Type II and 4 K type T.E. building at Jankia and of vertical extension to 8 Nos. of Type II and 6 Nos. of Type IV staff quarters at CTTC compound Vanivihar, Bhubaneswar.

4. The said contract contained an arbitration Clause in terms whereof the Chief Engineer, Telecommunication/ Postal Department in charge of the work at the time of dispute, or if there be no Chief Engineer, the Administrative Head of the said Telecommunication/ Postal Department was to be appointed as a sole arbitrator. The said provision envisaged that in terms thereof no person other than the one appointed by such Chief Engineer or Administrative Head of the Telecommunication/ Postal as aforesaid should act as arbitrator to decide the disputes referred to him.

5. The respondent, by letters, requested the Chief Engineer (Civil) for appointment of an arbitrator to adjudicate the disputes between the parties in terms of clause 25 of the respective agreements. According to the respondent, letters were received by the Chief Engineer of the appellant no.1 on different dates. The Appellants having failed to respond to the letters of respondent requiring them to appoint an arbitrator and to appoint an arbitrator in response to such letters within the stipulated period in accordance with Clause 25 of the respective Agreements, the respondent was constrained to file petitions under Section 11(6) of the Act for appointment of an Arbitrator. However, according to the case made out by the appellants, on 9th of March, 2005, Chief Engineer (Civil), BSNL had already appointed Sri Gurbaux Singh, Principal Chief Engineer (Arbitration) BSNL vide, its office letter No.69- 41(05)/CE©/BBSR/205. By the impugned order, the High Court allowed application under S.11(6) of the Act, and appointed one Sri Bibhudhendra Mishra in place of departmental nominee Sri. Gurbaux Singh who was appointed by Chief Engineer (Civil) BSNL of appellant No.1.

6. Feeling aggrieved by the said order of the High Court, the appellant has filed these special leave petitions which on grant of leave, were heard in the presence of learned counsel for the parties.

7. Before we consider the arguments raised by the learned counsel for the parties before us, it would be necessary to refer to Section 11 of the Act, which reads as under:

"Section 11. Appointment of arbitrators, (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3)& (4)……., omitted because these are not necessary for our purpose

(5)Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6)Where, under an appointment procedure agreed upon by the parties, - (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to – (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator… "

8. A plain reading of Section 11 (5) of the Act would show that if one party demands appointment of an arbitrator and the other party does not appoint any Arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the appellant makes an appointment even after thirty days of demand but the first party has not moved the Court under section 11, that action on the part of the appellant would be sufficient. In other words, in cases arising under Section 11 (6), if the respondent has not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application under Section 11 seeking appointment of an arbitrator before the High Court. It is only then the right of the respondent ceases. In

this connection, a three-Judge Bench decision of this Court in **Punj Lloyd Ltd. V. Petronet MHB Ltd., (2006) 2 SCC 638,** may be referred to. In this case, this Court considered the applicability of Section 11 (6) of the Act and after considering the scope and object of the Act held that once notice period of thirty days has expired and the party has moved the Hon. Chief Justice of the High Court under Section 11 (6) of the Act, the other party loses his right to appoint an arbitrator on the basis of arbitral agreement. While taking this view, this Court in the Punj Lloyd's case (supra) had relied on the judgment referred in **Datar Switchgears Ltd. V. Tata Finance Ltd. and Another, (2000) 8 SCC 151,** wherein in paragraph 19 at page 158 this Court observed as follows:

> *" So far as cases falling under Section 11(6) are concerned, such as the one before us no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an Arbitrator and the opposite party do not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, which would be sufficient. In other words, in cases arising under Section 11 (6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases."*

9. Similarly in the case of **Ace Pipeline Contracts Private Limited V. Bharat Petroleum Corporation Limited, (2007) 5 SCC 304,** this Court went to observe that :

> *"But in sub-section (6), where, the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may in that event, request the Chief Justice or a person or an institution designated by him to make necessary measures, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in Sub-section (6). The period of limitation is only provided under sub-*

sections (4) & (5) of Section 11. As such, as per the statute, the period of limitation of thirty days can not be invoked under sub-section (6) of Section 11 of the Act."

10. On a perusal of the above quoted observations of this Court made in Ace Pipeline Contracts Private Limited (supra), the reasons advanced in the orders passed by the High Court must be found to be a correct interpretation of the aforesaid provision and so far as the period of 30 days with regard to Section 11(6) is concerned, there is no doubt at all that thirty days limitation can not be invoked as mandatory period under Section 11 (6) of the Act. But a somewhat different view was expressed in a latter decision of this Court in the case of **Union of India vs. Bharat Battery Manufacturing Co.Pvt. Ltd.** (2007 (7) SCC 684**).** In view of the difference of opinion of the two coordinate benches of this Court, the matter was referred to a three-Judge Bench in the case of **Northern Railway Administration, Ministry of Railway vs. Patel Engineering Company Ltd.** (2008 (10) SCC 240) in which the decision in Ace Pipeline Contracts Pvt. Ltd. (supra) was also referred to, Arijit Pasayat, J. (as His Lordship then was), heading the three-Judge Bench of this Court, after considering the scope and object of the Act particularly Section 11 of the Act, concluded the following :

" A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

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In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of Sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

11. In the aforesaid decision in the case of Northern Railway Administration (supra), Arijit Pasayat, J. (as His Lordship then was), found that the High Court in the said case did not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator. In the aforesaid decision, this Court also concluded that since the requirement of sub-section (8) of Section 11 was not at all dealt with by the High Court in its order, the appointment of an arbitrator without dealing with Sub-section 8 of Section 11 of the Act became vulnerable and accordingly, such appointment was set aside. Similar is the position in this case. In this case also, before appointing an arbitrator under Section 11(6) of the Act, the High court had failed to take into consideration the effect of Section 11(8) of the Act as was done in Northern Railway Administration (supra).

12. In view of the discussions made hereinabove and particularly, in view of the principles laid down by this Court in Northern Railway Administration (supra), we set aside the impugned order and remand the case back to the High Court for fresh decision of the application under Section 11(6) of the Act and while considering the application afresh, the High court is directed to take into consideration the aforesaid decision of this Court.

13. The appeals are allowed to the extent indicate above. There will be no order as to costs.

Appeals allowed.

2010 (I) ILR-CUT- 437

I.M.QUDDUSI, J.

ISS CONSTRUCTIONS -V- NEERAJ CEMENT STRUCTURAL LTD.*

DECEMBER 24,2009

ARBITRATION & CONCILIATION ACT,1996 (ACT NO. 26 OF 1996) – SEC.11(6).

Appointment of Arbitrator – Agreement signed by the petitioner and Opp.Party – As per Clause 17 of the agreement any dispute between them would be subject to the jurisdiction of the Courts at Mumbai – Although subsequent documentation and communication were made from Cuttack branch office of the Opp.Party as per Clause 17 of the agreement Parties have consciously ousted the jurisdiction of the Courts at Cuttack – Held, this Court has no jurisdiction to entertain this petition.

(Para 4 & 6)

Case laws Referred to:-

1.AIR 1989 SC 1239 : (A.B.C.Laminart Pvt.Ltd.-V- A.P.Agencies, Salem).
2.AIR 1971 SC 740 : (Hakam Singh -V-Gammon (India) Ltd.)
3.AIR 1995 SC 1766 :(Angile Insulations -V- Davy Ashmore India Ltd.)

For Petitioner – M/s. Goutam Mukherjee, P.Mukherjee, A.Ch.Panda, B.Panigrahi, Suvalaxmi, R.Biswal.

For Opp.Party – Mr.G.M.Rath & M/s.D.K.Dwibedi, P.K.Patnaik, N.Mohanty, B.Guin, S.Mishra, S.S.Padhy, S.K.Patnaik with him.

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*ARBP NO. 20 of 2009. In the matter of an application under Section 11(6) of the Arbitration & Conciliation Act, 1996.

I.M. QUDDUSI, ACJ. This application has been moved by the petitioner ISS construction, a partnership firm, invoking jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint any arbitrator.

2. Brief facts of the case are that the petitioner is a partnership firm having expertise in construction of roads and it has undertaken and successfully completed number of Government and Semi-Government works. The Opposite party which is a Maharashtra based company claims to have undertaken major construction projects in the country. Government of Orissa floated tender for construction of Cuttack-Paradeep road and the opposite party was awarded with the construction of a stretch of 43 Kms. of the said road. After obtaining the contract, it entered into sub-contract with three contractors including the petitioner which was entrusted with construction of the road from 13/000 Kms to 28/000 Kms. The work entrusted to the petitioner involved construction of embankment with sand or earth, laying of sub grade and topping of with granular sub base so as to

improve two lanes rigid pavement carriage with paved shoulders of 1.5 Mts. on both sides along with C.D. (Cross Drainage) works in the allotted stretch of 15 Kms. For this purpose an agreement was executed between the petitioner and opposite party at Cuttack on 11.9.2007. As per the terms of the agreement, the petitioner was required to carry out the construction work as per the plans prepared and supplied by the opposite party. It was agreed that the work would be completed within a period of seven months. The opposite party promised to reward the petitioner with 0.5% to a maximum of 1.0% of the final bill as bonus for timely completion of the work. Therefore, time was essence of the contract. It is the further case of the petitioner that the terms of the contract between the State and the opposite party was not known to the petitioner and even after petitioner's insistence to know the same, opposite party avoided to disclose the same. Opposite party paid a sum of Rs. 7,00,000/- to the petitioner as mobilization advance and to secure the amount, petitioner furnished a bank guarantee of Union Bank of India for Rs. 40,00,000/- in favour of the opposite party for a period of one year. As per the agreement, opposite party was required to pay the running bills ever month. The opposite party was required to clear the bill within 7 days from the date of its receipt. Such bills were to be prepared after measurement made/certified by the opposite party. The petitioner was required to work according to the schedule prepared and given by the Planning Department of the opposite party. The schedule of work was not given to the petitioner in time and only verbal instructions were given based on which the petitioner proceeded to execute the work. The first schedule was given to the petitioner in March, 2008 by which time the work had progressed substantially. Though the petitioner was assigned construction of 15 Kms stretch, no clear stretch was provided to it and it was asked to begin work only with 4 Kms stretch, i.e. from 24/000 to 28/000 Kms. which was handed over to it. Since the petitioner had mobilized men and machinery for completing the assigned stretch of 15 Kms. within the schedule time, a lot of inconvenience was caused to the petitioner as it was handed over only a stretch of 4 Kms to work on. After starting execution of the work, the petitioner discovered that the original ground level was not fit for work. As it was slushy, the petitioner had to prepare the ground by engaging excavators to remove the loose earth and slush and achieve the initial ground level which would be fit for laying the embankment. Since the same was beyond the scope of work entrusted to the petitioner and was carried out on the verbal instruction of Mr. V.K. Chopra, the Managing Director of the opposite party who issued necessary instruction after personally inspecting the site, the petitioner wanted a supplementary work order to be issued. The petitioner was, however, advised to proceed with the work without waiting for such supplementary work order. The opposite party

had also promised to bear the cost of the extra work to be executed by the petitioner. The work commenced in 1st week of November, 2007 but the petitioner faced numerous hurdles which were brought to the notice of the opposite party and on the verbal assurances of the Project Manager, the petitioner went on doing the preliminary ground clearing work. However, no plans/specification, drawing etc. were provided by the opposite party so as to enable the petitioner to complete the work within the time stipulated. The petitioner by letter dated 3.1.2008 (Annexure-2) intimated the opposite party the impediments it was facing in executing the work and the fact that it had not received drawings for the Hume pipes, culverts and the slab culverts so also the methodology for earth work. The opposite party did not take any action on the representation made by the petitioner. On the contrary, it issued a fresh schedule and scope of work and forced the petitioner to complete the work as per the new schedule. Though the work order was given in September, 2007, the work started in November, 2007 upon receipt of initial verbal instruction from opposite party but proper utilization of machinery could only be done in February, 2008. As the site was not handed over till then nor were the drawing and specifications in its entirety supplied, the petitioner could only do the basic work of clearing the ground. Petitioner received payment of the first bill on 15.3.2008. The petitioner continued with the work as per schedule though the opposite party did not supply the required document and, therefore, the progress or work could not be achieved at the pace so as to be completed as per schedule. After completion of the embankment the petitioner was required to lay the sub-grade over the embankment. Laying of the sub-grade is of paramount importance as it had to withstand the heavy traffic that the road would be subjected to. Originally, it was contemplated that laying of sub-grade would be through earth only which was required to be compacted. Subsequently opposite party no.1 in consultation with the State Government wanted that the sub-grade would be a mixture of sand and moram in the ratio of 50:50 which was later changed to the ratio of 67:33. Such a change had financial implications for which the petitioner informed opposite party that the price had to be revised to Rs. 526.00 per cubic meter. Though the opposite party had verbally assured the petitioner that he would be duly compensated for the extra price implication on account of the sub-grade but in the statement furnished to the petitioner the rate of sub-grade (i.e. earth) initially calculated at Rs. 310/- per cubic meter was subsequently revised to Rs. 360/- per cubic meter. During execution of the work, there was increase in the price of petrol and diesel for which the petitioner faced difficulties to mobilize machineries to work site. On 9.6.2008, the petitioner requested the opposite parties to pay the running bills in time and at the same time, pay the differential escalation price, but to no effect. Thereafter, the petitioner requested

opposite parties to extend the time for completion of work, who in turn asked the petitioner to furnish certain information and particulars for extension of time. After a lapse of four months, the opposite party extended the time till 31.5.2009. Therefore, the delay was due to the negligence and indifference of the opposite party. Although the time was extended for no fault of the petitioner but opposite party required the petitioner to extend the bank guarantee for a further period of one year because of which the petitioner incurred unnecessary expenses of lakhs of rupees for processing the same. The petitioner requested the opposite party to release a sum of Rs. 39.65 lakhs for the work already done by it but the said request did not yield any result. While the request of the petitioner for measurement and payment remained unheeded, the opposite party insisted upon expeditious execution of the work and at times beyond the scope of work allotted to it. The petitioner went on carrying out the instructions with a view to complete the work early in order to have early release of payments. On 31.10.2008, the petitioner was served with a statement of account from which it was found that the same had been prepared in a manner so as to defeat his legitimate claim for the work which he did pursuant to the verbal instruction issued to him. The extra work and the changed specification involving extra expenditure had not been taken into account though the opposite party had claimed escalated price and obtained it from the Government. Such escalation cost was not passed on to the petitioner thereby causing it huge loss. Even though the opposite party was aware that earth had never been used as sub-grade, the calculation had been based on the basis of rate for earth work. Though the petitioner had categorically made it clear to the opposite party that it would not be possible to execute the sub-grade work at a rate less than Rs. 448.00 per cubic meter, the opposite party had calculated the same at the rate of Rs. 310.00 per cubic meter when it was insisted that the sub-grade work was to be done with moram and sand at the ratio of 50:50. Certain deductions were also made illegally. By letter dated 3.11.2008, the petitioner requested the opposite party to correct the statement so as to reflect the actual state of affairs on receipt of which assurance was given that correction would be made and corrected statement would be supplied to him which was never done. Therefore, the petitioner has reasons to believe that such distorted incorrect statement was deliberately prepared to defeat the claims of the petitioner and to cause it irretrievable loss and unjust enrichment to the opp. party. Although the opposite party has claimed much higher rate from the State Government, it does not intend to pass on such enhanced payment to the petitioner. The statement also showed deduction on account of salaries paid to Senior Engineers, Junior Engineers and Supervisors who are employees of opposite party. Such deduction was beyond the scope and terms of the

contract. Thereafter the petitioner furnished a clarification giving details of the work done in executing the project. In order to make a solid base for construction, the site was required to be filled up with sand and on getting permission from Mr. V.K. Chopra, M.D. of the opposite party, the petitioner filled the area with sand to make it ready for laying the gravel which is the basic ingredients for making the road. The petitioner intimated that the measurement had been taken from the original ground level and not from the initial ground level even though opposite party was aware of the same. The opposite party claimed payments from Government for work done from the initial ground level. The petitioner has been paid @ Rs. 310.00 instead of Rs. 448.00 per cubic meter for the sub grade work. The petitioner was entitled to be paid Rs. 526.00 in view of the changed specification while executing the sub-grade work. Again another statement was served on the petitioner in February, 2009 of the work done as on 31.12.2008. Though in the initial statement, the rate of sub grade work was calculated at Rs. 310.00 per cubic meter in the later statement the same was revised to Rs. 360.00 unilaterally without any reference to the petitioner. The later statement supplied in February, 2009 did not contain the correct state of affairs. In the first statement, opposite party claimed recovery of Rs. 33,17,909.98. Thereafter the petitioner executed some more work during the next two months without being paid anything but curiously the amount of recovery rose to Rs. 88,84,449.41. On protest raised by the petitioner, the opposite party revised the statement reducing the amount of recovery to Rs. 47,38,665.00. This shows that the opposite party is trying to exploit the petitioner financially by playing fraud. Petitioner's repeated request for measurement of the work already executed by him has not yet been accepted by the opposite party. The opposite party has played fraud and mischief by artificially enhancing the prices and illegally charging the same from the petitioner. The illegal and absurd calculation smacks of fraud and malice on the part of the opposite party. There is great variance of the quantities of work done and the quantities calculated. Though the petitioner has not been paid his bills since April, 2008, he is being served with erroneous statements one after the other. Therefore, by letter dated 28.1.2009 the petitioner requested the opposite party that measurement of the work done be taken and be he paid his dues. Though the said letter was received by the opposite party on 10.2.2009, it has not taken any steps for doing the measurement. As the dues was not paid, the petitioner was not able to make payment to his workers and therefore had to withdraw from the site. As the petitioner suffered from irreparable injury due to non-payment of dues in time, by letter dated 24.2.2009 intimated the opposite party that as despite repeated requests his claims are not being paid a dispute had arisen between the

parties and the petitioner is entitled to receive Rs. 3,21,421,09.82. Therefore, it request for referring the dispute to arbitration for adjudication as there was no scope and/or avenue left open for amicable settlement of disputes. Opposite party ignored the claim and on 4.3.2009 served a letter dated 23.2.2009 on the petitioner again raising a claim of Rs. 91,45,365.60 and surreptitiously approached the Bank and attempted to encash the bank guarantee furnished by the petitioner. Petitioner apprehending foul play approached the learned District Judge, Cuttack for restraining the opposite party from encashing the bank guarantee and the learned District Judge, Cuttack by order dated 31.7.2009 restrained the opposite party from encashing the bank guarantee till disposal of the arbitration proceeding. When the matter stood thus, the petitioner received two registered letters posted from College Square Post Office on 8.4.2009. In one letter Sri Gulshan Chopra, Director of the opposite party, has intimated the petitioner that by invoking clause 16 of the agreement, they have appointed Mr. V.K. Chopra as the Arbitrator. The other letter was sent by Sri V.K. Chopra intimating the petitioner that he has already assumed jurisdiction as an arbitrator and fixed the meeting to 24.4.2009. The case of the petitioner is that its letter dated 1.4.2009 sent by fax invoking clause 11 of the agreement proposing the name of retired High Court Judge has not yet been disputed by the opposite party. He has submitted that the contract was executed at Cuttack, the local office of the opposite party is situated within the jurisdiction of Cuttack so also the work is to be executed within Cuttack jurisdiction. The opposite party has entered into the agreement with Orissa Government. Hence, the Cuttack Court has jurisdiction to arbitrate the dispute between the parties. As no part of the cause of action has taken place in Mumbai, the parties even by consent cannot clothe the Court with jurisdiction since it has none. Since Mr. V.K. Chopra is the M.D. of the opposite party and has instructed the petitioner from time to time to execute the work, he cannot give a just and impartial decision in the case. Therefore, the petitioner has filed this petition invoking jurisdiction of this Court under section 11(6) of the Act for appointment of an arbitrator.

3. Since the opposite party on putting appearance has raised a preliminary objection that this Court has no jurisdiction to appoint arbitrator in view of the agreement signed by the petitioner as well as the opposite party which is binding on both of them, before taking up any other point, it is necessary to deal with that point in view of the agreement relied upon by both parties.

4. In the counter affidavit, it has been averred that the petitioner has not approached this Court with clean hand and has suppressed material facts. It is stated that pursuant to clause 16 of the agreement, the opposite party has appointed Mr. V.K. Chopra as the sole arbitrator who has already entered

into the reference and the petitioner has challenged his impartiality which is pending for decision before the arbitrator. The petitioner vide Annexure-5 requested the opposite party for amicable settlement of the dispute raised by it but due to the stubborn attitude of the petitioner no settlement could be reached. Therefore, the opposite party invoked the arbitration clause and referred the matter to Mr. V.K. Chopra and the appointment having been made in accordance with Section 11(2) read with Section 11(8) of the Act, the present petition is thoroughly misconceived. The disability pleaded by the petitioner in the petition if taken in toto, the same can at best be adjudged as a challenge under section 12(3) of the Act and can only be adjudicated by the arbitrator himself for which the present petition is not maintainable. It is further stated that in view of clause 17 of the agreement which provided that any dispute between them would be subject to the jurisdiction of the Courts at Mumbai and, therefore, this Court has no jurisdiction to entertain the petitioner's application. The original of the cause of action had accrued by issuance of letter of intent dated 18.5.2007 from Mumbai. Hence although the subsequent documentation and communication were made from the Cuttack branch office of the opposite party, it cannot be held that the courts at Cuttack alone have jurisdiction to decide the dispute. It is their further case that the Courts at Cuttack and Mumbai have jurisdiction as part of cause of action has arisen in both the placed. Referring to the law laid down by the apex Court that where two or more courts have under the Code of Civil Procedure, jurisdiction to try a suit or a proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy, the opposite party has contended that in view of clause 17 of the agreement wherein the parties have consciously ousted the jurisdiction of the courts at Cuttack, they can only approach the Court at Bombay and, therefore, this petition is not maintainable for want of jurisdiction. The facts mentioned in the different paragraphs of the petition have either been denied as untrue and false or twisted. Be that as it may, in view of the preliminary objection raised by the opposite parties, I do not think it necessary to mention in details the averments of the opposite party with regard to the facts mentioned in the petition paragraph-wise.

5. The agreement was executed by both the parties on 11.9.2007. Clause 17 of the agreement relates to jurisdiction which is reproduced as under:

> "All disputes, difference arising out of, connected with and/or in any way related with this Contract and/or interpretations of any of the clause contained therein and/or conforming part of the Contract shall be subject to exclusive jurisdiction of the court at Mumbai exclusive."

Clause 16 of the said agreement relates to Arbitration. The said clause reads as under:

> "All disputes or differences and/or claims between the parties hereto arising out of and or concerning and/or in connection with and/or in consequence of and/or relating to this Agreement shall be settled mutually and amicably between the two parties at the work site. In case of non agreement the decision of Director M/s. Niraj Cement Structurals Ltd. shall be final and binding. However, in case of dispute, the work shall not be delayed or stopped and continued diligently pending settlement of the dispute. In case of stoppage of work other than disputed, we reserve the right to terminate the contract and you shall have no claims on this regard and balance work shall be completed by the employer at your risk and cost".

In the case of A.B.C. Laminart Pvt. Ltd. V.A.P. Agencies, Salem, AIR 1989 SC 1239, the Hon'ble Apex Court has held as under.

> "Section 28 of the Contract Act, 1872 provides that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void to that extent. This is subject to exceptions, namely, (1) contract to refer to arbitration and to abide by its award, (2) as a matter of commercial law and practice to submit disputes on or in respect of the contract to agreed proper jurisdiction and not other jurisdictions though proper. The principle of Private International Law that the parties should be bound by the jurisdiction clause to which they have agreed unless there is some reason to contrary is being applied to municipal contracts. In Lee v. Showmen's Guild, (1952) 1 All ER 1175 at p. 1181 Lord Denning said:
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> "Parties cannot be contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. It parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void.
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> 10. Under Section 23 of the Contract Act the consideration or subject of any agreement is lawful, unless it is opposed to public policy. Every agreement of which the object or consideration is

> unlawful is void. Hence there can be no doubt that an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy. Ex dolo malo nona oritur action. If therefore it is found in this case that Clause 11 has absolutely ousted the jurisdiction of the Court it would be against public policy. However, such will be the result only if it can be shown that the jurisdiction to which the parties have agreed to submit had nothing to do with the contract. If on the other hand it is found that the jurisdiction agreed would also be a proper jurisdiction in the matter of the contract it could not be said that it ousted the jurisdiction of the Court. This leads to the question in the facts of this case as to whether Kaira would be proper jurisdiction in the matter of this contract. It would also be relevant to examine if some other courts than that of Kaira would also have had jurisdiction in the absence of Clause 11 and whether that would amount to ouster of jurisdiction of those courts and would thereby affect the validity of the clause.
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> 11. The jurisdiction of the Court in matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors."

The apex Court further held as under:

> "16. So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract if must be declared void being against public policy. Would this be the position in the instant case?"

In the case of Hakam Singh v. Gammon (India) Ltd., AIR 1971 S.C. 740, it has been held that the CPC in its entirety applies to proceedings under the Arbitration Act. The jurisdiction of the Courts under the Arbitration Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the CPC. By Clause 13 of the agreement it was expressly stipulated between the parties that the contract shall be deemed to have

been entered into by the parties concerned in the City of Bombay. In any event the respondent have their principal office in Bombay and they were liable in respect of a cause of action arising under the terms of the tender to be sued in the Courts at Bombay. It is not open to the parties by agreement to confer jurisdiction on a Court which it does not possess under the Code. But where two or more Courts have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act. In the case of Nanak Chand v. T.T. Elect. Supply Co., the Madras High Court observed that competency of a Court to try an action goes to the root of the matter and when such competency is not found, it has not jurisdiction at all to try the case. But objection based on jurisdiction is a matter which parties could waive and it is in this sense if such jurisdiction is exercised by Courts it does not go to the core of it so as to make the resultant judgment a nullity. It is a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the causes action having arisen there within, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by sections 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the Statute Merchantile Law and practice permits such agreements.

In the case of Angile Insulations v. Davy Ashmore India Ltd., AIR 1995 S.C. 1766, the apex Court held as under:

> "9. Clause 1 says – any legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai. The clause is no doubt not qualified by the words like 'alone', 'only' or 'exclusively'. Therefore, what is to be seen is whether in the facts and circumstances of the present case, it can be inferred that the jurisdiction of all other Courts except Courts in Mumbai is excluded. Having regard to the fact that the order was placed by the defendant at Bombay, the said order was accepted by the branch office of the plaintiff at Bombay, there was a clear intention to confine the jurisdiction of the Courts in Bombay to the exclusion of all other Courts. The Court of Additional District Judge, Delhi had, therefore, no territorial jurisdiction to try the suit."

In my view, the contract deed entered into and signed by the parties is binding on them to the extent they are not contrary to law. In the instant case, the contract in question between the parties contained a clause relating to jurisdiction which cannot be termed as against public

policy and the terms of the contract estopped the parties from raising contrary plea.

6. The next point raised by the learned counsel for the petitioner is that in Clause-11 of the work order, it has been mentioned that Sri V.K. Chopra, the Chairman and Managing Director of the opposite party will be arbitrator and his decision shall be final and binding on both the parties. Since I have already held that this Court has no jurisdiction to entertain this petition at this stage, it is futile to consider this clause. The petitioner may approach the competent Court and may file petition before the Bombay High Court and may raise this plea, if he is so advised.

This petition shall be returned to the petitioners for proper presentation.

Application disposed of.

2010 (I) ILR-CUT- 448

I.M.QUDDUSI, ACJ & SANJU PANDA,J,

GEETANJALI PATTNAIK & ORS.-V-DISTRICT JUDGE,BALASORE & ORS.*

MARCH 5,2010.

CONSTITUTION OF INDIA, 1950 – ART.16.

Service – Regularisation – Petitioners were selected in the recruitment held under the 1969 Rules – They were appointed temporarily on ad hoc basis and continued to be employed since 2003 without any interruption – Their services are otherwise required by the institutions and they would better serve than the fresh recruits by virtue of their experience gained in the meantime – Held, no justification to refuse regularisation to the petitioners.

(Para 9)

Case laws Referred to:-

1.AIR 2006 SC 1806 : (Secretary, State of Karnataka & Ors.-V- Umadevi).
2.2007 (II) OLR 533 : (Smt.Meera Piri -V-State of Orissa & Ors.).

For Petitioner – M/s.Sourya Sundar Das, Miss. K.Behera, s.Modi, P.K.ghosh & S.S.Pradhan (In all the three writ petitions)

For Opp.Parties – Additional Government Advocate.

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*W.P.(C) NO.9690, 9691 & 9692 OF 2009. In the matter of applications under Articles 226 & 227 of the Constitution of India.

I.M. QUDDUSI, ACJ. Since these three writ petitions have been filed on self-same facts claiming identical relief, they were heard analogously and are disposed of by this common order**.**

2. Facts leading to filing of these writ petitions are that pursuant to an advertisement dated 28th June, 2002, the District Judge, Balasore-Bhadrak, Balasore invited applications in plain papers from eligible candidates, inter alia, to fill up five posts of Junior Stenographers in the judgeship of Balasore-Bhadrak out of which one was reserved for S.T., one was for S.T.(Woman) and three for General candidates. Pursuant to the advertisement, the petitioners applied for the said post. After holding the interview and test, a merit list vide Annexure-2 was prepared in which the name of the petitioners found place at serial no. 8, 7 and 15 respectively. After recruitment, appointment orders were issued to three general candidates and one S.T. candidate who joined the posts and within one year of selection and joining two general candidates left the job as a result of which next two selectees were appointed. As some vacancies arose because of the opening of the Fast Track Courts, Satya Kumar Das and Geetanjali Patnaik, the petitioners in W.P.(C) No. 9690 of 2009 and W.P.(C) No. 9692 of 2009 sl. Nos. 7 and 8 of the Merit List (Annexure-2) by order dated 22nd March, 2003 (Annexure-5 to W.P.(C) No. 9690/2009) were

appointed as Junior Stenographer for a period of one year on ad hoc and temporary basis and posted to work in the Court of S.D.J.M., Bhadrak and J.M.F.C., Bhadrak respectively. Similarly order dated 1st of September, 2005 (Annexure-5) the petitioner in W.P.(C) No. 9691 of 2009 was appointed as Junior Stenographer on temporary and ad hoc basis for a period of one year and was posted in the establishment of the S.D.J.M., Balasore. The period of their appointment stood extended from time to time and they are continuing as Junior Stenographer till date without any interruption. They made representation to the District Judge to regularise their ad hoc services which was rejected by order dated 17.6.2009 on the ground that since they were recruited under Special Scheme of the Government of Orissa envisaged under Home Department Notification No. 65681 dated 12.12.2001 purely on ad hoc and temporary basis, their services cannot be regularised. Hence, these writ petitions praying to quash the order of rejection and for a direction to the opposite parties to regularise their services.

3. A counter affidavit has been filed on behalf of the opposite parties more or less admitting the factual aspects. Their specific stand is that since the petitioners were appointed temporarily on ad hoc basis under Rule 5 (3) of the Orissa District and Subordinate Courts Ministerial Services (Special Scheme) (Method of Recruitment and Conditions of Services) Rules, 2001, (hereinafter referred to as the 2001 Rules) their services cannot be regularised. It is further stated in the counter affidavit that as per Rule, 1969, the advertisement was made for 5 posts i.e. S.T. 1, S.T.(W) 1 and General-03. On regular basis four selectees, i.e. three general and one S.T. were appointed and the post reserved for S.T.(W) was lying vacant as no candidate from that category was available. Within one year of selection and joining two general candidates left the job as a result, next two selectees were appointed and consequently up to sl. No. 6 of the merit list vide Annexure-2 was exhausted and there was no chance for the petitioner and others to be appointed and that was stopped there. By that time, the Rules 2001 had come into force. On the basis of the Rules, 2001, when some other vacancies occurred, the posting of the petitioners were considered to be made by the District Judge. Accordingly, District Judge thought the petitioners fit to be appointed as such but not from the merit list since the petitioners have qualified in an examination without any further advertisement and previous advertisement was for limited posts, it was not possible to regularly absorb the petitioners beyond the advertisement made under the Rules, 1969. It has been further stated therein in the counter that at present 8 posts of Junior Stenographers are lying vacant and the service of the petitioners are not being counted and C.C.R. is not maintained. Rule 2001 is synonymous (in pari material) to the appointment Rules governing

appointment of Fast Track Judges who cannot be regularly absorbed and the appointment Rules under both the Schemes are guided and governed by the recommendation of 11th Finance Commission. It is further stated in the counter affidavit that for some new vacancies, fresh advertisement has been published in the year, 2009.

4. Mr. S.S. Das, learned counsel for the petitioners submits that the petitioners were appointed against the vacancies caused in the base level posts due to promotion of the existing incumbents as Senior Stenographers meant for the Fast Track Courts. The advertisement issued under Annexure-1 does not speak of appointment against the vacancies in the Fast Track Courts and further the advertisement does not speak of the Scheme. He has further submitted that petitioners are three out of the sixteen candidates who came out successful in the recruitment held in 2002 and included in the merit list in accordance with the 1969 Rules. His further submission is that the petitioners have been continuing as Junior Stenographers in the judgeship without any interruption till date from the respective date of their appointment, their service books have been opened and maintained, they have been allowed increments and their pay has been fixed in accordance with the 6th Pay Commission. They have by now become over-aged. He further submits that the candidate at Sl. No. 14 of the merit list of the year, 2002 was appointed on a consolidated pay of Rs. 3,000/- per month in the judgeship of Puri and was subsequently regularised vide Order No. 46/2005 dated 6.4.2006. Lastly he has submitted that similarly situated persons in other judgeships have been regularised. He contended that the petitioners having faced regular recruitment for appointment to State Government service pursuant to the advertisement published in the daily the Samaj dated 28.6.2002 and included in the merit list and having been appointed and posted to work in the Courts other than Fast Track Courts, it cannot be said that they were recruited under the Special Scheme and therefore their services cannot be regularised.

5. Learned counsel for the State sought to justify the action of the opposite parties contending that the petitioners having been recruited under the Special Scheme which does not provide for regularization, their services cannot be regularised.

6. On our direction the relevant file was produced by the learned Government Advocate. We have perused the file from which it appears that the last recruitment for the post of Junior Stenographer in the judgeship of Bhadrak and Balasore was made in the year, 2002 and the merit list was published on 14.8.2002. Sixteen candidates secured the standard pass mark and accordingly merit list of sixteen candidates was prepared and no recruitment having been made in the meanwhile, the vacancies arising in the meanwhile due to retirement/resignation/promotion have been filled up

by appointing the successful candidates of the previous merit list in order of merit. The petitioner in W.P.(C) Nos. 9690 and 9692 of 2009 whose names appeared at Sl. No. 8 and 7 of the merit list of the year 2002. Although petitioner Rabindra Kumar Mishra who was at sl. No.15 of the merit list was appointed in 2005, all of them have been allowed to continue till date.

7. In the case of ***Secretary, State of Karnataka and others V. Umadevi reported in AIR 2006 SC 1806*****,** the Hon'ble Apex Court has held that question of regularization in any service including any Government service arises in two contingencies. Firstly, if on any available clear vacancies which are of a long duration, appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the incumbent concerned have continued to be employed for a long period of time with or without any artificial break and their services are otherwise required by the institution which employs them, a time may come in service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the employee concerned can give their best by being assured security of tenure. But this would require one pre-condition that the initial entry of such employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaws in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment.

Following the cases of Umadevi (supra), this Court, in the case of ***Smt. Meera Piri V. State of Orissa and others; 2007 (II) OLR 533,*** has held as under:

> "Law is well settled that main concern of the Court in the above situation is to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Article 14 & 16 of the Constitution of India. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. Since the State is a model employer it is for this reason equal pay must be given for equal work which is indeed one of the directive principle of the Constitution. The person should not be kept in temporary or ad hoc status for long time. Where a temporary or ad hoc appointment is continued for long the Court presumes that there is need and warrant for regular post and accordingly directs regularization. If an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization provided he is

eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to reservation policy of the State. The normal rule of course is regular recruitment through the prescribed agency but exigencies of administration may some times call for an ad hoc and temporary appointment to be made."

8. It is necessary to mention here that the Eleventh Finance Commission allocated Rs. 502.90 crores under Article 275 of the Constitution of India for the purpose of setting up 1734 Courts in various States in India to deal with long pending cases particularly sessions cases. As allocation of funds was made by the Finance Commission stipulating time-bound utilization, i.e., within a period of five years, various State Governments were required to take necessary steps to establish the aforesaid Courts in their respective States. It appears that the Finance Commission suggested that the States may consider re-employment of the retired Judges for a limited period for disposal of pending cases. Government of Orissa vide Notification No. 65681 dated 12.12.2001 framed the Orissa District and Subordinate Courts Ministerial Service (Special Scheme)(Method of Recruitment and Conditions of Service) Rules, 2001 for regulating appointments of the staff of District and Sub-ordinate Courts on ad hoc and clearly temporary basis exclusively for implementation of the recommendation of the 11th Finance Commission relating to up gradation of judicial administration under up-gradation grant for elimination of old cases. Clause-5(3) of the said scheme deals with the terms and conditions of appointment for the post of Senior Stenographers, Peons and Drivers and says that the appointment for the posts of Senior Stenographers, Peons and Drivers shall be made by the District Judge by way of re-deployment from the surplus staff working in various Government Departments. In case of non-availability of surplus Senior Stenographers, the posts shall be filled up by way of promotion and the base level posts shall be filled up by way of fresh recruitment purely on ad hoc and temporary bais. Learned counsel for the petitioner has submitted that none of the clauses of Rules, 2001 deals with appointment of Junior Stenographers for which the said Rules cannot be said to have any application for appointment of Junior Stenographers and, therefore, the same is purely regulated by 1969 Rules.

9. It is an undisputed fact that the petitioners were the successful candidates of the interview held for the post of Grade III Stenographer (Junior Stenographer) under the Orissa District and Subordinate Ministerial Service (Method of Recruitment and Conditions of Service) Rules, 1969 (in short, 'the 1969 Rules') by the District Judge, Bhadrak-Balasore, Balasore and they were included in the merit list published in the year 2002. Rule 4 of

the aforesaid Rules provides for method of recruitment which speaks as under:

> "4. Method of recruitment – Subject to other provisions made in these rules, Recruitment to the posts in the ministerial service of the District Court and Subordinate Courts shall be made by the following methods, namely:-
>
> (a) in respect of Lower Division Clerks, Typists, Copyists and Grade III Stenographers by competitive examination in accordance with rule 6, and
>
> (b) in respect of other posts by promotion in accordance with rule 10."

Rule-6 (1) of the aforesaid rules, inter alia, says that Recruitment to the posts of Grade III Stenographers shall be made by a competitive examination, whenever necessary. Rule-6(5) provides that in case a vacancy occurs after the list of successful candidates is exhausted and before the announcement of the result of the next examination, such vacancy may be filled up by a successful candidate of the previous years; provided that his age does not exceed the maximum limit laid down in Sub-rule (3) and failing that by any candidate who possesses the requisite qualification and is within the prescribed age limit laid down in Sub-rule(3). Rule-7(1) prescribes that all appointments to the permanent post of Grade-III Stenographers (Junior Stenographers) shall be made on probation for a period of two years from the date of appointment provided that if during the period of probation a candidate's work or conduct is found unsatisfactory or shows that he is unlikely to become efficient, the District Judge may either discharge him from service or extend his period of probation for such further period as he may think fit. Under Rule-7(2), no person shall be confirmed in the permanent post of Grade-III Stenographers (Junior Stenographers) unless he has satisfactorily completed the probationary period, as aforesaid. After their appointment, the petitioners were posted in different courts like S.D.J.M., J.M.F.C. etc. but instead of giving them regular appointment they were given ad hoc appointment. At this stage, we cannot say that the ad hoc appointment was illegal because the appointing authority has ancillary powers to make appointment either on regular basis or on ad hoc basis even under Rule 1969. Under the 2001 Rules appointments were made only for the Fast Track Courts for which the Eleventh Finance Commission has recommended. Therefore, it cannot be said that the benefit of those rules were ever taken for appointment of the petitioners. The Courts of J.M.F.C. or S.D.J.M. and other Courts were not sanctioned by the Eleventh Finance Commission. So, when the petitioners were selected in the recruitment held under the 1969 Rules and were appointed and posted, as aforesaid, continued to be employed since 2003 in case of the petitioners in W.P.(C)

Nos. 9690 and 9692 of 2009 and 2005 in case of petitioner in W.P.(C) No. 9691 of 2009 without any interruption and their services are otherwise required by the institutions and they would better serve the organization than fresh recruits by virtue of the experience gained in the meantime, we see no justification as to why the benefit of regularization should be denied to them on the pretext of the Special Scheme.

10. We, therefore, allow the writ petitions and quash the impugned order refusing to regularize the services of the petitioner and direct that the services of the petitioners be regularized treating them as recruits under the 1969 Rules.

There would be no order as to costs.

Writ petitions allowed.

2010 (I) ILR-CUT- 455

I.M.QUDDUSI,ACJ & B.K.NAYAK,J.

M/S. HARSHPRIYA CONSTRUCTION (P) LTD.-V- THE INSPECTOR GENERAL OF REGISTRATION,ORISSA, CUTTACK & ORS.*

MARCH 23,2010.

THE INDIAN STAMP (ORISSA AMENDMENT) ACT, 2008 – SEC.47-A r/w SEC.61(2) OF REGISTRATION ACT.

Under valued sale deed – Neither the Registering Officer nor the Stamp Collector is legally empowered to retain possession of the same – They are obliged under law to return it to the Petitioner.

(Para 9)

Case law Relied on:-

1.AIR 2002 Kerala 248 : (Periyar Real Estates & etc.-V-State of Kerala & Ors.).

For Petitioner – M/s.S.S.Das & Sandipani Mishra.

For Opp.Parties – Addl.Government Advocate.

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*W.P.(C) NO.8690 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.K.NAYAK, J. The short question that arises for consideration in this writ application is whether the Registering Officer under the Indian Registration Act can retain possession of the original registered instrument (sale deed) where it raises a dispute in terms of Section 47-A of the Indian Stamp (Orissa Amendment) Act with regard to the stamp duty payable on such instrument.

2. The facts leading to the formulation of the aforesaid question have been depicted in the writ petition as follows:

The petitioner, a private limited company registered under the Companies Act, represented through its Director carries on business of development of land and construction of apartments. For the purpose of its business, the petitioner purchased a piece of Sarad non-irrigative variety of land measuring Ac.0.927 dec. pertaining to Sabik Plot No.1807 and Sabik Khata No.507 of Mouza Gadakana under Bhubaneswar Tahasil of Khurda district corresponding to Mutation Plot No.3803 and Mutation Khata No.1053/29, which further corresponds to Not Final Settlement Drat Khatiyan Plot No.1558 under Not Final Settlement Draft Khatiyan Khata No.3077, from the recorded owner by virtue of sale deed no.8927 which was registered before the District Sub-Registrar, Khurda(opposite party no.2) on 06.08.2007. The consideration money for the land as set forth in sale deed is Rs.30.00 lakhs, which is the prevalent market value of the land in question, and the petitioner-purchaser paid the required stamp duties and registration fees on such value of the land. Even after the registration when

the registered sale deed was not returned, on enquiry the petitioner was informed that the valuation of the land mentioned in the sale deed as well as the stamp duties and registration fees paid thereon are much less and, therefore, the petitioner was required to pay the deficit stamp duties and the registration fees after the matter of under valuation was adjudicated by the competent authority. The petitioner was also informed that only after payment of deficit stamp duties and registration fees, the original sale deed shall be returned to the petitioner. It is further stated that the valuation set forth in the sale deed exceeds Rs.1.00 lakhs and, therefore, as per the notification dated 31.05.2002 of the State Government in the Revenue Department, the Inspector General of Registration (opposite party no.1) is competent to act as the Stamp Collector under Section 47-A of the Stamp Act and adjudicate the dispute. The petitioner, however, received notice from opposite party no.2, the District Sub-Registrar, Khurda, a year after registration of the instrument calling upon the petitioner to appear before him on 18.7.2008 and to answer the claim of Rs.12,04,747/- payable towards deficit registration fees and stamp duties on the instrument in question. Having not received the original registered instrument, the petitioner is not in a position to carry on his business and also is unable to avail loans from the Banks. Finding no other way, the petitioner enquired from the office of opposite party no.1 about the pendency of undervaluation proceeding and also filed necessary objection along with some documents as well as an application for release of the original sale deed, but opposite party no.1, being in charge of a number of posts has not yet considered the objection and application of the petitioner.

3. It is contended on behalf of the petitioner that provision of Sub section (2) of Section 61 of the Registration Act casts a statutory duty on the Registering Officer to return the original instrument immediately after completion of registration and that the mere initiation of a proceeding under Section 47-A of the Stamp Act for the purpose of adjudication of the payability of any further stamp duty and registration fees does not entitle the Registering Authority to retain possession of the original registered instrument.

The petitioner, therefore, seeks a direction to the opposite parties to return his original sale deed and to quash the notice under Annexure-1.

4. The opposite parties have filed two counter affidavits contending inter alia that soon after the registration of the sale deed it was found that the instrument was prima facie undervalued and, therefore, the proceeding under Section 47-A of the Stamp Act has been initiated and the case was referred to the I.G.R. (opposite party no.1) for adjudication and notice under Annexure-1 has been issued to the petitioner in accordance with the

procedure prescribed under the Orissa Stamp Rules, 1952. It is also stated that as per Rules 28 and 29 of the said rules, the instrument, which has been referred to the Stamp Collector under Section 47-A of the Stamp Act, shall be returned with the order of the Collector to the Registering Officer. The opposite parties, therefore, cannot be said to have withheld or retained the instrument illegally.

5. Section 61(2) of the Registration Act, 1908 casts obligation on the Registering Officer to return the Registered instrument to the person concerned on completion of registration whereas Section 47-A of the Stamp (Orissa Amendment) Act speaks about reference of a dispute by the Registering officer to the Stamp Collector when he has reason to believe that the market value of the property which is the subject matter of such instrument has not been truly set forth in the instrument. For better appreciation, Section 47-A of the Stamp (Orissa Amendment) Act is quoted hereunder :

> "**47-A. Instruments under-valued how to be dealt with-**(1) where the registering officer under the Registration Act,16 of 1908, while registering any instrument of conveyance, exchange, gift, partition or settlement has reason to believe that the market value of the property which is the subject-matter of such instrument has not been truly set forth in the instrument, he may, after registering such instrument, refer the matter to the Collector for determination of the market value of such property and the proper duty payable thereon.
>
> (2) On receipt of a reference under Sub-section (1), the Collector shall, after giving the parties an opportunity of making their representations and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject matter of such instrument, and the duty as aforesaid and the deficient amount, if any, shall be payable by the person liable to pay the duty.
>
> (2-A) The Collector may suo motu within two years from the date of registration of such instrument examine the instrument, not already referred to him under Sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject matter of such instrument and the duty payable thereon and if, after such examination he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine the market value of such property and the duty as aforesaid in accordance with the procedure provided for in Sub-section (2), and the deficient amount of duty, if any, shall be payable by the person liable to pay the duty.

(3) Any person, aggrieved by an order of the Collector under Sub-section (2) or Sub-section (2-A), may, within thirty days from the date of the order, prefer an appeal before the District Judge and all such appeals shall be heard, and disposed of in such manner as may be prescribed by rules made under this Act."

6. Similar question came up for consideration before the Kerala High Court in the case of ***Periyar Real Estates and etc. v. State of Kerala and others, etc; AIR 2002 Kerala 248***. Relevant provisions of Section 45-B of the Kerala Stamp Act, 1959 which are similar to the provisions of Section 47-A of the Stamp (Orissa Amendment) Act., were considered vis-à-vis the provisions of Section 61 (2) of the Registration Act. Analysing the different provisions of both the Acts., the Kerala High Court held that if there is a dispute as to the stamp duty payable on the instrument subject to registration, after registration of the instrument, the registering authority is not entitled to retain possession of the original document under Section 45-B of the Kerala Stamp Act. By reason of Section 61(2) of the Registration Act, 1980, it is obliged to return the document and thereafter take appropriate proceedings under Section 45-B of the Kerala Stamp Act for adjudication and recovery of the under paid duty. One of the grounds which found favour with the Kerala High Court to take the aforesaid view is that the expression 'reference' used in Section 45-B of the Kerala Stamp Act means the sending of the matter for decision or consideration to some authority, and it does not require sending of the document itself. It was also reasoned that sending of the original instrument to the Stamp Collector was not at all necessary for deciding the claim of undervaluation.

7. Sub Section (1) of Section 47-A of the Stamp (Orissa Amendment) Act specifically uses the expression "refer the matter" and does not speak of referring or sending the instrument itself to the Collector. The aforesaid decision of the Kerala High Court was relied upon by this Court in exactly a similar matter vide order dated 30.01.2003 passed in O.J.C. No.472 of 2001 and we do not find any reason to differ from the aforesaid view.

8. Reliance has been placed by the opposite parties on the provisions of Orissa Stamp Rules, 1952. Chapter-V of the Rules (Rules 23 to 36) deals with the procedure to be followed in the matter of reference under Section 47-A of the Stamp (Orissa Amendment) Act. Rule 23 only reiterates the provision of Sub-section (1) of Section 47-A of the Act using the expression "refer the same", and at a later stage states that while referring the document to the Collector, the facts and circumstances that prompted the Registering Officer to come to the belief that the property, has been undervalued, shall be fully and clearly stated. As a corollary to the second part of the Rule 23, Rule 28 only speaks about how the instrument which has been referred to

the Collector under Section 47-A shall be dealt with after the Collector adjudicates the question of undervaluation. Since the provision of the Act, viz. Section 47-A, does not speak of reference of the instrument itself to the stamp Collector and, on the other hand, it is obligatory on the part of the Registering Officer, as per provision of Section 61 (2) of the Registration Act, to return the registered instrument, the provision of the Rules cannot override the provision of the Act.

9. On the aforesaid analysis, we hold that neither the Registering Officer nor the Stamp Collector in exercising jurisdiction under Section 47-A of the Act is legally entitled to retain possession of the instrument (sale deed) of the petitioner. They are legally obliged to return the same. It is apparent that interim order was passed in this writ petition on 29.6.2009 directing the opposite parties to return the registered sale deed in question to the petitioner subject to further orders to be passed in the writ petition. We, therefore, direct that the instrument (sale deed) in question which has not yet been returned to the petitioner in pursuance to the interim order dated 29.06.2009 be returned within ten days from the date of communication of this order or production of a certified copy thereof, which ever is earlier.

10. The notice at Annexure-1 does not appear to be one to answer the claim under Section 47-A of the Act, as admittedly, it has been issued by the District Sub-Registrar, Khurda styling himself as the Stamp Collector and directing the petitioner to appear before him, though admittedly the proceeding is pending before the Inspector General of Registration, Orissa (opposite party no.1). Further, the notice is not in Form No.1, as required by Rule 24(1) of the Rules. We, therefore, quash the notice under Annexure-1 and direct opposite party no.1, the Stamp Collector, to issue appropriate notice to the petitioner within 15 days from the date of communication of this order and thereafter dispose of the under valuation proceeding expeditiously.

The writ petition is accordingly allowed in the light of the aforesaid directions.

11. The CONTC No.963 of 2009 is also disposed of in view of the order passed in the writ petition. There shall, however, be no order as to costs.

Writ petition is accordingly allowed.

2010 (I) ILR-CUT- 460

B.P.DAS, J & I.MAHANTY, J.

SARASWATI PANIGRAHI -V- D.M.,UNITED INDIA INSURANCE CO. LTD. & ORS.*

MARCH 30,2010

CONSTITUTION OF INDIA, 1950 – ART.226.

S.B.I. Credit Card – Complementary Personal Insurance coverage of Rs.2.00 lakhs for loss of life in any accident – Certificate holder died in a road accident – Wife applied for the claim – Insurance Company wanted to pay Rs.1. lakh on the ground that due to new agreement between the insurer and the S.B.I. the assured amount was reduced to Rs.1. 00 lakh - Hence the writ petition.

While issuing certificate, promise has been made to pay the Card-Holder Rs.2. lakhs and the reduction of quantum of insurance coverage has never been communicated by S.B.I. during the life time of the late husband of the petitioner – Held, since the certificate holder was not a party to the change in the master policy and the agreement between the S.B.I. and the insured, the insurer is liable to pay a sum of Rs.2. lakhs to the petitioner towards insurance coverage of her late husband.

(Para 4)

For Petitioner - M/s. B.Pujari, R.N.Panda & N.Mohapatra.
For Opp.Parties – M/s. A.K.Mohanty, M.C.Nayak, & D.c.Dey
(For O.P.2)
M/s. A.Rath & P.S.Das Parida
(For O.Ps. 3 & 4)

*W.P.(C) NO.11633 of 2007. In the matter of an application under Article 226 of the Constitution of India.

B.P.DAS, J. The petitioner has filed this writ petition with a prayer to direct the O.P.s. to pay Rs.2,00,000/- which she is entitled to get towards the insurance coverage of her husband, late Budhadev Panigrahi, who died in a road accident on 16.3.2005.

2. The undisputed facts are that during his lifetime, late Budhadev Panigrahi had obtained a Credit Card from the State Bank of India in the month of April, 2002. The State Bank of India had given a complementary personal insurance coverage of Rs.2.00 lakhs in the event of loss of life resulting from rail, road or other accidents. After the death of her husband, the petitioner claimed the assured sum from O.P.2-Regional Manager, United India Insurance Company Ltd. Thereafter, O.P.1-Divisional Manager, United India Insurance Company Ltd. by letter dated 24.8.2006 asked the petitioner to submit No Objection Certificate from the S.B.I. Card authorities under Annexure-2. On 14.11.2006 the petitioner submitted the No-Objection Certificate obtained from the Manager, Payment Assistance, S.B.I. Card

(Annexure-3). Thereafter, O.P.1 sent a voucher of Rs.1.00 lakh to be signed and returned for payment towards full and final settlement of the death claim.

According to the petitioner, the dispute arose when the petitioner claimed that as per Annexure-6, the Certificate of Insurance and the guideline issued by the S.B.I. Card, she is entitled to Rs.2.00 lakhs, for which she issued a notice through her lawyer to O.P.1 in order to know the reason to reduce the insurance coverage to Rs.1,00,000/- by O.Ps.1 & 2. But the O.Ps. did not give any reply, for which she has filed this writ petition for the relief indicated in the foregoing paragraph.

3. In the counter affidavit filed by O.Ps.1 & 2, a stand has been taken that although initially the Insurance Company had granted insurance coverage of Rs.2.00 lakhs to S.B.I. Credit Card holder, the same was changed subsequently and a new agreement was entered into between the insurer and the S.B.I. CPSL from 1.12.2002, wherein the assured amount was reduced to Rs.1.00 lakh. Therefore, according to the insurer, they are not liable to pay the amount of Rs.2.00 lakhs as because the same was reduced by virtue of an agreement as aforesaid. It is further urged that there is no direct agreement between the husband of the petitioner and the insurer to compel the insurer to pay the aforesaid amount, the death of the insured occurred after 1.12.2002, i.e., after the new agreement came into force, for which the petitioner is not entitled to get Rs.2.00 lakhs on the death of her husband.

4. Having regard to the rival contentions of the parties, we refer to Annexure-6, which is the Certificate of Insurance issued by Sri Sameer Bahadur, Divisional Manager, United India Insurance Company Ltd., certifying that “the holder of this Certificate, being an SBI Premium Cardholder is insured against loss of life due to an accident, up to the amount specified overleaf, subject to exclusions, provisions and other terms as specified in the Master Policy No.040900/46/01/266/01” and specifying the sum assured as Rs.2.00 lakhs in the event of accidental death other than during air travel. Clause-2, which contains the heading of “Validity”, is extracted hereunder :-

> “2. Validity- The insurance cover is valid if, while the Master Policy is in force, credit facilities continue to be available on the SBI Card (i.e. SBI Card is valid for use and has not expired or been terminated or suspended) and that there are no outstanding greater than 90 days.”

The aforesaid condition of the policy would show that the policy was issued to the holder of Certificate being a SBI Card Holder and promise has been made to pay the card holder the amount of Rs.2.00 lakhs. The fact of reduction of quantum of insurance coverage has never been communicated by S.B.I. during the lifetime of late Budhadev Panigrahi (the policy holder). The Insurance Company, in our considered opinion, is bound by its Certificate of Insurance and cannot escape the liability of paying the dues covered under the aforesaid Certificate on the plea that there is a change in the Master Policy and the agreement between the S.B.I. and the insured, to which the certificate holder is not a party.

Accordingly, we hold that the insurer is liable to pay a sum of Rs.2,00,000/- (rupees two lakhs) to the petitioner towards insurance coverage of her husband, late Budhadev Panigrahi. It is pertinent to mention here that by virtue of the orders of this Court dated 30.6.2009 and 13.7.2009, the Insurance Company has already paid a sum of Rs.1,00,000/- to the petitioner and an amount of Rs.1,00,000/- (rupees one lakh) is in deposit with the Registry. Let the Registry release the said amount along with accrued interest in favour of the petitioner by way of account payee cheque on proper identification.

Although permission had been granted on the prayer of the learned counsel appearing for the S.B.I. (O.P.4) to file counter affidavit vide order dated 25.8.2009, no counter affidavit was filed. Hence, liberty is also granted to the Insurance Company (O.P.1) to seek reimbursement of the excess amount paid to the petitioner, over and above, its agreement with the S.B.I., from the S.B.I. (O.P.4).

The writ petition is allowed accordingly.

2010 (I) ILR-CUT- 463

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

STATE OF ORISSA & ORS. -V- SRI JIRIMIYA PRASAD NANDA.*

FEBRUARY 18, 2010.

POLICE ACT, 1861 (ACT NO. 5 OF1861) – SEC.9.

Under Section 9 of the Police Act, 1861 there is neither any scope for the Opp.Party to withdraw the resignation after it was accepted nor there is any scope for the employer to wait for two months to accept the resignation.

(Para 10)

Case laws Referred to:-

1.AIR 1989 SC 1083 : (Punjab National Bank -V- P.K.Mittal).

2.86 (1998) CLT 546 : (Satya Sundar Nayak & Kumuda Ranjan Mahaduk -V- Industrial Development Corporation).

For Petitioner – Mr.M.S.Sahoo, Addl.Standing Counsel.

For Opp.Party – Miss. Nandita Patra.

*O.J.C. NO.73 OF 2002. In the matter of an application under Article 227 of the Constitution of India.

B. P. DAS, J. This writ petition has been filed by the State with a prayer to quash the judgment dated 20.6.2001 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 33 of 1996 under Annexure-3.

2. The brief fact as delineated in the writ application tents to reveal that the opposite party while working as a Writer Constable of Bolangir Police District when his case was not considered for promotion, he made a representation to the authorities, which was also not considered. Thereafter the opposite party vide his letter dated 10.10.1980 tendered his resignation to the Superintendent of Police, Bolangir and requested him to accept his resignation. The resignation letter of the opposite party was accepted on 24.10.1980. Thereafter on 5.11.1980 the opposite party made a representation to the Inspector General of Police requesting him to restore him back in his service, which was refused by the authorities. Against the denial /refusal of the authorities to restore him in service, the opposite party approached the Tribunal in O.A. No. 33 of 1996 .Before the Tribunal, the opposite party took the aid took the aid of the provisions of Section-9 of the Police Act, 1861 and advanced an argument that he had withdrawn his resignation prior to expiry of two months and as such he should have been restored to service. The opposite party also alleged that the acceptance of hid resignation before expiry of two months' period was illegal as it violated the mandate of Section –9 of the Police Act.

The Tribunal after hearing learned counsel for the parties and relying on the judgment of the apex Court in the case of ***Punjab National Bank v. P.K.Mittal***, AIR 1989 SC 1083 and the decision of this Court in the case of

Satya Sundar Nayak & Kumuda Ranjan Mahaduk v. Industrial Development Corporation, 86 (1998) CLT 546, vide judgment dated 20.6.2001d allowed the Original Application and held that the acceptance of registration was illegal in view of the principles enunciated in the aforesaid cases.

The relevant portion of the judgment, of Satya Sundar Nayak (suipra),which has been relied upon by the Tribunal and quoted in paragraph-10 of its judgment, is also quoted herein below:-

(i) In absence of a legal, contractual or constitutional bar, a prospective resignation can be withdrawn at any time before it becomes effective and it becomes effective when it operates to terminate the employment or office tenure of the resignor.

(ii) Normally, the tender of resignation becomes effective and the service or office-tenure of the resignor is terminated when it is accepted by the competent authority.

(iii) If resignation of an employee was to take effect on a subsequent date and withdrawal was long before that date, acceptance of resignation is illegal. If in the resignation letter it is stated that the letter may be taken as a notice for the required period, by waiving that period of notice resignation cannot be accepted.

4. Learned counsel for the State submits that the ratio decidendi in the case of Panjab National Bank (supra) and Satya Sundar Nayak (supra) is absolutely not applicable to the facts and circumstances of the this case because, the opposite party here is a member of the Police Force and is guided by the provisions of the police Act. For the shake of convenience it is profitable to quote herein below Section-9 of the Police Act.

> **"9- Police-officers not to resign without leave or two months notice** – No police-office shall be at liberty to withdraw himself from the duties of his office unless expressly allowed to do so by the District Superintendent or by some other office authorized to grant such permission, or without the leave of the District Superintendent, to resign his office unless he shall have given to his superior officer notice in writing, for a period of not less than two months of his intention to resign"

5. A bare reading of the aforesaid provision would go to show that the District Superintendent of Police has been empowered not to allow a Police Officer of a disciplined service to leave the Force at his own sweet will meaning by a letter of resignation. The mandate of the provision is that the officer shall not be allowed to withdraw himself from the duties unless expressly allowed to do so by the District Superintendent of Police or unless he has given not less than two months' notice of his intention to resign.

6. There is no provision under the aforesaid section that the employer is bound to wait for two months to accept the letter of resignation. In the present case, the letter of resignation of the opposite party is enclosed to the Original Application, which is annexed to the writ petition as Annexure-1. In paragraph-12 of the said letter of resignation, it has been indicated as thus:-

> "That I am a scheduled caste candidate for which due privilege would have been given to me according to law framed by the Government as per the Development programme for S.C. and S.T. as per action 10.11.12 and the Orissa Reservation of vacancy in posts and services for S.C. and S.T. Act, 1975. But I am debarred from the above Development programme meant for uplifting the condition of S.C. and S.T. and as such, I presume that law framed by the Government for Development programme of the purpose is only in black and white. I am refrained from the privilege so also the general privilege for which I am naturally depressed. This is for your favour of information and necessary action. Please treat this resignation on condition and protest of two months notice."

So, after the resignation letter was received by the employer, the employer accepted the same on 24.10.1980.

7. Let us now examine whether the ratio of the decisions relied upon by the Tribunal in its Judgment is acceptable to the facts of the case at hand. In the case of Punjab National Bank (supra), the relevant regulation is Regulation-20(2), which reads as thus:-

"No officer shall resign from the service of the bank otherwise than on the expiry of three months from the service on the back of a notice in writing of such resignation."

The aforesaid regulation provides a rider on the employer not to accept the resignation of his employee before expiry of three months. In other words, the resignation of the employee can be accepted only after expiry of the notice period of three months. Here in this case, such a provision is not available in the statute. Hence the conclusion would be that after the resignation is tendered, the authority can accept the same at any time and even within two months.

8. The other decision which has been relied upon is the case of Satya Sundar Nayak (supra). In this case this Court was called upon to take a decision regarding the date on which the resignation would become effective and nit was decided that in the absence of any legal, contractual or constitutional bar, a prospective resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or office tenure of the resignor.

The principle decided in the above case is no way beneficial to the opposite party.

9. In view of such, the Tribunal has totally proceeded on a wrong premise by relying upon the aforesaid two decisions, which are not applicable to the facts and circumstances of the present case.

10. Looking at the provision of Section-9 of the Police Act, 1861, there is neither any scope for the opposite party to withdraw the resignation after it was accepted nor there is any scope for the employer to wait for two months to accept the resignation tendered by the employee.

11. For the reasons indicated above, we set aside the judgment dated 20.6.2001 passed by the Tribunal in O.A. No. 33 of 1996 (Annexure-3). The writ application is accordingly allowed, but without any order as to costs.

Writ application allowed.

2010 (I) ILR-CUT- 467

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

INDRAMANI SWAIN -V- STATE OF ORISSA & ORS.*

FEBRUARY 25,2010.

CONSTITUTION OF INDIA, 1950 – ART.21.

Un natural death of U.T.P. – Injury Nos.1,4,5,6 & 9 are ante mortem in nature – There was no clear explanation as to the cause of such injuries which normally can not be caused in one fall – Even if the opinion of the doctor is accepted that the deceased died due to over dose of Nitroson-10 then it is also the negligence of the authorities for which Nitroson-10 group of drugs reached the U.T.Ps inside the jail – Held, death of the deceased was due to negligence on the part of the officers concerned who were in charge of proper watch and ward duty of UTPs – Direction issued for payment of Rs.2,50,000/- as Compensation to the petitioner.

(Para 6 & 7)

Case laws Referred to:-

1.(1993) 2 SCC 746 : (Nilabati Behera @ Lalita Behera -V-State of Orissa).
2.AIR 1997 SC 1203 :(People's Union of for Civil Liberties -V- Union of India).
3.(2007) 36 OCR 836 :2007(I) OLR-410: (Kalpana Mandal & Ors.-V- State of Orissa
4.(2009) 42 OCR 602 : (Ahalya Pradhan -V- State of Orissa & Ors.)

For Petitioner - M/s.U.C.Mohapatra, Mrs.S.Mohapatra & B.N.Tripathy.
For Opp.Parties – Mr.D.Panda,
Learned Addl.Government Advocate.

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*W.P.(C) NO.14891 OF 2006. In the matter of an application under Article 226 & 227 of the Constitution of India.

B.P.DAS, J. The petitioner has filed this writ petition claiming compensation for the unnatural death of his son, Deepak Kumar Swain while in custody in Choudwar Circle Jail

2. The case of the petitioner is that his son Deepak Kumar Swain was arrested and remanded to judicial custody by the J.M.F.C., Salipur, as he was implicated in a criminal case being G.R.Case No.97/2003 for commission of offences under Sections 452/294/427/307, IPC. When the said Deepak Kumar Swain was in custody as an U.T.P., he died in S.C.B.Medical College & Hospital, Cuttack where he was taken for treatment. Thereafter, an F.I.R. was lodged by the brother of the deceased before the I.I.C., Choudwar Police Station on the allegation that they found the body of Deepak Kumar Swain being kept in S.C.B.Medical College & Hospital and there were some injuries on his body and face.The further

allegation was that his brother did not die a natural death but was killed by some persons. The said F.I.R. was filed by the brother of the deceased after cremating the dead body. Initially U.D.Case No.6/11.3.2003 was registered, which was later converted to G.R.Case No.97/2003 and was registered under Section 302, IPC, which ultimately ended in Final Form and the cause of death, as indicated in the Final Form, was due to over dose of Benzodiazepine, i.e., a sedative group of drugs and due to respiratory failure. The petitioner in the circumstances claims compensation of an amount of Rs.5.00 lakhs.

3. The Superintendent, Circle Jail, Choudwar, has filed an affidavit, in paragraph-4 of which it has been averred that on 10.3.2003 morning the deceased was brought to Dr.L.S.Mohapatra, Jail Doctor, by the Duty Warder, convict Night-Watchman and some room mates for treatment of lacerated scalp injury situated on the left temporal and parietal area with mild rise of temperature and basal crepitation on left lungs. As per the opinion of the Jail Doctor, the deceased was presented before him with violent action, irrelevant talk and mild visual hallucination. As per the query made by the doctor, the injury caused on the head was due to fall on the ground under violent stage. Apart from the same, the deceased confessed before the doctor that he was addicted to Nitroson-10 (Benzodiazepine group of drug), Cannabis, Alcohol and Brown Sugar before he was forwarded to Jail. The injury sustained on the head of the deceased was stitched by the Jail doctor and all the ancillary treatment was given to the patient. As per the post-mortem report, there are altogether nine injuries, out of which injury nos.1, 4, 5, 6 & 9 are as follows :-

> "1.Stiched lacerated wound of 3 cm long with one Nylon Sutar present antero-posteriorily over the left fronto temporal 9 cm. above the left eye brow and left ear had been caused due to fall on the ground, which has been noted in the case sheet.
>
> 4. Multiple small abraded contusion of varying size and shape in an area of 7 X 5 cm placed on lateral aspect of elbow joint.
>
> 5. Two small abraded contusion of irregular shape present over the dorsum of right in an area of 4 X 2 Cm.
>
> 6. Multiple small abraded contusion of varying size and shape over an area of 7 X 6 Cm. placed in postero-lateral aspect of right elbow joint.
>
> 9. Abraded contusion two in number placed over front of right upper leg 3 Cm. below lower border of paltela 1 X 1 Cm. each."

The Superintendent, Circle Jail, Choudwar, was directed to explain the external injuries, as the aforesaid relevant injuries did not disclose anything regarding the cause of the aforesaid injuries. This Court by order dated 5.8.2009 observed that the affidavit filed by Sri Dharanidhar Das, the Jail Superintendent, was not in terms of the order dated 17.7.2009, for

which it was rejected. No affidavit is forthcoming from the Secretary to Government, Home Department.

4. In the order dated 17.7.2009 the Secretary to Government, Home Department was directed to file an affidavit. Thereafter, the counter affidavit sworn to by one Sanatan Hembram, Under Secretary to Government, Home Department, was filed. Paragraphs-4 & 5 of the said counter affidavit are extracted hereunder :-

> "4.That in reply to the averments made in para-1 of the writ application, the deponent respectfully submits that the information collected from the records of Circle Jail, Cuttack at Choudwar, it is found that the deceased was brought to the Jail Medical Officer, Choudwar for treatment in the morning of 10.3.2003 with a superficial injury on the scalp alleged to have been sustained due to fall in the night. The said injury was stitched by the Jail Medical Officer and the deceased was admitted for treatment as an indoor patient in the Jail Hospital. On 11.3.2003 as his condition deteriorated, the Jail Medical Officer referred him for specialized treatment to S.C.B.Medical College and Hospital, Cuttack and the deceased UTP was shifted there by an ambulance. He was declared found dead on arrival at the S.C.B. Medical College and Hospital.
>
> 5. That being an UTP, a Post Mortem was conducted and the doctor conducting post mortem found some injuries both post mortem as well as ante-mortem on the body which he has noted in Annexure-3. In the opinion of the doctor conducting post mortem injuries No.1,4,5,6,8 and 9 were ante-mortem and could have been caused by hard, blunt and rough contact and were not fatal either individually or combinedly. Injury No.1 was stitched lacerated wound which deceased had sustained due to fall in the night of 9/10.03.2003 inside his cell as noted by the Jail Medical Officer which he had stitched. The other external injuries noted in the post mortem report were minor abrasions and contusions which could have been caused during shifting of the patient from Choudwar to Cuttack in the ambulance as per opinion of the Jail Medical Officer."

The said affidavit further indicated that the deceased Under Trial Prisoner had previous history of drug abuse and he had been diagnosed by the Jail Medical Officer as suffering from encephalitis (inflammation of the brain) exhibiting violent behavior, talking incoherently and with mild hallucination. It is further indicated that the viscera report as well as final opinion of the doctor relating to the cause of death not having been annexed to the writ petition, the Home Department is unable to give any comment on the allegation made in the petition to the effect that Benzodiazepine group of

drugs had crept into the Circle Jail, Choudwar and consumed by the deceased.

5. Another counter affidavit was also filed by Sri Dharanidhar Das, Senior Superintendent of Circle Jail, Cuttack at Choudwar, reiterating the same facts in paragraph-6 that the lacerated injury was due to fall in the night and multiple small adraded contusions of varying size and shape placed at the lateral elbow joint, right hand area and in postero-lateral aspect of right elbow joint and posterior aspect of left shoulder and abraded contusions placed front of right upper leg and below lower border of patella. These injuries in the opinion of the Jail Medical Officer could have been caused while the deceased was being taken to the S.C.B. Medical College and Hospital. As regards the fact that the deceased was suffering from encephalitis, no document has been filed by the O.Ps. The affidavit of the Superintendent of Jail filed at a later stage as well as the affidavit filed on behalf of the Secretary to Government, Home Department, save and except saying that the deceased suspected case of encephalitis, the post-mortem report, which has detailed various injuries on the body of the deceased, some of which have been indicated in the foregoing paragraphs, the opinion of the doctor that the external injuries nos.1,4,5,6,8 & 9 are ante-mortem in nature and could have been caused by hard, blunt and rough contact and were not fatal either individually or combinedly, neither the Home Department nor the Jail Authority has taken any step for bringing the chemical repot of examination of viscera to the notice of the Court. But learned counsel for the State produced the case diary, which indicates that benzodiazepine group of drugs were detected in the viscera report as indicated above and on the basis of the report, the final opinion as to cause of death given by the F.M.T. Department was due to over dose of Benzodiazepine group of drugs resulting in respiratory failure.

6. This is worse. It is not known as to how these drugs crept into the jail wards and ultimately reached the U.T.Ps. It certainly speaks volumes about the negligence on the part of the jail authority or that the jail authorities are giving the scope, for the reasons best known to them, for trafficking these drugs into the jail wards. However, coming to the nature of injury, as indicated in the post-mortem report, injury nos.1, 4, 5, 6 & 9 are ante mortem in nature. There is no clear explanation as to the cause of such injuries, which normally cannot be caused in one fall. So if we accept the version in the affidavits of the Home Department and the jail authority and the final opinion of the doctor that the deceased died due to over dose of Nitroson-10, then the death is definitely due to negligence of the authorities, for which the Nitroson-10 group of drugs reached the U.T.Ps. inside jail. Apart from that, if we look at the external injuries on the body of the deceased, more specifically injury nos. 1, 4,5,6 & 9, the version of the

authority that they are due to fall and might have been caused while he was transported to S.C.B. Medical College & Hospital, Cuttack, cannot be accepted. So the cause of external injuries on the body of the deceased is shrouded in misery and no cogent explanation is coming forward from the authority or from the case diary. It is, therefore, crystal clear that the death of the deceased was due to negligence on the part of the Officers concerned, who were in-charge of proper watch and ward duty of U.T.Ps.

With regard to the question whether the prayer of the petitioner for compensation can be allowed, it is already settled and no more res integra in view of the decisions in the cases of **Nilabati Behera alias Lalita Behera vrs. State of Orissa** (1993) 2 SCC 746, **People's Union for Civil Liberties vrs. Union of India,** AIR 1997 SC 1203, **Kalpana Mandal & others vrs. State of Orissa,** (2007) 36 OCR 836 : 2007 (I) OLR-410 and **Ahalya Pradhan vrs. State of Orissa & others** (2009) 42 OCR-602.

7. Learned counsel for the petitioner submits that the son of the petitioner was doing grocery business. As per the interim direction of this Court, the petitioner has already received a sum of Rs.2.00 lakhs.

Considering the age of the deceased and looking at his character and the offences he was implicated with and the circumstances, in which the deceased died, we are of the considered opinion that grant of an amount of Rs.2,50,000/- (rupees two lakhs and fifty thousand) as compensation to the petitioner would be just and proper and we direct accordingly. Since the petitioner has already received Rs.2,00,000/- (rupees two lakhs), let the balance amount of Rs.50,000/- (rupees fifty thousand) be paid to the petitioner within a period of three months from today.

The writ petition is accordingly allowed.

2010 (I) ILR-CUT- 472

L.MOHAPATRA, J & B.P.RAY, J.

KESHAB CHANDRA MISHRA -V- G.M.,SOUTH EASTERN RAILWAY & ORS.*

JANUARY 25,2010.

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

Petitioner filed O.A. for retiral benefits along with interest for the delay in payment – Tribunal disposed of O.A. on the basis of statements made by the petitioner but did not look to the prayer for interest – Petitioner filed review petition – Petition rejected – Hence the writ petition.

Held, the Tribunal having not at all adjudicated one of the prayers in the O.A., the review petition in respect of such prayer was maintainable and the Tribunal was competent to deal with the said prayer in the review petition.

(Para 4)

For Petitioner - M/s. Yeeshan Mohanty, P.C.Biswal, B.N.Mohanty, M.Jena, S.Nayak & J.Rout.

For Opp.Parties – M/s. Piyush Kumar Mishra, A.K.Panda & S.S.Mishra (For O.Ps. 1 & 3)

*W.P.(C) NO.4721 OF 2006. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA, J. The petitioner, who is a retired employee of the South Eastern Railway had filed O.A. No. 455 of 2001 before the Central Administrative Tribunal, Cuttack Bench, Cuttack for payment of his retrial benefits. He also prayed for payment of interest at the rate of 18% for the delay in payment of Pension, Gratuity, P.L. Bonus, salary for January, 1996, Provident Fund dues and Group Insurance benefits. The said Original Application was heard on 01.1.2002 and the petitioner argued his case in person. The learned counsel for the South Eastern Railway was also present. It was submitted by the learned counsel for the South Eastern Railway that all the benefits claimed by the petitioner had already been released in his favour and the petitioner also submitted before the Tribunal that he had received Rs. 1,48,000/- and was also entitled to receive a further sum of Rs. 1,73,000/- towards commuted value of pension for which instruction had also been given to the State Bank of India. In view of such statement made by the petitioner, the Tribunal disposed of the Original Application holding that there remains nothing to be adjudicated in the said Original Application. The petitioner thereafter filed a review petition bearing R.P. No. 02 of 2003 on the ground that the Tribunal while disposing of the Original Application on the basis of the statement made by the petitioner, did not allow interest for the delay in payment of the retrial benefits. The said

review petition having been rejected by the Tribunal by order dated 01.3.2005, this writ application has been filed.

2. The learned counsel for the petitioner submitted that in course of hearing of the Original Application no lawyer appeared for the petitioner and he argued the case himself. According to the learned counsel, on the basis of the statement made by the learned counsel for the South Eastern Railway that all the retirement dues have been paid, when a question was put to the petitioner by the Tribunal, out of nervousness, though he admitted to have received the retired dues, could not pray for payment of interest for delayed payment and accordingly, the Tribunal also did not look into the said prayer made in the Original Application and disposed of the same holding that nothing further remained for adjudication.

As it appears from the averments made in the writ application, the petitioner while working in the cadre of O.S. Grade-I in the office of the Chief Engineer, Construction, Cuttack was put under suspension on 21.8.1991 in connection with a Vigilance Case and while continuing on suspension, he retired on 31.1.1996. He was ultimately acquitted of the charges in the Vigilance Case in October, 1998 and not a single pie had been paid to him till he was acquitted of the charges. Till 2001 nothing having been paid to him, he approached the Tribunal and by virtue of an interim order he started getting provisional pension. During pendency of the Original Application, he was paid his retiral benefits. Therefore, admittedly there has been delay at least from 1998 till 2001 in payment of the retired benefits.

3. The ground taken by the South Eastern Railway in the review petition for such delay is that the entries in the leave calculation sheets from the date of joining till 1991 had not been attested by any officer and, therefore, permission had to be obtained from the competent authority to validate the old records and in the process there was some delay. The petitioner also did not co-operate and only in the year 2000 when it was decided that the date of retirement of the petitioner was 31.1.1996, he signed the documents for settlement of the retirement benefits in the month of August, 2000 and for the above two reasons, thee was delay in payment of the benefits. The Tribunal while dismissing the review came to hold that the petitioner having not been able to prove that there was no lack of co-operation from his side in settling his retrial dues, he was not entitled to interest. We are unable to accept such a finding since it is the South Eastern Railway, who took the plea by making a bald statement that there was non-cooperation from the side of the petitioner. Law is well settled that specific plea taken by a party has to be proved by that party. Railway administration took a plea that there was non-cooperation from the side of the petitioner and it was for them to prove the said fact and the petitioner is not required to prove that there was no lack of co-operation from his side. Admittedly the petitioner retired from

service in 1996 while under suspension and was acquitted of the charges in the Vigilance Case on 15.10.1998. There was no reason for causing any further delay after acquittal from the criminal charges, in payment of the retirement benefits. The Railway administration has admitted that due to non-attestation of the entries in the leave calculation sheets from the date of joining in service till 1991 there was delay and permission from the competent authority had to be obtained to validate the records. There is nothing on record to show that the petitioner at any point of time was called to attend the office for signing the pension papers. In absence of such documents, the delay in finalizing any payment of the benefits to the petitioner cannot be attributed to him, he having retired from service since 1996. We are therefore of the view that the Tribunal came to an erroneous finding that under such circumstances, it was for the petitioner to prove that he did not lack co-operation for settling his benefits.

4. The other question raised by the learned counsel for the opposite parties is that whether in a review such relief can be granted. Admittedly there was a prayer in the Original Application for payment of interest at the rate of 18% per annum for delayed payment of the dues. The Tribunal while disposing of the Original Application on the basis of the statement made by the petitioner did not look into the said prayer and, therefore, erroneously held that there was nothing more to be adjudicated in the said Original Application. Had the Tribunal looked into the prayer for payment of interest, it could have adjudicated the said question. The Tribunal having not at all adjudicated one of the prayers in the Original Application, the review petition in respect of such prayer was maintainable and the Tribunal was competent to deal with the said prayer in the review petition.

5. For the reasons stated above, we set aside the impugned judgment passed by the Tribunal in the review petition and direct that the petitioner shall be entitled to interest at the rate of 9% (nine per cent) per annum for delayed payment of the retirement dues from 15.10.1998 when he was acquitted of the criminal charges till the date of payment. Such interest be calculated and paid to the petitioner within four months from the date of communication of this order.

Requisites for communication of this order to the opposite parties be filed within one week.

Writ petition allowed.

2010 (I) ILR-CUT- 475

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

MANOJ KUMAR TRIPATHY -V- MAYARANI PRAHARAJ.*

MARCH 18, 2010.

HINDU MARRIAGE ACT, 1955 (ACT NO. 25 OF 1955) – SEC.13 (1)(ia).

Divorce sought on the ground of cruelty – No evidence regarding any specific instance of cruelty – Further plea that due to long separation of parties there has been " irretrievable break down of marriage" which is not included as a ground for divorce U/s.13 of the Act – Only the Apex Court in some cases directed the marriage to be dissolved on that ground in exercise of jurisdiction Under Article 142 of the Constitution of India and such jurisdiction is not available to any other Court including the High Court.

Held, in the absence of cogent evidence to prove cruelty, long separation by itself can not be a ground for grant of decree of divorce.

(Para 18,19)

Case laws Referred to: -

1.AIR 2007 SC 1077 :(Hasham Abbas Sayyad -V-Usman Abbas Sayyad).
2.AIR 1962 SC 199 : (Hira Lal -V- Kali Nath)
3.AIR 1954 SC 340 : (Kiran Singh -V- Chaman Paswan).
4.AIR 2001 SC 1709 : (Chetan Dass -V- Kamla Devi).
5.AIR 1995 SC 2170 : (Smt. Sneh Prabha -V- Ravinder Kumar).
6.AIR 2005 SC 3297 : (Durga Prasanna Tripathy -v- Arundhati Tripathy).
7.(2007) 2 SCC 263 : (Rishikesh Sharma -V- Saroj Sharma).
8.AIR 1994 SC 710 : (V.Bhagat -V- D.Bhagat).
9.AIR 1997 SC 1266 : (Ashok Hurra -V- Rupa Ashok Hurra).
10.(2003) 25 OCR (SC) 806 : (Anjana Kishore -V- Puneet Kishore).
11.(2004) 27 OCR (SC) 204 :)Smt. Swati Verma -V- Rajan Verma).
12.AIR 1995 SC 851 : (Romesh Chander -V- Savitri).
13.AIR 2008 SC 3093 : (Satish Sitole -V- Ganga).
14.AIR 2005 SC 534 : (a.Jayachandra -V- Aneel Kaur).
15.AIR 2006 SC 1675 : (Naveen Kohli -V- Neelu Kohli).
16.AIR 2009 SC 2254 : (Visnu Dutt Sharma -V- Manju Sharma).

For Appellant – M/s. S.Sujata Jena, G.B.Jena & S.Mohanty.
M/s. Samir Kumar Mishra, Malaya Ranjan Das, S.S.Ray & Samapika Mishra.

For Respondent – M/s. Prasanta Kr.Sahoo, B.B.Pattanaik, S.S.Mallick, P.K.Behera, U.C.Dora & H.P.Ojha.

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*MATA NO.41 OF 2003. From the judgment and order dated 16.9.2003 passed by Sri P.C.Pathy, Judge, Family Court, Cuttack in Civil Proceeding No.198 of 1999.

B.K. PATEL, J. Aggrieved by dismissal of his application for dissolution of marriage by decree of divorce under Section 13(1)(ia) of Hindu Marriage Act (for short 'the Act') in Civil Proceeding No.198 of 1999 by learned Judge, Family Court, Cuttack, husband-appellant has preferred this appeal against wife-respondent.

2. Parties are Hindus. Appellant is a native of village Bodar in the district of Cuttack. Their marriage was solemnized in Danda Bibha form on 5.1.1998. Appellant is a doctor employed under the State Government whereas respondent is working as Senior Technical Assistant in the Department of Architect under O.U.A.T., Bhubaneswar. Appellant's father was a Government servant and working as a Health Educator prior to his retirement. It is also not disputed that parties are living in separation since 2.10.1998.

3. It is asserted by the appellant that his marriage with respondent was solemnized in village Bodar. After the marriage the parties resided in village Bodar till the 5th day of the marriage, and thereafter shifted to Bhubaneswar. It is alleged by the appellant that respondent is an adamant and rowdy lady, who has no respect or affection towards her in-laws. She used to underestimate him and praise her brother-in-law. Respondent's family members suppressed the fact that respondent was a State level athlete and she used to attend various tournaments in and outside the State. Though the respondent was a diploma holder in Architecture, appellant was given the impression that she was a B.Tech. While staying in the appellant's house, respondent was reluctant to prepare food, and gave out that she would continue to ride two-wheeler, put on jean pants and shirts, and visit her father's house everyday. It is further alleged that when appellant's mother had undergone eye operation in the month of April, 1998, respondent instead of shouldering house-hold responsibility chose to take her meals in the hotel and returned home late in the night in a drunken state. Appellant could take notice of such conduct of respondent when he came home from his place of service. Respondent did not mend her conduct in spite of appellant's advice. Moreover, she did not allow the appellant for cohabitation and asked him to keep sexual relationship with the girls at his service place and not to come to Bhubaneswar frequently. She also threatened the appellant of divorce. It is also alleged that respondent suggested to the appellant that she would mix with others for sexual relationship by taking proper precautions during his absence. It is categorically alleged that deprivation of conjugal sexual relationship by the respondent amounted to inflicting of cruelty and mental agony on the part of appellant. It is further alleged that most of the time respondent remained absent from her matrimonial home and preferred to spend her time in her maternal home or in the house of her brother-in-law situated at Bhubaneswar. She used to

quarrel with appellant and his family members and conduct herself in a violent and abusive manner. She used to abuse and subject the appellant to humiliation in public places. On one occasion she caught hold of appellant's collar and abused him in the market, and on another occasion she threw food plate on his face. Due to respondent's conduct, appellant's relations, friends and neighbours stopped visiting his house. Though respondent received Rs.8,000/- towards her monthly salary excluding private practice, she did not render financial help to the family. She used to spend her money in attending parties in hotels with her boy friends. Once the appellant required money for his younger brother's treatment, but the respondent got enraged and threw currency notes on his face. In her birth day in the month of May, 1998 the respondent was offered a saree and asked to go to temple with the appellant but she refused to wear the saree and go to temple. She left for office where she observed her birth day in Western style. It is further alleged that once in the month of July, 1998, respondent took the appellant to her friend, who was wearing a jean pant and shoulderless banian. She told the appellant that her friend was having a bottle of Champagne and proposed to go to hotel and drink the same. When the appellant rejected the proposal, respondent took Champagne and created unpleasant situation for which the appellant had to bring her home in a taxi. Appellant's father requested respondent's brother-in-law to intervene and settle the disputes between the appellant and the respondent amicably but he did not respond. On 3.6.1998 respondent, instead of returning home from office, went to her maternal home and telephoned that she had resigned from service. She informed that she would not stay with the appellant in her matrimonial home and expressed her willingness to stay in separate mess. Appellant and his father found from the respondent's office that she had not resigned. When they went to respondent's maternal home they were misbehaved by her mother who declared that respondent would never return to her matrimonial home and advised the appellant's father to persuade the appellant for divorce or for keeping the respondent in a rented house. However, the appellant persuaded the respondent to return home and ultimately respondent's father and brother left her in the appellant's house on 6.6.1998. It is alleged that respondent is an abnormal lady suffering from Schizophrenia. She used to threaten of committing suicide unless the appellant resided with her separately in a rented house. On 2.10.1998, which being a Friday and "Ekadasi" was not an auspicious day to go to maternal home, the appellant left her matrimonial home despite advice rendered by appellant's parents to her that she should not leave her matrimonial home on that particular day. Thereafter, she did not keep any contact with the appellant or his family and on 9.11.1998 respondent finally

denied to return to her matrimonial home. In such circumstances, appellant filed application for divorce.

4. Respondent filed written statement denying the allegations made by the appellant. It is pleaded by her that learned Family Court, Cuttack has no territorial jurisdiction to entertain the application for divorce. According to her, marriage between her and appellant was solemnized in Bhubaneswar and they all along resided in Bhubaneswar prior to their separation. She asserts to have treated the appellant as well as his parents and brother with respect, regard, love and affection. According to her, the appellant, who is a simple gentleman, is loving and affectionate towards her. However, appellant's father is a greedy person. Though the respondent wanted to resign from her service in order to devote herself towards house-hold responsibilities, appellant and his father insisted that she should continue with her employment and contribute her income to the family. Respondent alleges that despite the appellant's love and affection towards her, he has immense fear for his father. When appellant's father's plan to extract money from respondent did not materialize, the appellant was set up to obtain a decree of divorce only with a view to get appellant married with another woman. Appellant's mother also treated the appellant with love and affection but she is also mortally afraid of her husband. It is categorically averred by the respondent that she is ready and willing to voluntarily join her husband at any time if he desires her to do so. However, she was mortally afraid of her father-in-law, who, according to her, would not hesitate to inflict torture on her or to kill her. It is averred that despite her eagerness to join the company of the appellant, she has been deserted without her fault and in spite of her approaches appellant's father did not take any interest to take her to his house.

5. On the basis of rival pleadings of the parties learned court below observed that the crucial points for determination are, (i) whether the Court at Cuttack had got territorial jurisdiction to entertain the petition u/s. 13 of the Act ? (ii) whether the respondent-wife had intentionally deserted the petitioner with a view to put an end to their conjugal relationship in perpetuity ?, and (iii) whether the respondent had treated the petitioner with cruelty ?

6. In order to substantiate their respective assertions, appellant examined two witnesses. P.W.2 is the appellant himself and P.W.1 is his father. Appellant also relied upon document marked Ext.1. Altogether six witnesses, O.P.Ws.1 to 6, were examined and documents marked Exts. 'A' to 'E' were relied upon on behalf of the respondent. Of them, O.P.W.6 is respondent herself and O.P.W.5 is her father.

7. On consideration of evidence on record, learned Judge, Family Court, Cuttack came to categorical finding that as no part of cause of action in the proceeding arose within the local limits of jurisdiction of Family Judge Court,

said Court has no territorial jurisdiction to entertain the petition under Section 13 of the Act. However, as the parties had already adduced evidence, the learned court below proceeded to decide the case on merit. It was held that the petition having been presented before expiry of two years from the date on which appellant alleges the respondent to have deserted him, application for divorce is not maintainable on the ground of desertion under Section 13(1)(i-b) of the Act. On scrutiny of evidence, it was further held that appellant has failed to substantiate the allegations of cruelty on the part of respondent. Therefore, the appellant was held to be not entitled to decree of divorce.

8. Learned counsel for the appellant initially made an attempt to assail the impugned judgment on the ground of lack of territorial jurisdiction of the Family Court, Cuttack without pursuing the contention at a later stage. It was not disputed by the learned counsel for the appellant that in view of provision under Section 19 of the Act, application under the Act should have been filed in the appropriate court in Khurda district. It was also conceded that the learned court below having proceeded to decide the case on merit and no prejudice occasioning in failure of justice being shown to have been caused by adjudication of the case by the learned Judge, Family Court, Cuttack, there is no scope for the appellant to assail the legality of the impugned judgment on the ground of lack of territorial jurisdiction.

9. In ***Hasham Abbas Sayyad vs. Usman Abbas Sayyad***: AIR 2007 SC 1077, it has been held :

> "An order passed by a person lacking inherent jurisdiction would be a nullity. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a Court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to. However, a distinction must be made between a decree passed by a Court which has no territorial or pecuniary jurisdiction in the light of Section 21 and a decree passed by a Court having no jurisdiction in regard to the subject-matter of the suit. Whereas in the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

10. In ***Hira Lal Vs. Kali Nath***: AIR 1962 SC 199 also, it has been held:

> "It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the

> jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure."

11. Moreover, the appellant himself having chosen to file application for divorce in the Family Court, Cuttack, he can not take advantage of his own action to urge that said Court has no jurisdiction to entertain the application. In ***Kiran Singh Vs. Chaman Paswan*** : AIR 1954 SC 340, it has been held by the Hon'ble Supreme Court that prejudice can be a ground for raising the objection about jurisdiction only when it is due to the action of another party and not when it results from one's own act. Courts cannot recognize that, as prejudice which flows from the action of the very party who complains about it. In the present case both parties proceeded to adduce all the evidence they waned to adduce. Appellant does not allege that there has been any failure of justice. Therefore, learned counsel for the appellant rightly and prudently abandoned the objection to the impugned judgment on the ground of lack of territorial jurisdiction.

12. In fact the application for divorce does not appear to have been filed on the ground of desertion under Section 13(1)(i-b) of the Act also. Alleging that respondent deserted him on 2.10.1998 and the appellant presented the petition in Court on 30.4.1999. Therefore, it is not alleged in the petition that respondent deserted the appellant for a continuous period of not less than two years immediately preceding the presentation of present petition.

13. In course of hearing it was also fairly conceded by the learned counsel for the appellant that evidence adduced on behalf of appellant falls far short of proof to substantiate the allegations of cruelty against the respondent. No independent witness was examined on behalf of the appellant though some of the incidents were pleaded to have taken place in public places. Neither the appellant nor his father P.W.1 deposed regarding any specific instance of cruelty. It is apparent from their testimonies that they objected to the manner in which the respondent dressed herself and to her conduct in riding bike in order to go to her office. P.W.1 appellant's father deposed that respondent did not behave like a Hindu wife. Both the appellant as well as his father alleged that the appellant did not attend to house-hold works. Similar allegations have been made in the petition for divorce also taking exception to the respondent's attire and lack of interest in attending to house-hold works. It is to be borne in mind that respondent is an educated working woman. She was also a State level athlete. That apart, evidence adduced on behalf of the respondent, more particularly that of respondent herself, negate all such allegations. It was categorically stated that by her that she is ready and willing to join appellant's company. She has no

allegation so far as appellant is concerned. However, it is evident that appellant's father was not happy with the respondent and on his instigation the appellant filed application for divorce. Ext. 'C' a letter written by the appellant to the respondent reveals that he used to love her.

14. Despite lack of evidence to substantiate the allegations of cruelty it was contended by the learned counsel for the appellant that in view of long separation of the parties it is to be presumed that there has been irretrievable break down of marriage. In such circumstances, a decree of divorce should be passed in the interest of appellant as well respondent. In reply, it was rightly contended by the learned counsel for the respondent that irretrievable break down of marriage is yet to be included under Section 13 of the Act as a ground of divorce. Learned counsel appearing for both the parties cited decisions in support of respective contentions.

15. Upon perusal of the decisions cited on behalf of the parties, it is found that in a number of cases Hon'ble Supreme Court has granted or upheld decree of divorce on the ground that the marriage between the parties has irretrievably broken down. However, it is evident from the decisions that such recourse was adopted in exercise of jurisdiction under Article 142 of the Constitution of India to do complete justice. Also, in some cases like ***Chetan Dass -vs.- Kamla Devi*** : AIR 2001 SC 1709 plea for dissolution of marriage was rejected despite the fact that marriage between the parties had become dead. In ***Smt. Sneh Prabha –vrs.- Ravinder Kumar*** : AIR 1995 SC 2170, ***Durga Prasanna Tripathy –vrs.- Arundhati Tripathy*** : AIR 2005 SC 3297 and ***Rishikesh Sharma –vrs.- Saroj Sharma*** : (2007) 2 SCC 263, divorce was granted on the ground of irretrievable break down of marriage without reference to Article 142 of the Constitution of India. In ***V. Bhagat –vrs.- D. Bhagat*** : AIR 1994 SC 710, it was observed that irretrievable break down of the marriage is not a ground by itself for grant of decree of divorce. In ***Ashok Hurra –vrs.- Rupa Ashok Hurra*** : AIR 1997 SC 1266, ***Anjana Kishore –vrs.- Puneet Kishore*** : (2003) 25 OCR (SC) 806, ***Smt. Swati Verma –vrs.- Rajan Verma*** : (2004) 27 OCR (SC) 204, ***Romesh Chander –vrs.- Savitri*** : AIR 1995 SC 851 and ***Satish Sitole –vrs.- Ganga*** : AIR 2008 SC 3093, decree of divorce was granted in exercise of jurisdiction under Article 142 of the Constitution of India on the ground that there was irretrievable break down of the marriage which had become dead.

16. In ***A. Jayachandra –vrs.- Aneel Kaur*** : AIR 2005 SC 534, it was observed by a Three Judges Bench of Hon'ble Supreme Court that in some cases dissolution of marriage has been allowed on the ground that the marriage had irretrievably broken down with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle. It was held:

"17. Several decisions, as noted above, cited by learned counsel for the respondent to contend even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of **Shiv Sunder's** case (reported in AIR 2004 SC 511 : 2004 AIR SCW 5857) (supra). The factual position in each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In **Shiv Sunder's** case (Supra) it was noted that the husband was leading adulterious life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases."

17. Another Three Judges Bench of the Hon'ble Supreme Court in ***Naveen Kohli –vrs.- Neelu Kohli*** : AIR 2006 SC 1675 also took note of the fact that irretrievable break down of marriage is not a ground for divorce under the Act, and, therefore, recommended for inclusion of the same by way of amendment. It was held:

"71. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage, Act, 1955.

xx xx xx xx xx xx xx xx xx xx xx xx

96. Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice,

Department of Legal Affairs, Government of India for taking appropriate steps."

18. In view of the above, in the absence of cogent evidence to substantiate the allegations of cruelty as made by the appellant, long separation by itself cannot be a ground for grant of decree of divorce. That would be against the provision under Section 13 of the Act. In ***Visnu Dutt Sharma -vrs.- Manju Sharma*** : AIR 2009 SC 2254, it has been held by the Hon'ble Supreme Court :

> "12. Learned counsel for the appellant has sated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant."

19. Thus, it is obvious that in some cases marriage was directed to be dissolved on the ground that the same has irretrievably broken down by the Hon'ble Supreme Court in exercise of jurisdiction under Article 142 of the Constitution of India which jurisdiction is not available to any other court including High Court. Despite several recommendations, irretrievable break down is yet to be included by way of amendment as a ground for dissolution of marriage under Section 13 of the Act. In the present case, we do not find any infirmity in the finding of the learned Judge, Family Court, Cuttack to the effect that evidence on record does not substantiate allegations of cruelty against the respondent. Evidence of respondent herself exhibits her eagerness to resume the matrimony. Therefore, we find no reason to interfere with the impugned judgment.

Accordingly, the appeal is dismissed and the impugned judgment passed by learned Judge, Family Court, Cuttack is confirmed. Parties shall bear their own cost.

Appeal is dismissed.

2010 (I) ILR-CUT- 484

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

UNION OF INDIA, REP.THROUGH THE CHIEF GENERAL MANAGER,(TELECOM),BSNL & ANR.-V- SHRI JUGAL KISHORE SAMAL.*

MARCH 5,2010.

CONSTITUTION OF INDIA, 1950 – ART. 309, 311.

Promotion – Sealed cover Procedure – D.P.C. recommended Promotion of Opp.Party under OTBP and BCR Schemes w.e.f. 30.11.1983 and 1.7.1991 respectively – By that time Opp.Party suffered punishment in a disciplinary proceeding – So recommendation of D.P.C. kept in sealed cover – Opp.Party was found guilty and was awarded punishment of stoppage of promotion for a period of one year vide order Dt.31.12.2003.

Held, during currency of the punishment Opp.Party is not entitled to the benefits under both the Schemes and the department rightly extended the benefits to the Opp.Party w.e.f. 31.12.2004 and 1.1.2005 respectively. (Para 5 & 6)

Case laws Referred to:-

1.AIR 1991 SC. 2010 : (Union of India -V- K.V.Jankiram).
2.AIR 1999 SC. 2407 : (Bank of India & Anr.-V-Degala Suryanarayana).
3.AIR 2000 SC. 2337 : (Union of India & Anr.-V-R.S.Sharma).

For Petitioners - Mr.P.N.Mohapatra.

For Opp.Party - M/s.B.S.Tripathy, M.K.Rath & Mrs.M.Bhagat.

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*W.P.(C) NO.8215 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L. MOHAPATRA, J. Union of India represented through its Chief General Manager (Telecom), BSNL and another are the petitioners before this Court questioning the legality of the order dated 6th November, 2008 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 637 of 2005.

2. The opposite party had filed the Original Application before the Tribunal praying for quashing the order dated 19th February, 2005 granting him the benefit of OTBP with effect from 31.12.2004 and BCR with effect from 1.1.2005 as well as the order dated 1st July, 2005 rejecting the representation which were annexed as Annexures A/6 and A/9 to the Original Application.

The opposite party joined as Telephone Operator at Rourkela under the Orissa Telecom Circle on 20.3.1965. While continuing as such, One Time Bound Promotion (OTBP) Scheme was introduced by the Department of Telecommunication providing therein that the employees who have completed 16 years of regular service in the grade are entitled to the benefit of the scheme with effect from 30.11.1983. Even though the opposite party

had completed 16 years of regular service, he was not extended the benefit of the scheme and accordingly, he made several representations. One such representation dated 24.5.1987 addressed to the then Director General and Secretary, Telecommunications having been rejected by order dated 3.7.1990, he approached the Tribunal in O.A. No. 382 of 1990. The said Original Application was allowed in favour of the opposite party and the Department filed a review challenging the said judgment passed in the Original Application. The review was also dismissed and the matter was carried to the Hon'ble Supreme Court. The Civil Appeal filed by the Department was disposed of by the Hon'ble Supreme Court on 1.4.2003 quashing both the orders of the Tribunal passed in the Original Application as well as in the review petition. It appears that a contempt petition was filed by the opposite party before the Tribunal vide C.P. No. 56 of 2003 and during pendency of the said contempt petition, D.P.C. was convened. The recommendation of the D.P.C. was kept in the sealed cover considering the fact that the disciplinary proceeding started against the opposite party had resulted in major penalty of stoppage of promotion for a period of one year with immediate effect imposed by order dated 31.12.2003. Challenging the said order of punishment, the opposite party again moved the Tribunal in O.A. No. 259 of 2004. The opposite party having not preferred an appeal against the order of punishment, the said Original Application was disposed of on 9.6.2004 permitting the opposite party to prefer an appeal by the end of June, 2004. However, because of certain observations made by the Tribunal in C.P. No. 56 of 2003, the opposite party again moved the Tribunal in O.A. No. 283 of 2004 for a direction to the Department to communicate the findings of the D.P.C. During pendency of O.A. No. 283 of 2004, the Department opened the sealed cover and by letter dated 20.5.2004 communicated the findings of the D.P.C. which had recommended that the opposite party is entitled to get the benefits under the OTBP Scheme with effect from 30.11.1983 and BCR Scheme with effect from 1.7.1991. In view of the above, O.A. No. 283 of 2004 was disposed of by the Tribunal on 16.6.2004 directing the Department to release the consequential benefits arising out of the D.P.C. recommendations in favour of the opposite party. The opposite party therefore on the basis of the orders passed by the Tribunal in the said Original Application and the findings of the D.P.C. in the present Original Application claimed that he is entitled for the benefit of promotion under the OTBP Scheme and under the BCR Scheme with effect from 30.11.1983 and 1.7.1991 respectively and not from 31.12.2004 and 1.1.2005 as have been allowed by order dated 19th February, 2005. The ground taken by the opposite party before the Tribunal was that the D.P.C. had considered the disciplinary action taken against him as well as the

punishment and in view of such recommendation made by the D.P.C., he is entitled for such benefits.

3. The petitioners, who were respondents before the Tribunal resisted the petition. It appears from the counter affidavit filed before the Tribunal that the sole ground taken before the Tribunal in the counter affidavit was that during currency of the punishment the opposite party could not have been given the benefits recommended by the D.P.C.

The Tribunal in the impugned order found that when the D.P.C. considered the opposite party for promotion the proceeding had culminated, the recommendation of the D.P.C. had been kept in sealed cover. The D.P.C. having recommended for the benefits under both the Schemes with effect from 31.11.1983 and 1.7.1991 respectively, the opposite party is entitled to the same and could not have been extended the benefits as has been done by order dated 19th February, 2005 extending such benefits from 31.12.2004 and 1.1.2005 respectively.

4. Challenging the said order, the sole contention made before this Court by Shri P.N. Mohapatra, the learned counsel appearing for the petitioners is that by the time the opposite party was considered by the D.P.C., the departmental proceeding had culminated. In view of the above, recommendation of the D.P.C. was kept in sealed cover. After the disciplinary proceeding culminated, the opposite party was imposed punishment of stoppage of promotion for a period of one year with effect from 31.12.2003. Therefore, during currency of this punishment, the opposite party could not have been given the benefits as per recommendation of the D.P.C. The opposite party having been extended the benefits in terms of the recommendation of the D.P.C., after he suffered the punishment, he could not have any grievance and, therefore, the order of the Tribunal setting aside the order of the Divisional Engineer (P & A) dated 19th February, 2005 granting the benefits of OTBP with effect from 31.12.2004 and BCR with effect from 1.1.2005 is not sustainable.

Shri Tripathy, the learned counsel appearing for the opposite party submitted that in the earlier Original Application the Tribunal having directed to grant the benefits to the opposite party in terms of the recommendation of the D.P.C. and the same having not been challenged, it is no more open for the petitioners to say that the recommendation of the D.P.C. could be given effect to only after the period of punishment is over.

5. Undisputedly the opposite party had completed the required years of service for grant of benefits under both the Schemes. However, by the time his case was considered by the D.P.C., he has suffering the punishment in a disciplinary proceeding. Therefore, the recommendation of the D.P.C. was kept in sealed cover. In the departmental proceeding the opposite party was found guilty of the charges and the punishment of stoppage of promotion for

a period of one year was passed as per order dated 31.12.2003. In view of the above, it was contended by Shri Mohapatra, the learned counsel appearing for the petitioners that during currency of the punishment such benefits recommended by the D.P.C. could not have been extended to opposite party No.1. However, it appears that the opposite party had filed O.A. No. 283 of 2004 seeking for a direction to the present petitioners to communicate the findings of the D.P.C. and during pendency of the said Original Application, the Department opened the sealed cover and vide letter dated 20.5.20004 communicated the findings of the D.P.C. indicating therein that the opposite party was entitled to get the benefits under the O.T.B.P. Scheme with effect from 30.11.1983 and under the B.C.R. Scheme with effect from 1.7.1991. The said Original Application was disposed of by the Tribunal on 16.6.2004 with direction to the Department Authorities to release the consequential financial benefits arising out of the D.P.C. recommendation in favour of the opposite party. This order of the Tribunal was challenged by the Department in Review Application No. 5 of 2004. The Tribunal having found that the opposite party had been granted the benefit under the OTBP Scheme with effect from 31.12.2004 and the benefit under the BCR Scheme with effect from 1.1.2005 following to the termination of the disciplinary proceeding, dropped the review application and observed that it is for the claimant-opposite party to work out the remedies by approaching the Tribunal again. For this observation made in the review application, the opposite party approached the Tribunal in the present Original Application claiming the benefits under the OTBP Scheme with effect from 30.11.1983 and under the BCR Scheme with effect from 1.7.1991 as recommended by the D.P.C. Therefore, the sole question before this Court is that whether during currency of the punishment, the opposite party is entitled to the benefits under the Schemes as recommended by the D.P.C. which had been kept in sealed cover. Reference in this connection is made to a decision to the Hon'ble Supreme Court in the case of **Union of India vrs. K.V. Jankiram reported in AIR 1991 Supreme Court 2010.** In paragraph 8 of the judgment the Court laid down the following point:

"It cannot be said that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. The officer cannot be rewarded by promotion as a matter of course even if penalty is other than that of the reduction in rank. An employee has no right to promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clear and

efficient administration and to protect the public interests. An employee found guilty of misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalized in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion, his whole record has to be taken into consideration and if promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion."

The learned counsel for the opposite party referred to two decisions of the Hon'ble Supreme Court in this connection. In the case of **Bank of India and another vrs. Degala Suryanarayana reported in AIR 1999 Supreme Court 2407** the fact is completely different. In the said case when the D.P.C. considered the case of the respondent therein, no departmental proceeding or criminal proceeding was pending against him. Therefore, the Court held that under such circumstances, the sealed cover procedure could not have been followed. The other decision relied upon by the learned counsel is the case of **Union of India and another vrs. R.S. Sharma reported in AIR 2000 Supreme Court 2337.** In the said case the Court have only laid down the law where sealed cover procedure can be followed and we are of the view that it has no relevance for the purpose of this case considering the fact that by the time the D.P.C. considered the case of the opposite party, he had been punished in a departmental proceeding and, therefore, the present case is covered by the decision rendered by the Supreme Court in the case of **Union of India vrs. K.V. Jankiram** (supra).

6. Admittedly in the present case when the D.P.C. considered the opposite party for extension of benefits under the OTBP and BCR Schemes, the departmental proceeding had culminated and for the said reason, the recommendation of the D.P.C. had been kept in sealed cover. The petitioner having been found guilty of the charge in the said disciplinary proceeding

and punishment having been imposed, we are of the view that during currency of the punishment at least he is not entitled to the benefits under both the schemes even if he has been found fit by the D.P.C. for getting such benefits. The Department therefore rightly extended the benefits under both the schemes to the opposite party with effect from 31.12.2004 and 1.1.2005 respectively.

7. We, therefore, allow the writ application and set aside the impugned order.

Writ application allowed.

2010 (I) ILR-CUT- 490

A.S.NAIDU, J & B.N.MAHAPATRA, J.

SK.AKHTARUL ISLAM -V- D.I. OF POLICE & ANR.*

FEBRUARY 17, 2010.

CONSTITUTION OF INDIA, 1950 – ART.226.

Every action of the executive must be fortified by reasons and should be free from arbitrariness.

Petitioner applied for the post of Constable – His application accepted and he appeared at the physical test – Thereafter he was informed that his form has been rejected due to wrong mentioning of his age.

Mistake in calculation of the age by one day appears to be inadvertent and not deliberate and by such mistake Petitioner does not gain any thing – Held, action of the authorities in rejecting the application of the petitioner not justified - Direction issued to the Opp.Parties for appointment of the petitioner to the post of Constable failing which the petitioner shall be entitled to compensation of Rupees one lakh which shall be paid within three months or which ever is earlier. (Para 9,13)

Case laws Referred to :-

1.AIR 1974 SC 555 : (E.P.Royappa -V- State of Tamil Nadu).
2.AIR 1988 SC 157 : (Haji T.M.Hassan Rawther -V- Kerala Financial Corporation)
3.AIR 1967 SC 1458 : (State of Andhra Pradesh & Anr.-V-Nalla Raja Reddy).

For Petitioner - M/s. B.S.Tripathy, M.K.Rath, J.Pati & Mrs.M.Bhagat.
For Opp.Parties – Addl.Govt.Advocate.

*W.P.(C) NO.17667 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

A.S. NAIDU, J The petitioner is a poor man, belonging to the down trodden class of the society. He is neither litigation minded nor litigation is his hobby, but then, circumstances have compelled him to enter into litigation, which he is constrained to pursue willy-nilly. He has approached the portals of this Court being aggrieved by the arbitrary action of the opposite parties, who have disqualified him in course of the selection for the post of constable in General Railway Police, Cuttack.

2. According to learned counsel for the petitioner, in response to an advertisement issued in daily news paper inviting applications from eligible candidates, the petitioner applied in prescribed proforma for the post of constable on 18.8.2008. After due scrutiny of the application form and on being satisfied that the petitioner satisfies all the eligibility criteria, his

application was accepted and he was called upon to appear at the physical test on 1.9.2008. After the physical test, the opposite parties without any rhyme or reason withdrew the identity card and informed him that his form has been rejected. Being aggrieved, the petitioner approached the Public Relation Officer-cum-Superintendent of Railway Police and wanted to know the reasons for disqualifying him. The Public Relation Officer informed the petitioner that as he had committed a mistake in calculation of his age and furnished wrong particulars in the application form, he was disqualified. The said fact was intimated to the petitioner by letter dated 21.10.2008 (Annexure-2). The relevant portion of the letter reads as follows:

> "..... In this connection, I am to inform you that you have been deprived of from further test of recruitment on 8.9.2008 due to wrong calculation of your age on your application form....."

The said decision is assailed in this writ petition. It is submitted that as per the advertisement the age of a candidate should not be less than 18 years and more than 25 years as on 1.1.2008. The date of birth of the petitioner as per the matriculation certificate was 5.7.1985. Thus, his age as on 1.1.2008 was 22 years, 5 months and 27 days. It appears that against Col. No.6 of the application he had written his age as on 1.1.2008 to be 22 years 5 months and 27 days. Thus, according to the petitioner, he was within the age prescribed in the advertisement had committed no mistake nor furnished any wrong particulars and as such, disqualifying him on that ground was not justified.

3. After receiving notice, counter affidavit has been filed by the Superintendent of Railway Police taking a stand that during the scrutiny it was found that the petitioner against Col. No.6 of the application form, reflected his age to be 22 years, 5 months and 27 days, but on actual calculation it was found that his age was 22 years 5 months and 26 days. In view of the aforesaid anomaly, the Superintendent of Railway Police disqualified the petitioner to appear the rest of the tests.

4. In course of hearing, learned counsel for the petitioner submitted that there is no dispute that the date of birth of the petitioner was 5.7.1985. It is also not disputed that the prescribed age of a candidate should be more than 18 years and less than 25 years as on 1.1.2008. The age of the petitioner on calculation comes to 22 years, 5 months and 27 days. Thus, he is within the age limit prescribed.

5. The sole ground for rejection of the application is that the petitioner had wrongly reflected his age to be 22 years, 5 months 27 days in stead of 26 days. While disputing the said fact, in the alternative, it is submitted that the difference of one day in calculation of age, does not affect the merits of the case and on such a mistake on which the application should not have been rejected.

6. The petitioner, as stated earlier, belongs to the down trodden class of the society. He is not a very qualified person. The required qualification for the post is only HSC Examination passed. Thus, rejecting his application only because there is a mistake in the calculation of his age to the extent of only one day, appears to be unjust and unreasonable and arbitrary.

7. In course of hearing, learned counsel for the State, however, submitted that in the advertisement there is a clause that if any of the materials/particulars furnished in the application form are found to be not correct, then the application was liable to be rejected. But then the said clause cannot be attracted to the case in hand. In fact, the mistake in calculation of the age by one day appears to be an inadvertent one and not deliberate. Even otherwise, by such mistake, the petitioner does not gain anything. Thus, we find that the action of the authorities in rejecting the application of the petitioner was not justified.

8. After hearing learned counsel for the parties, to satisfy our curiosity, we made a calculation of ourselves. As it appears, there is no dispute with regard to the years and months of the petitioner's age. The only controversy is with regard to number of days. Admittedly, the petitioner was born on 5th July 1985. Month of July carries 31 days. If the day on which the petitioner said to have born is taken into calculation, it appears, his age will be 22 years, 5 months and 27 days. In the alternative, if the said date is excluded, then it becomes 26 days. The time when the petitioner was born is not available. Thus, we find absolutely no discrepancy and it appears that the Superintendent of Railway Police concerned was in haste and in an arbitrary manner rejected the application of the petitioner. Such rejection appears to be not structured by any rational consideration.

9. It is well settled that where Government activity involves public element, the citizen has a right to claim rational treatment and when the State acts to the prejudice of a person, it has to be supported by legality. In such functioning, arbitrariness and discrimination have no role to play. In other words, every action of the executive must be fortified by reasons and should be free from arbitrariness. That is the very essence of rule of law and its bare minimum requirement. The decision taken in an arbitrary manner contradicts the principle of legitimate expectation. The plea of legitimate expectation relates to procedural fairness in decision making process. Denial of administrative fairness is a constitutional anathema. (See – **E.P. Royappa v. State of Tamil Nadu,** AIR 1974 SC 555).

10. In the case of **Haji T.M. Hassan Rawther v. Kerala Financial Corporation,** AIR 1988 SC 157, the apex Court observed that every action of the State or its instrumentality should not only be fair, legitimate and above-board but should be without any affection or aversion. It should

neither be suggestive of discrimination nor even apparently give an impression of bias, favouritism and nepotism or arbitrariness.

11. In the case of **State of Andhra Pradesh and another v. Nalla Raja Reddy,** AIR 1967 SC 1458 the constitutional Bench of the apex Court observed as under:

> "The official arbitrariness is more subversive of doctrine of equality than the statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately."

The facts and circumstances of the present case reveal that the decision taken to reject the application of the petitioner is tainted with arbitrariness and is beyond rational thinking.

12. In course of hearing, this Court called upon the learned counsel for the State to obtain instruction as to whether any vacancies are existing. On instruction it is submitted that at present there are two vacancies for the post of constable and against the above vacancies, two constables are yet to join.

13. In view of the aforesaid facts and circumstances and the principles of law laid down, we allow the writ petition and direct the opposite parties to adjudge the suitability of the petitioner for appointment to the post of constable against the posts lying vacant and/or appoint him in the first post, which is going to be available in near future failing which the petitioner shall be entitled to a compensation of rupees one lakh, which shall be paid within three months or whichever is earlier.

14. With the aforesaid observation and direction, the writ petition is allowed.

Writ petition is allowed.

2010 (I) ILR-CUT- 494

A.S.NAIDU, J & B.N.MAHAPATRA,J.

SUBASH CHANDRA MAHATAB -V- STATE OF ORISSA & ORS.*

FEBRUARY 25,2010.

CONSTITUTION OF INDIA, 1950 – ART. 16, 309.

Advertisement to fill up the post of Member, State Consumer Disputes Redressal Forum, Cuttack – Petitioner already appeared at the interview – again he was asked to appear for the second round of interview – Action challenged – Plea that in the Ist interview short-listing of Candidates was adopted – Advertisement silent about short-listing – Neither the Act nor the rules contain such provision – Held, decision to conduct second round of interview for the said post is quashed – Authorities are directed to select Candidates out of the list prepared in the first round of interview.

(Para 8)

Case law Relied on:-

2006(Suppl.) Vol-II OLR 178 : (Sushanta Kumar Sethi & Anr.-V-District Judge, Puri & Ors.).

Case law Referred to:-

AIR 1995 SC 77 : (Madhya Pradesh Public Service Commission -V- Navnit Kumar Potdar & Anr.).

For Petitioner - Mr.S.K.Nayak-1 & Associates.

For Opp.Parties – Addl.Govt.Advocate.

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*W.P.(C) NO.19577 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

A.S.NAIDU, J. An advertisement was issued for filling up of the post of President and Members of different District Consumer Disputes Redressal Forums of the State and Member of the State Consumer Disputes Redressal Forum, Cuttack and was published in daily 'Samaj' on 24.6.2009 (Annexure-4). The dispute in this writ petition is with regard to filling up of the post of Member of the State Consumer Disputes Redressal Forum, Cuttack. The said post was opened for all. The eligibility criteria and other paraphernalias for filling up of the said posts were clearly spelt out in the advertisement under Annexure-4. In consonance with the said advertisement, the petitioner along with many others applied. After scrutiny of the applications and on being satisfied that the petitioner was other wise eligible, he was called upon by letter dated 9.11.2009(Annexure-5) to appear before the selection committee for interview on 5.12.2009. He attended the interview on 5.12.2009. Thereafter, he received another letter on 16.12.2007 (Annexure-7) requesting him to appear before the selection committee once again on 2.12.2009 for the second round of interview. Being

aggrieved by the said action, the petitioner filed this writ petition praying as follows :-

> "xx xx xx xx
>
> And after hearing the counsels of the parties issue a writ in the nature of mandamus or any other suitable writ quashing the impugned letter (Annexure-7), directing the Opp.parties to complete the process of selection and appoint the petitioner as a Member of the Orissa State C.D.R. Commission within a period fixed by the Hon'ble Court prior to 28.2.2010.
>
> Director the Opp.Parties not to tag the petitioner with the second interview scheduled to be held on 21.12.2009 in pursuance of the advertisement, Annexure-5."

2. According to Mr.Nayak, learned counsel for the petitioner, neither the Consumer Protection Act nor the Rules framed thereunder contemplate any provision to conduct the second round of interview. Drawing the attention to the advertisement (Annexure-4), Mr.Nayak submitted that in the said advertisement also, there was no stipulation to hold any second interview and as such, it is prayed that the second round of interview having been arranged with ulterior motive, the same should be quashed.

3. After receiving notice, counter affidavit has been filed on behalf of opposite parties 1 and 2. Most of the facts are admitted. In paragraph 5 of the counter affidavit, it is stated that in response to the advertisement (Annexure-4), 26 applications were received for the post of Member, State Consumer Disputes Redressal Commission, Cuttack. All of them were called upon to attend the interview, which was scheduled to be held on 5.12.2009. Out of 28 candidates, 23 appeared in the interview. In view of the fact that large number of candidates appeared, the selection committee decided to short-list the candidates at the first round of interview. Accordingly, after completion of the first round, four candidates were short-listed and all the four including the petitioner were called upon to attend the second round of interview. It is stated that neither there was any mala fide nor any evil intention and the allegation to that effect are unfounded.

4. Rejoinder affidavit has been filed by the petitioner strongly repudiating the facts stated in the counter. According to the petitioner, 23 candidates appeared in the interview and it is not a fact that large number of candidates appeared. It is further submitted that there was no impediment for the selection committee to select one candidate out of 24. According to Mr.Nayak, the entire endeavour of the opposite parties is to delay the interview as long as possible so as to prejudice the petitioner.

To appreciate the modalities in past years, this Court also called upon the learned counsel for the State to produce the file dealing with the selection. A perusal of the file also reveals that at no point of time (in past) the procedure of short-listing of candidates was adopted.

5. The advertisement in the present case is totally silent about short-listing. The Act and Rules also do not make any stipulation for short-listing of any candidates. In fact it could not have contained such a stipulation in view of the fact that the rules do not contain any such provision. In the case of **Madhya Pradesh Public Service Commission v. Navnit Kumar Potdar and another**, AIR 1995 SC 77, the Supreme Court observed that as the interview of a large number of candidates would make the exercise casual and superficial, short-listing of candidates was allowed. But then, in the case in hand, there were only 23 candidates and in fact the interview was held and out of them four candidates were selected and thus, this Court fails to understand as to why the final selection was not complete and second round of interview was felt necessary.

6. In the case of **Sushanta Kumar Sethi and another v. District Judge, Puri and others,** 2006(Suppl.) Vol-II OLR 178, this Court relying upon several decisions of the Supreme Court held that in the absence of any clause in the advertisement and specific provision in the recruitment rules, short listing was not justified.

7. Taking into consideration the ratio laid down in the aforesaid decisions, this Court has no hesitation to hold that the exercise taken to conduct second round of interview for the post of Member, State Consumer Disputes Redressal Commission, Cuttack was not just and proper or in consonance with law being contrary to the provisions of the Act and Rules as well as the advertisement. Consequently, the decision to conduct second round of interview for the said post is quashed. The authorities are directed to select the candidates out of the list prepared in the first round of interview. The entire exercise shall be completed as expeditiously as possible preferably by the first week of March.

8. The writ petition is accordingly allowed.

2010 (I) ILR-CUT- 497

A.S.NAIDU, J & B.N.MAHAPATRA, J.

JOGENDRANATH GHARAI -V- CHAIRMAN & MANAGING DIRECTOR,U.Co.BANK, KOLKATA & ORS.*

FEBRUARY 23,2010.

CONSTITUTION OF INDIA, 1950 – ART.311.

Disciplinary proceeding – Writ Court can not re-appreciate evidence but can not shut its eyes where the evidence and relevant materials have not been taken into consideration.

In this case there is deliberate omission of the evidence of D.W.1 which goes in favour of the delinquent and there was non consideration of the reply to the enquiry report – Held, proceeding vitiated, impugned orders set aside – Matter remitted to disciplinary authority to restart from the stage of furnishing the reply –However, before the proceeding restarts the petitioner be reinstated in service.

(Para 8,9,10,14)

Case laws Referred to:-

1.AIR 1994 SC 1074 : (Managing Director, ECIL,Hyderabad -V- Karunakar).
2.AIR 1963 SC 1723 : (State of Andhra Pradesh & Ors.-V-S.Sree Rama Rao).
3.AIR 1997 SC 3387 : (Union of India & Ors.-V-G.Ganayutham)
4.AIR 2003 SC 1571 : (Chairman & Managing Director, United Bank & Ors.-V- P.C.Kakkar).
5.(2007) 1 SCC 437 : (Mathura Prasad -V- Union of India & Ors.).
6.(1988)4 SCC 59 : (State of U.P. & Ors.-V-Renusagar Power Co.& Ors.).

For Petitioner – M/s.Rabindra Nath Prusty & C.R.Kar.
For Opp.Parties – M/s.A.K.Rath, A.K.Panda & A.K.Nath.

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*W.P.(C) NO.13914 OF 2007. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.N.MAHAPATRA, J. This writ petition has been filed challenging the order dated 21.4.2007 (Annexure-9) passed by opposite party no.3-Deputy General Manager (appellate authority) whereby the order dated 13.7.2006 (Annexure-6) passed by opposite party No.4-Chief Officer (disciplinary authority) has been modified without any variation of the punishment of removal from service with superannuation benefits such as pension and/or provident fund and gratuity as were due otherwise under the Rules and Regulations prevailing at the relevant time and without disqualification for future employment.

2. Bereft of unnecessary details the facts and circumstances giving rise to the present writ application are that on 1.9.1989 the petitioner was given appointment as Peon-cum-Farash in the UCO Bank at Langaleswar Branch in

the district of Balasore. Thereafter, the petitioner was given promotion to the post of Clerk from the post of Peon. While he was working as Clerk in the UCO Bank at Thakurpatna Branch in the district of Kendrapara, on 04.03.2005 a charge sheet was issued against him vide Annexure-3. In response to the said charge sheet, the petitioner submitted his reply dated 16.03.2005. Being not satisfied with the reply of the delinquent-petitioner, the disciplinary authority appointed Enquiry Officer and the Presenting Officer. The matter was enquired into by the Enquiry Officer and on completion of enquiry he submitted a report dated 17.03.2006 under Annexure-5. A copy of the enquiry report was supplied to the delinquent who filed his reply vide Annexure-7 denying all the charges except allegation No.2 which he claimed to be unintentional lapse. The disciplinary authority on the basis of said enquiry report passed the order dated 13.07.2006 inflicting punishment of removal from service as per Annexure-6. Against the said order of removal, the petitioner preferred an appeal under Annexure-8 before opposite party no.3 with a prayer to exonerate him from the charges and to reinstate him in service. The appellate authority while modifying the said order upheld the order of removal from service passed by the disciplinary authority against the petitioner. Hence, the writ application.

3. Mr R.N. Prusty, learned counsel appearing on behalf of the petitioner vehemently argued that the order of removal from service passed by the disciplinary authority and confirmed by the appellate authority is illegal, arbitrary, mala fide and bad in the eye of law. The petitioner was given promotion to the post of Clerk from the post of Peon because of his honesty, sincerity, devotion and dedication to hard work. While working as Clerk in the UCO Bank at Thakurpatna Branch, the then Manager/Assistant Branch Manager of the said Branch entrusted more workload upon the petitioner by issuing Office Order dated 20.01.2005 vide Annexure-1. The petitioner received that order on protest and, as a token of respect to the said Office Order he went on discharging his duties allotted to him with sincerity. Both the disciplinary authority and the appellate authority have failed to appreciate the evidence in its proper perspective. The disciplinary authority as well as the appellate authority being the court of facts should have examined the evidence / records / documents relied upon by the petitioner. The reply / submission / argument (Annexure-7) of the petitioner filed before the disciplinary authority in response to the enquiry report that the findings arrived at by the Enquiry Officer are illegal and arbitrary has neither been considered by the disciplinary authority nor the appellate authority. The proceedings having not been conducted fairly, lawfully and without bias, all the allegations held to have been proved against the petitioner are far from truth. The order of punishment passed by the opposite parties is based on extraneous materials, personal whim and colourable exercise of powers. Neither any customer nor any public was produced by the management as witness to

prove that the petitioner was in habit of coming to the Bank in drunken state and misbehaving with public. The disciplinary authority neither lodged any complaint before the higher authority and police nor requisitioned any doctor for examination of the petitioner to prove his intoxication. The allegation that on 26.1.2005 the petitioner came to the Bank in a drunken state and misbehaved with Mr. B.K. Mohanty was false and frivolous. Therefore, allegation nos.1, 5 and 8 are not sustainable. Allegation nos.2 and 3 are not at all true since the petitioner was a sincere and hard working employee. The signatories of the complaint, on the basis of which allegation nos.4 and 6 were made, having denied of making any such complaint by way of filing an affidavit, the said allegations should not have been used against the petitioner. Since the petitioner did not become a party to the illegality and irregularity committed by M.W. 2 in the matter of extending irregular loan facilities to the loanees by taking bribe, he has been subjected to harassment and inconvenience in all spheres. Finding no other way, the petitioner had written a letter to the Chairman and Managing Director for redressal of his grievance. On receipt of the said letter, the Chairman conducted an enquiry against the then Manager, A.K. Samantray, Assistant Manager, Shri Birakishore Mohanty and Head Cashier, Shri Golak Behari Sahu by the UCO Bank Regional Vigilance Squad. The said squad found prima facie evidence against those persons. Thereafter, the Management reverted the Manager, A.K.Samantray from scale-II to scale-I, dismissed the Assistant Manager B.K. Mohanty from service and as G.B. Sahu, Head Clerk died, no action could be taken against him. Out of the five witnesses produced on behalf of the Bank, three witnesses are the prime witnesses and on the basis of their evidence all the charges are held to have been proved. Unfortunately, these three prime witnesses are G.B.Sahu, Head Clerk (M.W.1), A.K. Samantray, Manager (M.W.2), B.K. Mohanty, Asst. Manager (M.W.4) who as stated above have been punished in the meantime. The name of D.W.1-Chakradhar Pradhan who stated before the Enquiring Officer that the petitioner had done commendable works in recovery of loans has been struck off from the enquiry register and in that place the name of one Narayan Das. D.W.1 had been taken in. This aspect has been ignored by the disciplinary authority as well as the appellate authority. In spite of making an application to the disciplinary authority under Annexure-11 dated 5.10.2005 for supply of the photo copy of certain letters/documents which were claimed to have relevance for the investigation, the same were not supplied to the petitioner. The completion of enquiry and also the disposal of appeal were not done within the stipulated time. Both the Manager and Assistant Manager hatched out a conspiracy to harm the petitioner and they could be able to do so. Learned counsel relying upon a decision of the apex Court in ***Managing Director, ECIL, Hyderabad v. Karunakar, AIR 1994 SC 1074***, submitted that the orders passed by the disciplinary authority and appellate authority vide Annexures-6 and 9 respectively should be quashed.

4. Mr A.K. Rath, learned counsel appearing on behalf of the opposite parties contended that there is no infirmity or illegality in the orders of the disciplinary authority as well as the appellate authority. Adequate hearing was given by the Enquiry Officer to the petitioner and after a vivid discussion on the materials available on record, the Enquiry Officer submitted his report on 17.3.2006 holding that all the charges framed against the petitioner have been proved. The disciplinary authority after affording opportunity of hearing to the petitioner agreed with the finding of the Enquiry Officer and by order dated 13.07.2006 inflicted punishment of removal from service with superannuation benefits. The appellate authority went through the entire proceeding, deposition of witnesses, enquiry report and appeal memo and after affording opportunity of hearing to the petitioner concurred with the findings of the disciplinary authority except Charge no.4, but finally held that the penalty imposed on the petitioner by the disciplinary authority has to be commensurated with the gravity of the charges. Placing reliance on the decision of the apex Court in ***State of Andhra Pradesh and others v. S.Sree Rama Rao, AIR 1963 SC 1723***, and many other decisions of the apex Court, Mr. Rath contended that scanning of evidence is beyond the purview of the writ court unless the conclusion reached on such evidence is found to be perverse. It is not the duty of the High Court in exercise of its jurisdiction under Article 226 to scan the evidence and arrive at independent finding on the basis of such evidence. Relying on the decision of the apex Court in ***Union of India and others v. G. Ganayutham, AIR 1997 SC 3387***, it was submitted that unless the Court opines in its secondary role that the administrator was, on the material before him, irrational, according to Wednesbury or CCSU norms, the punishment cannot be quashed. Placing reliance on a decision of the apex Court in ***Chairman and Managing Director, United Bank and others v. P.C. Kakkar, AIR 2003 SC 1571,*** he submitted that a bank officer is required to exercise higher standard, honesty and integrity as he deals with the money of the depositors and the customers. The petitioner has not established the prejudice caused to him for non-observance of the principles of natural justice. The petitioner having participated in the enquiry without any demur or protest cannot turn round and say that the documents were not supplied to him since the result is not palatable to him. The petitioner asked for certain documents vide letter dated 5.10.2006 under Annexure-11 at the final stage of enquiry. The enquiry was over on 27.10.2006. Thus no prejudice has been caused to the petitioner. The orders passed by the disciplinary authority and the appellate authority is commensurate with the gravity of charges. It is neither shocking nor defiant of logic and, therefore, the writ application is liable to be dismissed.

5. While the petitioner was functioning as a Clerk in the Bank at Thakurpatna Branch, as many as six charges have been levelled against the petitioner-delinquent on the basis of nine allegations.

Domestic enquiry was conducted in respect of all those charges. The petitioner all along denied the allegations on the basis of which charges were framed except allegation No.2 which he claimed to be unintentional lapse and there was no attempt on his part to cause any damage to the property of the Bank. The Enquiry Officer submitted his report holding that all the six charges are proved. However, according to the Enquiry Officer, the allegation no.7 has not been proved. The disciplinary authority agreeing with the finding of the Enquiry Officer has inflicted the penalty of removal from service. In appeal, the appellate authority although modified the order of the disciplinary authority deleting charge No.4 corresponding to allegation No.6, maintained the penalty imposed by the disciplinary authority.

6. There is no dispute that on receiving the copy of the enquiry report the petitioner filed his reply dated 30.4.2006 under Annexure-7. Perusal of Annexure-7 and the order of the disciplinary authority reveals that the delinquent challenged the findings of the Enquiry Officer in respect of each and every allegation in its reply (Annexure-7) relying on both oral and documentary evidence, which has not been taken into consideration in its entirety by the disciplinary authority, while passing final order of punishment. No specific finding against each allegation/charge has been recorded by the disciplinary authority with reference to the reply/submission made by the petitioner on the basis of oral and documentary evidence. Reply to the enquiry report is a vital piece of material. Non-consideration of the same vitiates the proceeding. Merely saying that the reply of the delinquent and submission/argument of defence representative were considered is not enough. Giving opportunity to the delinquent to file his reply to the enquiry report is not an empty formality. A casual approach to the reply of the delinquent is not at all permissible. The right of the delinquent to receive the report of the Enquiry Officer and to avail a fair opportunity to meet, explain and controvert it and consideration of his representation by the disciplinary authority has been highlighted by the apex Court in the case of ***Managing Director, ECIL (supra).*** The apex Court in the said case held as under:-

> "The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity at the fist stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If

> such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusion. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employees should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is then require to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it."

In the case at hand, in reply to the enquiry report, the delinquent brought to the notice of the disciplinary authority as to how the findings of the Enquiry Officer were wrong indicating the reasons therein on the basis of evidence recorded by the Enquiry Officer. Non-consideration of the reply to the enquiry report by the disciplinary authority amounts to miscarriage of justice. The disciplinary authority having been required to pass the final order of punishment is obliged under the law to examine the case of the delinquent minutely by reading between lines with reference to the reply of the delinquent. In the instant case, neither the disciplinary authority nor the appellate authority has considered the defence taken by the delinquent in Annexure-7 and also in the appeal memo in Annexure-8 in its entirety. As it appears, the disciplinary authority has been simply influenced by the evidence of the employer and has not taken into consideration the various

evidence led and submission advanced on behalf of the petitioner in respect of each and every allegation/charge. The abrupt conclusion arrived at by the opp. parties shows not only non-application of mind of the said authorities but also their casual approach in dealing with career of an employee who has served the employer for pretty long period. Therefore, the decision taken is wholly arbitrary and capricious.

7. We are conscious that scanning of evidence is beyond the purview of this Court while exercising its writ jurisdiction. There is no quarrel over the legal propositions settled by the apex Court in various decisions relied upon by Mr. Rath. But, the writ court is not precluded to interfere with the decision where the departmental authorities have conducted the proceeding against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion or on similar grounds. (See *The State of Andhra Pradesh & Ors. v. S.Sree Rama Rao, AIR 1963 SC 1723*).

8. Even though this Court while exercising its writ jurisdiction cannot re-appreciate evidence, but where the evidence and relevant materials have not been taken into consideration at all, the Court cannot shut its eyes and put its judicial seal on the orders of the disciplinary authority and the appellate authority by which the livelihood of a delinquent has been wrongly and arbitrarily taken away.

The apex Court in ***Mathura Prasad V. Union of India & Ors., (2007) 1 SCC 437***, held that when an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedures laid down under the sub-rules are required to be strictly followed. A judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review.

9. In the instant case, non-consideration of the reply to the enquiry report (Annexure-7) in its entirety and in respect of all the points raised by the opp. parties amounts to non-application of mind and vitiates the entire proceeding.

9. Another glaring irregularity found in the proceeding is that on 27.7.2005, the petitioner produced the list of defence witnesses including the name of one Chakradhar Pradhan, Daftary, at Tharkurpatna Branch. On the same day,

Chakradhar Pradhan was examined as D.W.1 and his name was entered in the enquiry register. According to the petitioner, D.W.1 has categorically stated that the petitioner had done a commendable job for recovery of the loan and he only recommended for grant of loan in favour of the persons from whom he recovered the overdue installments and loan amount. But, surprisingly the name of Chakradhar Pradhan (D.W. 1) has been struck off from the enquiry register and, in his place, the name of one Narayan Das has been taken as D.W.1. The Management with *mala fide* intention has ignored D.W.1. In reply to the said averments, the opposite parties in their counter submitted that the name of Chakradhar Pradhan was inadvertently omitted as D.W.1. The deposition of Chakradhar Pradhan was considered by the Enquiry Officer who in his deposition has categorically stated that the petitioner used to interfere while sanctioning and disbursing the loan. Omission of the name of Chakradhar Pradhan is a typographical error, which could not change the nature of the entire proceeding.

However, perusal of the evidence of Chakradhar Pradhan D.W.1 reveals that he has categorically stated that every day the delinquent used to come in time and after completing his daily work, he was invariably leaving office at 6/7 P.M. He does not have any knowledge whether the delinquent had ever taken alcohol. The delinquent recommended for grant loan in respect of the persons from whom he could recover the loan. He did not usually recommend any name for advancement of loan. The evidence of DW-1 has not been taken into consideration by the opp. parties. Be that as it may, non-consideration of the evidence of witness Chakradhar Pradhan-D.W.1 by omitting his name from the list of defence witnesses, and his evidence which goes in favour of the delinquent, is a serious lapse in the disciplinary proceeding. The manner in which the disciplinary proceeding has been conduced puts a question mark about the fair trial.

Law is well settled that action of State instrumentality or public authority having public element must be just, fair and reasonable in public interest and in consonance with constitutional conscience and socio-economic justice. (See *Life Insurance Corporation of India & Anr. Vs. Consumer Education and Research Centre & Ors [1995] 5 SCC 482)*

11. In the instant case, we are not appreciating the evidence, but we are considering the effect of non-consideration of the relevant materials in a disciplinary proceeding. It is the settled law that non-consideration of relevant materials and consideration of irrelevant materials vitiate the proceeding.

The apex Court in ***State of U.P. & Ors. Vs. Renusagar Power Co. & Ors., (1988) 4 SCC 59,*** held that exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of

such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the execise of power will be regarded as manifestly erroneous.

In revision, High Court can justifiably interfere with an order where its material evidence has been overlooked either by the trial court or the appeal court. [*See Baidyanath Das Vs. Ghana Das & Ors., 1989 (3) CRIMES 492 (Orissa)*]

12. It is further noticed that the petitioner made an application dated 5.10.2005 under Annexure-11 to supply him the documents, which were relevant to be produced as defence exhibits to exonerate him from the charges levelled against him. According to the petitioner, the said documents were written to the higher authorities appreciating the performance of the petitioner in the matter of recovery of loan, which could show his sincerity. Non-supply of the aforesaid documents to the petitioner was illegal, arbitrary and mala fide and violative of principles of natural justice.

In reply to the said averments, opposite parties in paragraph 18 of the counter affidavit stated that so far as supply of documents is concerned, some documents as requisitioned by the petitioner were not at all relevant and not at all related to the case of the petitioner. The petitioner neither raised any objection nor protested before the Enquiry Officer nor the disciplinary authority nor the appellate authority. He having participated in the enquiry without any demur or protest cannot turn round and say that the documents were not supplied to him since the result is not palatable to him. The further contention of opp. parties is that at the final stage of enquiry the petitioner asked for certain documents vide his letter dated 5.10.2006 (Annexure-11). The enquiry was over on 27.10.2006. During enquiry in the previous occasion, the petitioner did not raise any point nor asked for any document either on 18.10.2006 and 24.10.2006 respectively.

Perusal of Annexure-11 reveals that the same was dated 5.10.2005 and was received by the opposite parties on the even date. The said annexure further contains that the Manager, Thakurpatna Branch refused to give him the same even after the instruction of the Enquiry Officer. The stand of the opposite parties that the petitioner asked for certain documents at the final stage of the enquiry, i.e., 05.10.06 is not factually correct as because the petitioner made an application under Annexure-11 on 5.10.2005 and the enquiry report is dated 8.3.2006 and order of the disciplinary authority is dated 13.7.2006. In such scenario, it cannot be said that the petitioner asked for certain documents at the final stage of enquiry as contended by the opposite parties. Further, the contention of the opposite parties that some of the documents asked for by the petitioner were not relevant nor related to the case

shows that there are some documents, which were relevant and related to the case

In this admitted position, non-supply of documents as asked for under Annexure-11 amounts to violation of natural justice, which certainly has caused prejudice to the petitioner.

13. Further, there are certain aspects which have been highlighted before us relating to departmental action taken against the prime witness, namely, A.K.Samantray, Manager, B.K. Mohanty, Asst. Manager and G.B. Sahu, Head Cashier, which according to the petitioner, throw considerable light on the weakness of departmental case. These aspects have been elaborated in the written statement, which according to the petitioner, are the subsequent events. Since those are not specifically averred in the writ petition, we are not going to delve into those aspects. The relevancy and effect of those aspects can be considered when the matter is taken up pursuant to the present order.

14. In the above fact situation, we have no hesitation to hold that the disciplinary proceeding has not been conducted in a fair manner complying with the principles of natural justice and requirement of law. We, therefore, set aside the order of punishment (Annexure-6) and appellate order (Annexure-9) and remit the matter to the disciplinary authority to re-start the proceeding from the stage of furnishing the reply under Annexure-7. We further direct that before the proceeding restarts, the petitioner shall be reinstated in service in terms of the decision of the apex Court in ***Managing Director, ECIL (supra)*** and supplied with the documents as required by him under Annexure-11. The petitioner shall be afforded an opportunity to furnish his further reply, if any. While passing final order, the disciplinary authority is directed to consider the reply of the petitioner in detail made under Annexure-7, further reply if any, and evidence of D.W.1-Chakradhar Pradhan. The disciplinary authority shall also take into consideration the relevancy and effect of the aspects indicated in paragraph-13 above. It is made clear that we have expressed no opinion on the merits of the case. The entire exercise shall be completed within a period of six months from the date of receipt of this order.

The writ petition is disposed of accordingly.

2010 (I) ILR-CUT- 507

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

BIRANCHI NARAYAN SAHOO -V- STATE OF ORISSA.*

DECEMBER 19,2009.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – SEC.300 (EXCEPTION-4).

Intention to cause death – Nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed by the accused and the circumstances of death.

In this case the appellant used a bhujali and inspite of prevention by the witnesses he pushed the Bhujali into the belly of the deceased and when deceased tried to put his hand on the wound in order to pull out the bhujali, the appellant pushed the bhujali further to the inner part of the abdomen – It shows motive and intention of the accused to kill the deceased – Held, act committed by the appellant will not come within the ambit of Exception 4 to Section 300 IPC so the prayer of the appellant for conversion of his conviction to one U/s.304 Part-II IPC is rejected. (Para 9)

Case laws Referred to:-

1.2009 AIR SCW 5206 : (Jagruti Devi -V- State of H.P.).
2.2009 AIR SCW 5203 : (Indrasan -V- State of U.P.)
3.1986(II) OLR 313 : (Narasingh Bisoi -V- State).
4.1985 (I) OLR 148 : (Bishnu Charan Das -V- The State).
5.AIR 2003 (SC) 4147 : (Manke Ram -V- State of Haryana).
6.(2006)4 SCC 653 : (Sandhya Jadhav (Smt.) -V- State of Maharashtra).
7.AIR 1981 SC 1552 : (Jagrup Singh -V- State of Haryana).

For Appellant – M/s.J.K.Panda & S.Pradhan.
For Respondent – Mr.K.K.Mishra,
Addl.Govt. Advocate.

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*CRIMINAL APPEAL NO.157 OF 1996. From the judgment dated 30.04.1996 passed by Shri A.C.Mohanty, 2nd Additional Sessions Judge, Bhubaneswar in S.T.No.7/29 of 1996.

PRADIP MOHANTY, J. Challenge in this appeal is to the judgment and order dated 30.04.1996 passed by the learned 2nd Additional Sessions Judge, Bhubaneswar in ST. No.7/29 of 1996 convicting the appellant under Sections 302/323 I.P.C. and sentencing him to undergo rigorous imprisonment for life.

2. This is a case of patricide. Sans unnecessary details, the prosecution allegation is that the appellant is the natural born son of the deceased. He had been adopted by his maternal grandparents and was residing with them at village Nuapatna whereas the deceased was residing in his own house at Lewis Road,Bhubaneswar along with other family members. Ground floor

of his house was let out to different tenants including P.Ws.1, 6 and 9. The appellant was frequently demanding money, gold and property from the deceased and was quarrelling with him. On 15.08.1995 at 10.00 AM, the appellant had come near the room where P.W.6 Nabaghana was staying on rent. At about 2.30 PM he again came and created some disturbance searching for Nabaghana, but at the intervention of P.W.1 and his brothers, the appellant went back. At about 3.00 PM on the same day, the appellant once again came to the residence of the deceased in the first floor holding a bhujali. Seeing the bhujali, the younger daughter of the deceased (P.W.8) tried to prevent him, but the appellant gave a slap and brandished the bhujali causing injury on her hand. The deceased, his elder brother P.W.10, wife P.W.12 and elder daughter P.W.11 intervened, but the appellant saying to commit murder stabbed on the abdomen of the deceased causing serious bleeding injury. The appellant pulled the bhujali from the abdomen of the deceased, as a result of which his intestine came out through the wound. The appellant was overpowered with the help of other persons who arrived there. On the basis of information (Ext.4) lodged by the injured P.W.8 although the case was initially registered for attempt to commit murder, it was turned to Section 302 IPC as the deceased succumbed to the injury on the same day. The police sprang into action and after conclusion of investigation filed charge-sheet against the appellant.

3. The appellant took the plea of denial and false implication.

4. In order to prove its case, prosecution examined as many as twenty witnesses and exhibited thirty-three documents. The defence examined one witness.

5. The trial court on careful scrutiny of the evidence adduced by both the parties convicted the appellant under sections 302 and 323, IPC and sentenced him to undergo imprisonment for life for the offence under Section 302, IPC. No separate sentence was imposed for the conviction under Section 323, IPC.

6. Mr. Panda, learned counsel for the appellant seeks to assail the judgment of the trial court on the following grounds:

(i) P.Ws.8, 10, 11 and 12, the so called eye witnesses, are inimical towards the appellant and interested for successful termination of the case. That apart, their evidence suffers from major contradictions. So, the trial court should not have accepted their evidence for awarding the conviction.

(II) In absence of any evidence that the alleged weapon of offence was seized from the appellant, the trial court should not have convicted him.

(III) Prosecution has not explained the injury on the person of the appellant and no motive has been proved by the prosecution against the appellant.

(iv) Evidence of P.Ws.1, 6 and 19 to the effect that deceased disclosed before them to have been stabbed by the appellant is highly doubtful on the face of the evidence of P.W.18 that the condition of the deceased was serious.

(v) His alternative argument is that since it is alleged that one blow was given, it is presumed that the appellant had no intention to kill the deceased and, therefore, the conviction of the appellant may be turned to section 304 Part-II, I.P.C.

Learned counsel for the appellant relies upon the decisions reported in ***Jagruti Devi V State of H.P.***, 2009 AIR SCW 5206, ***Indrasan v. State of U.P.,*** 2009 AIR SCW 5203, ***Narasingh Bisoi v. State***, 1986 (II) OLR 313, ***Bishnu Charan Das v. The State***, 1985 (I) OLR 148, ***Manke Ram v. State of Haryana,*** AIR 2003 (SC) 4147, ***Sandhya Jadhav (Smt) v. State of Maharashtra,*** (2006) 4 SCC 653 and ***Jagrup Singh v. State of Haryana,*** AIR 1981 SC 1552.

7. Mr. Mishra, learned Additional Government Advocate vehemently contends that there are direct materials which prove the guilt of the appellant. P.Ws.8, 10, 11 and 12 are the eye witnesses and their evidence is very clear, cogent and consistent in establishing that it is the appellant who stabbed the deceased. P.Ws.8 and 11 are also the injured and in their evidence they categorically stated that while they were preventing the accused from stabbing the deceased they sustained injuries. P.Ws.10 and 12 corroborate the evidence of P.Ws.8 and 11. The evidence that appellant was frequently demanding money, gold, property, etc. from the deceased claiming that the deceased was depriving him of the properties of his adoptive parents proves the motive. It is there in the evidence that after stabbing the deceased while the appellant was trying to escape he was overpowered by the witnesses and in the process there was a scuffle between them. So, the presumption that the injuries on the person of the appellant are result of such scuffle cannot be ruled out. There is no evidence with regard to sudden provocation and, therefore, the act of the appellant cannot come within the ambit of section 304 Part-II, IPC.

8. Perused the LCR and the decisions cited by the appellant. P.W.8 is the informant. She is the daughter of the deceased and sister of the accused-appellant. She stated in her deposition that the appellant was not pulling on well with her father (deceased) and was frequently demanding money, gold and other property from him. The appellant was scolding the

deceased and threatening to assault him when he was not complying with his demands. On the date of occurrence, the appellant came to the residence of P.W.6 and searched for him, but on the interference of P.W.1, he went back. Again at 2.30 P.M. on the same day, the accused-appellant came and knocked at the door of P.W.6 giving threats to kill P.W.6 as well as her father. P.W.1 with his brothers and other relations interfered and the appellant went away from the premises. At about 3.00 P.M. on the same day, the appellant suddenly came to the up stair of their building holding a bhujali. Seeing the appellant being armed, her father's elder brother (P.W.10) tried to prevent, but the appellant kicked him and entered inside. Then P.W.8 herself tried to prevent the appellant, but he dealt a slap and brandished the bhujali which struck against her left wrist causing bleeding injury. When she started crying, her parents, sister and father's elder brother came near her and tried to prevent the appellant. As the appellant was brandishing the bhujali, deceased sustained cut injury on his right forearm and her sister (P.W.11) also sustained bleeding injury on her left thumb. The accused-appellant also dealt a kick to her father's elder brother (P.W.10) who fell down. Then the appellant stabbed on the right side belly of her father (deceased) by means of the said bhujali, as a result of which he sustained serious bleeding injury. The deceased pressed the injured part of the belly by means of his left hand and tried to pull out the bhujali from the belly by his right hand, but the appellant was trying to push that bhujali further into the belly of the deceased. After hearing the cry, P.Ws.3, 7 and Milu, the brother of P.W.1, came to the upstair. They physically intervened and separated the appellant from the deceased, but the appellant brought out the bhujali from the belly of the deceased, as a result of which the intestine of the deceased came out. The deceased was shifted to the Capital Hospital by P.Ws.1, 2, 6 and Firoz Khan (P.W.17). She then went to Bhubaneswar Police Station and lodged FIR (Ext.4). Thereafter, she and her sister (P.W.11) went to the Bhubaneswar Municipal Hospital for treatment on police requisition. The defence has not elicited a single word from the mouth of this witness to support its case. Her evidence is very clear, cogent and consistent. There is nothing to disbelieve her testimony. The evidence of P.W.8 is substantially corroborated by the evidence of P.Ws.10, 11 and 12. The FIR also corroborates the evidence of P.W.8. P.Ws.10, 11 and 12 are the ocular witnesses. P.W.10 is the elder brother of the deceased, P.W.11 is the daughter of the deceased and sister of the accused and P.W.12 is wife of the deceased and mother of the appellant. Nothing has been elicited by the defence through cross-examination to discredit their testimony. P.Ws.3, 7 and 9 are the independent witnesses who reached the spot on hearing hullah and witnessed a part of the occurrence. P.W.2, the younger brother of the accused and son of the

deceased, is a post occurrence witness. He stated in his evidence that his father was lying on the verandah sustaining a cut injury on his right fore-arm and serious bleeding injury on the belly and his intestine was protruding. His father (deceased) disclosed that the appellant assaulted him by bhujali causing those injuries. He also stated about the presence of other witnesses including P.W.1. He also found the accused-appellant being detained nearby by some persons of the locality. This witness along with P.W.1, Firoz Khan (P.W.17) and Nabaghana Jena (P.W.6) shifted the deceased to Capital Hospital, Bhubaneswar by a car. Nothing has been elicited through cross-examination to discredit his evidence. In cross-examination he, however, admitted that for non-fulfilment of frequent demand of money, the accused was quarrelling with the deceased and also threatening to assault. P.W.1 is the tenant of the deceased and residing in the ground floor. He stated in his examination-in-chief that on the day of occurrence at about 10.00 AM the wife of P.W.6, Naba came to him through the back side of the house and told that the accused was searching for her husband saying that he would assault Naba (P.W.6). Getting that information, his younger brother Pradyumna @ Gulu P.W.3 first came out and talked something with the accused and thereafter they tried to give consolation to the accused-appellant as he was in an agitating mood and was searching for Naba. On being called, the wife of P.W.6 came there and accused threatened her and asked about Naba. On the same day at about 2.15 P.M. he heard heavy knocking sound on the door of Naba and shouting of the accused-appellant who was abusing Naba in obscene language. Hearing that P.W.1 came out from his residence and found that the accused was knocking at the door of Naba by means of an iron rod and abusing Naba. He tried to give consolation to the accused and requested him to go away from that place without creating any trouble. At that time Pradyumna @ Gulu (P.W.3) and Prasanna @ Milu (P.W.9) came outside. The deceased was also found coming down from the stair case. Seeing the deceased, the accused left that place. On the same day at 3.00 P.M, P.W.1 heard noise in the up stair in the residence of the deceased. Hearing this, P.W.3, P.W.9 and P.W.1's nephew Deepak Pattnaik rushed to the up stair. Of them, P.W.3 came down immediately and asked P.W.1 to arrange some vehicle for shifting the deceased to the hospital as the accused had stabbed the deceased by bhujali. P.W.1 immediately went to the up stair and found Laxmidhar (deceased) lying in their entrance room with bleeding injury on the right side belly and his intestine had come out. Besides that, he had also sustained a cut injury on his right fore-arm. Being asked by him, deceased told that Biranch (accused) had assaulted on his belly and hand by means of a bhujali and requested to arrange some vehicle to shift him to the hospital. At that time, the younger son of the deceased reached there.Then

he along with Tikina, the younger son of the deceased, P.W.6, and P.W.17 shifted the deceased to Capital Hospital in a Taxi. He noticed that some persons of the locality had detained the accused in an open place situated near that building. On the same day at about 6.00 PM, the deceased died in the hospital. He also heard about the demand of money by the appellant from his father and when his demand was not being fulfilled, the accused was scolding the deceased and throwing brickbats at him. He heard it from some persons of the locality. Nothing has been elicited through his cross-examination to disbelieve his version. P.Ws.3, 7 and 9 have also substantially corroborated the evidence of P.W.1. P.W.17 is Feroz Khan who was working in the garage (tyre repairing shop) which is situated in front of the residence of the deceased. He specifically stated that the accused had once come at 10.00 A.M. Again he came at 2.30 PM, parked the bike in front of his shop, took a tyre lever iron rod from his shop and went towards the building of the deceased. The accused once again came at 3.00 P.M., brought out a bhujali and throwing the cover of that bhujali went to the upstair house of the deceased. After a while, hearing hue and cry he rushed to the upstair and saw that the deceased had sustained bleeding injury on his belly and his intestine had come out and the accused was detained by P.W.9 and some other persons. He admitted the presence of P.Ws.1, 3, 7and 9. Thereafter, they brought the deceased to the ground floor and placed him on the verandah. His evidence is materially corroborated by P.Ws.1, 6, 7 and 9. Despite thorough cross-examination his evidence remained unshaken. P.W.18 is the Surgery Specialist, who treated the deceased and he proved the injury report of the deceased. He gave out that the deceased was received at 3.30 P.M. with penetrating injury of abdomen with prolapse of intestines and the deceased was immediately shifted to operation theatre. Despite all efforts the deceased expired on 15.08.1995 at 6.00 P.M. Ext.18 is the bed head ticket of the deceased. Nothing contrary has been elicited from him through cross-examination. P.W.5 is the doctor, who conducted autopsy over the dead body of the deceased and proved the post mortem report (Ext.10). He opined that death was due to haemorrhage and shock resulting from the injuries to liver and aorta and inferior venacava by the external injury no.2. He also found one incised wound over the back of right forearm. He further opined that all the injuries were ante mortem in nature and the external injury no.2 was sufficient to cause death in ordinary course of nature. Nothing has been elicited through cross-examination to belie his testimony. The testimonies of ocular witnesses found corroboration from the medical evidence.

From the above analysis of the prosecution evidence, it is crystal clear that the present appellant is the assailant and was responsible for causing fatal injury by stabbing on the belly of the deceased. The motive for committing such gruesome and heinous crime writs large from the evidence of the prosecution witnesses and it has been well established by the prosecution.

9. Now the question is whether the act committed by the appellant comes under Exception 4 of Section 300, IPC and his conviction can be converted to Section 304 Part-II, IPC. The whole thing depends upon the intention to cause death. It is the settled principle of law that the nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon the death. In the case at hand, the present appellant used a bhujali and in spite of prevention by the witnesses, he pushed the bhujali into the belly of the deceased and when deceased tried to put his hand on the wound and pull out the bhujali, the appellant pushed the bhujali further to the inner part of the abdomen. It shows the intention of the accused to kill the deceased. Therefore, by no stretch of imagination the act committed by the appellant will come within the ambit of Exception 4 to Section 300 IPC. Accordingly, the contention for conversion of conviction of the appellant to one under section 304 Part-II, IPC is rejected. The facts of the decisions cited by the appellant are different from that of the present case. In all those decisions, motive or intention had not been proved whereas in the present case motive as well as the intention of the appellant behind commission of the crime has been proved beyond reasonable doubt.

10. In the result, the Criminal Appeal is dismissed and the judgment of conviction and sentence passed by the trial court is upheld.

Criminal Appeal is dismissed.

2010 (I) ILR-CUT- 514

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

CHHOTE KISHAN -V- STATE OF ORISSA.*

JANUARY 14,2010.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.304, PART-I.

Deceased gave a push to the wife of the appellant – Appellant brought an axe (Falsia) and gave only one blow on the chest of the deceased – Occurrence took place due to sudden provocation of the appellant – Held, conviction of the appellant U/s.302 IPC. is converted to one U/s. 304 Part-I IPC.

(Para 10)

For Appellant – Mr.Sk. Zafarulla.
For Respondent – Mr.J.P.Pattnaik,
Addl.Govt.Advocate.

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*JAIL CRIMINAL APPEAL NO.74 OF 1996. From the judgment dated 05.02.1996 passed by Shri S.N.Nanda, Sessions Judge, Sundargarh in S.T.No.183 of 1993.

PRADIP MOHANTY,J. The appellant having been convicted under Section 302, IPC and sentenced to undergo rigorous imprisonment for life by the learned Sessions Judge, Sundargarh in S.T. No.183 of 1993 has preferred this appeal from jail.

2. The case of the prosecution is that on 21.07.1993 the appellant dealt a Falsia blow on the chest of the deceased Mana Kishan causing injury to his vital organs like heart, liver and other parts of the body, as a result of which the died at the spot. The incident took place in presence of the deceased's wife (P.W.1), Sitaram Kishan (P.W.7) and others. On being reported by the deceased's wife Rohini Kishan, the police took up investigation and after its completion submitted charge-sheet against the appellant under Section 302, IPC.

3. The plea of the appellant is one of complete denial. His specific plea is that on the date of occurrence he had gone to work and returned home at 4.30 PM. On his return, he found somebody had thrown the dead body of the deceased Mana Kishan in front of his house. As per advice of the villagers, he went to the police station to report the matter and there he was detained by the police and falsely implicated in the case due to enmity over land dispute.

4. In order to prove its case, prosecution examined as many as sixteen witnesses including the I.O. and the doctor and exhibited nine documents. Accused examined himself as a defence witness.

5. The trial court after conclusion of the trial convicted the appellant under section 302 I.P.C. and sentenced him to undergo rigorous imprisonment for life basing upon the evidence of P.Ws.1 and 15 coupled

with the evidence of P.W.3 as well as the opinion of the doctor P.W.5 that the injuries found on the deceased can be caused with the Falsia (M.O.I).

6. Mr. Zafarulla, learned counsel for the appellant assails the judgment on the following grounds:

(i) P.Ws.1, 7 and 15 being respectively the wife, brother and sister-in-law of the deceased are interested witnesses and their evidence is full of contradictions.

(ii) The prosecution has not proved the motive on the part of the appellant to kill the deceased.

(iii) The extrajudicial confession is a very weak piece of evidence. The confession said to have been made to P.W.3 is not corroborated by surrounding circumstances and other reliable evidence and therefore it can not be relied upon by the Court to convict the appellant.

(iv) There is absolutely no material on record to connect the appellant with the murder of the deceased.

(v) His alternative submission is that even if it is assumed that the appellant is responsible for the death of the deceased, the act committed by him may come under the ambit of Section 304 Part-I, IPC but not under Section 302, IPC, since it is alleged that the deceased died as a result of a single blow dealt by the appellant due to sudden provocation.

7. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that there is no illegality committed by the trial court convicting the appellant under section 302 I.P.C. Moreover, the evidence of P.Ws.1 and 15 is very clear, convincing and cogent and they are the eye witnesses. Their evidence gets corroboration from the doctor (P.W.5) and P.W.3 before whom the extrajudicial confession was made. In this case, motive has been proved by P.W.1 inasmuch she stated that the incident took place due to a quarrel between the wife of the appellant and P.W.15, the sister-in-law of the deceased and that there was a meeting in their village to decide about the illicit relationship between P.W.2 and the brother of the accused. In view of all these, according to Mr. Pattnaik the trial court has rightly convicted the appellant under section 302 IPC.

8. Perused the LCR. P.W.1 is the deceased's wife who lodged FIR. She stated in her evidence that the occurrence took place on a Wednesday in the month of Shraban. On the preceding Sunday Pratima P.W.2 and Mungi, wife of the appellant, had been to the field of Suban to uproot paddy seedlings. Pratima P.W.2 went to the house of Suban to take Mudhi. The brother of the appellant, namely, Lengeda was in that house. The son of Pratima P.W.2 suspected something and called a meeting on the following Tuesday. The husband of Pratima P.W.2 said that he did not find any fault

with Pratima and accepted her as his wife. The husband of Pratima agreed to give a feast to the caste men and to remain in the caste. He gave 10 Kgs of rice and a goat for the feast. Malati P.W.15, sister-in-law of the deceased, and Mungi, wife of the accused, quarreled with each other on Wednesday (the date of occurrence) over the incident of Sunday. P.W.9, the husband of Pratima called the deceased to the house of the appellant to pacify the quarrel. P.W.1 accompanied the deceased to the house of the appellant. The deceased told the wife of the appellant not to quarrel. At this, the appellant assaulted on the chest of the deceased by means of Falsia (axe) and the deceased died at the spot. Nothing has been elicited through cross-examination to discard the evidence of P.W.1. P.W.2 Pratima is the wife of deceased's elder brother P.W.9 and the mother of P.W.6. She stated that her son suspected her conduct and informed to his deceased uncle. A meeting was convened. No proof was available against her conduct but still the caste people demanded for a feast. P.W.3 is a co-villager before whom the appellant confessed his guilt. He is also a witness to the seizure of sample earth and blood stained earth vide Ext.1 as well as the Falsia (M.O.I) vide Ext.2. Nothing has been elicited to discard the evidence of P.W.3. P.W.4 is a witness to the inquest and seizure of the proceeding of the Panchayat vide Ext.4. P.W.5 is the doctor who conducted autopsy over the dead body of the deceased. He opined that the injury was ante mortem and probably homicidal in nature. The death was due to hemorrhage and shock from the injury to vital organs like heart and liver. His evidence has remained unshaken despite thorough cross-examination. P.W.6 is the son of P.W.2 and P.W.9. In examination-in-chief, he specifically stated that a meeting was held, since he suspected the conduct of his mother, but no proof was available in the said meeting regarding suspicious conduct of his mother (P.W.2). But the caste people demanded a feast. P.W.7 is the brother of the deceased and an eye witness. He stated that there was a quarrel between his wife Malati (P.W.15) and wife of the accused. So, he along with his deceased brother and his wife went to the house of the appellant to pacify the quarrel. The deceased requested the wife of the accused not to pick up quarrel with his (P.W.7's) wife. All on a sudden, the accused came with M.O.I and gave a blow on the chest of the deceased, as a result of which his intestine came out. After assault, the accused fled away from the spot. There are some material contradictions brought out by the defence through cross-examination from the mouth of P.W.7. P.W.8 is a witness to the seizure of a check lungi and nail cuttings vide Ext.7. P.W.9 is the husband of P.W.2 and brother of the deceased. He specifically stated that suspecting the character of his wife a caste meeting was convened wherein he had agreed to give a bag of rice and a goat to the caste people. P.W.15 Malati is the wife of P.W.7. She is a witness to the

occurrence. She stated that she along with her husband P.W.7, the deceased and his wife P.W.1 went to the house of the appellant. The deceased advised everybody not to pick up quarrel with any body. But immediately the appellant brought out an axe (Falsia) from his house and gave a blow on the chest of the deceased. The deceased sustained bleeding injury on his chest, his intestine came out and he died at the spot. Nothing has been elicited through cross-examination to disbelieve her testimony.

9. From the analysis of the evidence made above, this Court comes to hold that there are material contradictions in the evidence of P.W.7 and the trial court is justified in not placing any reliance on his evidence. However, there is no reason to disbelieve the evidence of P.Ws.1 and 15 who are witnesses to the occurrence. Just because P.Ws.1 and 15 are related to the deceased is no ground to discard their testimonies since their testimonies inspire confidence. P.W.3 has no axe to grind against the appellant. In this case, extrajudicial confession made to P.W.3 is bound to be accepted since it is corroborated by surrounding circumstances and other related evidence. The doctor P.W.5 has categorically opined that the injuries found on the deceased could be caused by the Falsia (M.O.I.). Taking into account the evidence of P.Ws.1 and 15 coupled with the evidence of the doctor P.W.5 and P.W.3 before whom the accused had confessed his guilt, it can be safely concluded that the deceased died due to the assault made by the appellant.

10. Now, it is to be seen whether by the act committed the appellant is liable for the offence under Section 302, IPC or Section 304 Part-I thereof. P.W.1 in her cross-examination has specifically admitted that her deceased husband gave a push to the wife of the appellant and thereafter the appellant brought an axe (Falsia) and gave one blow only on the chest of her deceased husband. P.W.16, the investigating officer, in cross-examination has admitted that according to his investigation the occurrence took place out of sudden provocation due to quarrel. In view of this evidence, it is established that the appellant assaulted the deceased as the deceased provoked him by giving a push to his wife. Taking an overall view of the fact situation, this Court is satisfied that the appellant is guilty of committing an offence under Section 304 Part-I, IPC.

11. In the result, the appeal is allowed in part, the conviction of the appellant under Section 302, IPC is converted to one under Section 304 Part-I, IPC and he is sentenced to undergo rigorous imprisonment for ten years. It is stated by Mr. Zafarulla that the appellant has remained in custody from the date of his arrest and by now has completed more than thirteen years. If that be so, the appellant Chhote Kishan be set at liberty forthwith, unless his detention is required otherwise. Appeal allowed in part.

2010 (I) ILR-CUT- 518

M.M.DAS,J.

CUTTACK DEVELOPMENT AUTHORITY -V- REGIONAL PROVIDENT FUND COMMISSIONER.

OCTOBER 12,2009.

(A) EMPLOYEES PROVIDENT FUND & MISC PROVISIONS ACT, 1952 (ACT NO.19 OF 1952) – SEC.2(f).

Whether the Definition of "Employee" includes labourers engaged by the Contractor to execute work pursuant to the agreement – No.

Held, it only includes Labour Contracts to provide workmen.

(Para 9)

(B) EMPLOYES PROVIDENT FUND & MISC PROVISIONS ACT, 1952 (ACT NO.19 OF 1952) – SEC.16 (1) (c) r/w SEC.83 O.D.A. ACT,1982.

Exempted establishment – Cuttack Development Authority has been created under the provisions of O.D.A. Act – Section 83 of the ODA Act provides for Provident Fund benefits to its employees – In view of Sec.16(1) © of E.P.F. & M.P. Act the establishment of C.D.A. is an exempted establishment.

Held, notice issued by the Regional Provident Fund Commissioner U/s.7-A of the Act, 1952 is without jurisdiction.

(Para 10 & 11)

Case law Relied on:-

1999-III-LLJ (Supp) 151 : (Karachi Bakery -V-Regional Provident Fund Commissioner).

For Petitioner - M/s. D.Mohapatra, & C.R.Dash.

For Opp.Party - M/s. S.C.Satpathy & T.K.Sahoo.

O.J.C. NO.5878 OF 1997. In the matter of an application under Articles 226 & 227 of the Constitution of India.

M.M.DAS, J. The petitioner has filed the present writ application challenging the jurisdiction of the Regional Provident Fund Commissioner in issuing notice as at Annexure-3 dated 3.9.1996 under Section 7-A of the Employees Provident Fund and Misc. Provisions Act, 1952 (hereinafter referred to as 'the Act, 1952) on the ground that the provisions of the said Act, 1952 do not apply to the petitioner. The petitioner is the Cuttack Development Authority (in short 'C.D.A.'), which is a statutory body, constituted under the Orissa Development Authorities Act, 1982 (hereinafter referred to as 'O.D.A. Act'. The petitioner (C.D.A.) is the successor of Greater Cuttack Improvement Trust, which was constituted under the provisions of Orissa Town Planning Improvement Trust Act, 1956 (hereinafter referred to as 'O.T.P.I.T. Act'). It is the case of the petitioner that in consonance with Section 83 of the O.D.A. Act, a resolution was passed by

the C.D.A. resolving that the employees working under the C.D.A. are entitled to the benefit of pension and G.P.F. with effect from 1.9.1983 i.e. the date on which the C.D.A. was constituted. Admissibility of pension and other retirement benefits to the employees of C.D.A. was before this Court in OJC No. 768 of 1990. This Court by judgment dated 29.10.1990 interpreting Section 83 of the O.D.A. Act held that the employees are entitled to old age pension and other retirement benefits. It is averred by the petitioner that in accordance with the provisions of Section 83 of the O.D.A. Act as well as the ratio of the decision referred to above, all the employees working in the establishment of C.D.A. are entitled to old age retirement benefits and the employees of C.D.A., who have retired in the meanwhile have been paid old age pension as payable to their counter parts working under other Government organizations pursuant to the resolution of the C.D.A. in their 34th meeting held on 7.3.1993.

2. Attention of this Court is drawn to Section 83 of the O.D.A. Act relying upon which it is submitted that the C.D.A. comes under the said section and as prescribed in Section 16 (1) (c) of the Act, 1952, it shall not apply to any other establishment set up under any Central Provincial or State Act and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

3. A counter affidavit has been filed by the opp. party, inter alia, stating that the ratio of the decision in OJC No. 768 of 1990 of this Court do not apply to the facts of the present case and further there is no scheme or rule by which a contractor's employees and daily wage employees of the petitioner are entitled to the benefits of Contributory Provident Fund or Old Age Pension. Thus, in such circumstances, the petitioner cannot claim the benefits of Section 16(1) (c) of the Act, 1952. The further plea taken in the counter affidavit is that the proceeding pursuant to the impugned notice is pending and during pendency of such proceeding, the writ application is not maintainable. Any order passed by the competent authority in the said proceeding is appealable before the Provident Fund Appellate Tribunal, which has been constituted pursuant to the notification of the Government of India dated 30.6.1997. In view of such availability alternative remedy, this Court should not exercise its jurisdiction under Article 226 of the Constitution.

4. The petitioner has filed a rejoinder affidavit reiterating its stand in the writ application and stating that a provision has been made for payment of pension and other retirement benefits pursuant to the judgment of this Court in OJC No. 768 of 1990. The petitioner has further stated that it being not covered under the Act, 1952, any such activities undertaken through the

contractors on execution of independent contracts are also not covered under the said Act. The contracts thus entered are not labour contracts nor the contractors provide labour to the C.D.A.. The man power engaged by the contractors is not controlled by the C.D.A. nor there is any relationship of employer and employee between the C.D.A. and the persons working under such contractors. The notice itself having been issued without jurisdiction the availability of alternative remedy or the contention that proceeding is pending before the competent authority under the Act, 1952, can be a ground to contend that the writ application is not maintainable.

5. It would be apt to refer to Section 83 of the O.D.A. Act and Section 16 of the Act, 1952 for adjudicating the present dispute.

Section 83 of the O.D.A. Act is as follows:

"83. **Pension and provident fund** - (i) The authority shall constitute for the benefits of its whole time paid members and of its officers and other employees in such manner and subject to such conditions as may be prescribed by rules and such pensions and provident funds as it may deem fit.

(ii) Where any such pension or provident fund has been constituted the State Government may declare that the provisions of the Provident Fund Act, 1925 (19 of 1925) shall apply to such fund as if it were a Govt. Provident Fund."

Section 16 of the E.P.F. and M.P. Act, 1952 is as under:

"16. **Act not to apply to certain establishments**.-

(1) This Act shall not apply -

(a) (b) xxx xxx xxx

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that act governing such benefits.

xxx xxx xxx"

6. The impugned notice under Annexure-3 discloses that the Regional Provident Fund Commissioner issued the said notice under Section 7-A of the Act, 1952 mentioning therein that the C.D.A. is an establishment to whom the Act, 1952 apply, there is default in payment of (i) Provident Fund Contributions for the period from January, 1990 to December, 1995 for the contractors' employees, (ii) payment of family pension contributions for the above period for such contractors' employees, (iii) payment of administrative charges for the same period for such type of employees, (iv) payment of employees' deposit linked insurance contribution for the above period for similar employees and payment of employees' deposit linked insurance administrative charges for the same period for such employees, for which it

has become necessary to determine the dues from the C.D.A. and it is proposed to afford the said C.D.A. a reasonable opportunity before any order determining the amount due is made. The said notice further discloses that the C.D.A. is informed that, to determine the dues, the enquiry under Section 7-A of the Act, 1952 shall be held in the office of the Regional Provident Fund Commissioner and the C.D.A. is summoned to remain present at the said enquiry to state their case as required under Section 7-A (3) of the Act, 1952 and produce all relevant evidence.

7. From the above notice, it therefore appears that contemplating that the C.D.A. is covered under the Act, 1952, the said notice was issued to only conduct an enquiry for assessing the dues of the C.D.A. towards contractors' employees. Firstly, as stated by the C.D.A., such employees of the contractors, who have executed agreement with the C.D.A. for execution of the developmental work are not employees of the C.D.A. and there is no relationship of employer and employee between such workers of the contracts and the C.D.A., moreso when such contracts are not labour contracts. Hence, such employees of the contractors cannot be held to be covered under the Act, 1952. Section 2 (f) defines the word 'employee' to mean any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the establishment etc. An interpretation of the above definition clearly shows that the contract for the purpose of Section 2 (f) between the establishment and the contractor must be a contract by which a contractor agrees and brings labour to be employed by the establishment. The contractor for the purpose of Section 2 (f) is purely a labour contractor and not an independent contractor who contracts to deliver a finished product to the establishment and who for purposes of manufacture of such a finished product, engages labour for his own purposes.

8. The view of a Division Bench of Andhra Pradesh High Court in the case of ***Karachi Bakery –v- Regional Provident Fund Commissioner***, 1999-III-LLJ (Supp) 151 is also similar. In the said case, the Division Bench was dealing with a writ appeal against an order of the learned Single Judge of the said High Court dismissing the writ petition filed by the appellant, Karachi Bakery. In the said writ petition, the appellant challenged an order of the Regional Provident Fund Commissioner by which the Commissioner treated employees of two other firms to be employees of the appellant firm for the reason that the appellant had entered into contracts with those two firms for supply of certain bakery products and that the said contracts were in connection with the business of the appellant firm within the meaning of Sec. 2 (f) of the Act, 1952.

The A.P. High Court in the said decision took the view that the words "whether they are employed by or through a contractor in or in connection with the work of the establishment", postulate that such persons must be employed by or through a contractor as "contract labour". In other words, the contract for purposes of Section 2 (f) between the establishment and the contractor is by which a contractor agrees and brings labour to be employed by the establishment. The contractor for purposes of Section 2 (f) is purely a labour contractor and not an independent contractor who contracts to deliver a finished product to the establishment and who for purposes of manufacture of such a finished product, engages labour for his own purposes. It further held that in the later case, the contractor cannot be treated as one who is employed to get labour for and on behalf of the principal establishment but will be an independent contractor who alone exclusively controls and supervises the work of his employees and directs what work is to be done and how it is to be done. On the above interpretation, the said High Court set aside the judgment of the learned Single Judge as well as the decision of the Regional Provident Fund Commissioner.

9. This Court while endorsing the above view of the Andhra Pradesh High Court finds that in the instant case, as has been averred by the petitioner, which has remained uncontroverted, the contractors' employees are engaged by such contractors to execute a work entrusted to them pursuant to the agreement executed between such contractors and the C.D.A.. Such contracts are not labour contracts to provide workmen to the C.D.A.. Thus, in the facts of the case, such employees of the contractors cannot be governed under the Act, 1952.

10. Addressing to the question as to whether the C.D.A. is exempted from the application of the provisions of the Act, 1952, a bare reading of Section 16 (1) (c), as quoted above, clearly establishes that the C.D.A. having been constituted/established under the O.D.A. Act and its employees having been made entitled to the benefit of old age pension in accordance with the resolution of the C.D.A. referred to above, the said establishment of the C.D.A. is clearly exempted from the application of the provisions of the Act, 1952.

11. In view of the above analysis, the irresistible conclusion would be that the Act, 1952 does not apply to the C.D.A. and as such, action of the Regional Provident Fund Commissioner in issuing notice under Section 7-A of the Act, 1952 in Annexure-3 to the writ petition being without jurisdiction is unsustainable. The said notice is, therefore, quashed.

The writ application is allowed, but in the circumstances, without cost.

Writ application is allowed.

2010 (I) ILR-CUT- 523

M.M.DAS, J.

ARJUNA CHANDRA SAHOO -V- PRESIDING OFFICER,INDUSTRIAL TRIBUNAL, ROURKELA & TWO ORS.*

MARCH 10,2010.

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – SEC.25-F.

Petitioner was engaged as peon on daily wage basis – He served the Bank continuously from 1.10.1995 to 27.7.2000 – His daily wage enhanced from time to time – Tribunal found the appointment of the petitioner was not in terms of the Staff Service Rules and terminated him from service – Hence the Writ petition.

Even if the engagement of the petitioner was not in accordance with the Staff Service Rules, 1984, the petitioner having rendered continuous service of 240 days in one calendar year he can be considered as a workman – Once he is a workman he can swim into the harbour of Section 25-F and he can not be terminated without payment at the time of retrenchment – Held, retrenchment of the petitioner is illegal and he is entitled to an order of reinstatement and he may be paid Rs.50,000/- in lieu of back wages.

(Para 10,11 & 12)

Case law Relied on:-

1.AIR 2001 SC 672 : (Vikramaditya Pandey -V- Industrial Tribunal & Anr.).

Case laws Referred to:-

1.AIR 1979 SC 1356 : (Pottery Mazdoor Panchayat -V- The perfect Pottery Co.Ltd. & Anr.)

2.FLR 1976 (32) (SC) 197 : (State Bank of India -V- N.Sundra Money).

3.65 (1988) CLT 467 : (Cuttack Municipal Council & Anr.-V- Presiding Officer, Labour Court & Ors.).

4.AIR 1986 SC 132 : (H.D.Singh -V- Reserve Bank of India & Ors.).

5.1999 LAB. I.C. 3386 : (Executive Engineer CAD, Kota -V- Satya Narain & Ors.).

6.1986(2) LLJ 492 : (Eranalloor Service Co-operative Bank Ltd.-V- Labour Court &Ors.)

For Petitioner – M/s. J.R.Dash & M.Dash.

For Opp.Parties – M/s. K.R.Mohapatra, S.N.Mohapatra & S.Ghose. Addl.Government Advocate.

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*W.P.(C) NO.1194 OF 2003. In the matter of an application under Articles 226 & 227 of the Constitution of India.

M.M. DAS, J. This writ petition has been filed by the workman-petitioner against the award dated 14.11.2002 passed by the Presiding Officer, Industrial Tribunal, Rourkela. On an industrial dispute being raised upon failure of conciliation, the matter was referred to the Industrial Tribunal under Section 10 (1)(d) read with Section 12 (4) of the Industrial Disputes Act, 1947

(for short 'I.D. Act'), the same was registered as I.D. Case No. 23 of 2001. The reference was as follows:

> "Whether the termination of services of the workman Sri Arjun Charan Sahoo, working as Peon at Fertilizer Branch, Rourkela of the Bank by the Secretary, Sundargarh, Dist. Central Co-operative Bank Ltd., Sundargarh w.e.f. 28.7.2000 is legal and/or justified? If not, to what relief the workman Sri Sahoo is entitled to?"

2. After filing of the respective statements by the parties, the Tribunal framed three issues, which read as follows:

1. Whether the 2nd party workman was in continuous employment for more than one year under the Ist party management?
2. Whether the termination of services of 2nd party workman by the Ist party management w.e.f. 28.7.2000 is legal and/or justified?
3. If not, to what relief the 2nd party is entitled to ?
4. Whether the reference is maintainable?

3. In answering Issue No. 1, the Tribunal held that the petitioner was engaged in the services of the Bank on daily wage basis and worked there continuously for more than 240 days in 12 calendar months and his daily wage was enhanced from time to time. In answering Issue No. 2, it was held that the petitioner-workman was retrenched from service with effect from 28.7.2000 and was not entitled for regularization in services of the Bank. His retrenchment or termination or dismissal from service is justified because there has been restriction imposed by the Government from time to time on any employment and the appointment of workman was ab-inito void in view of the fact that the authority of the Bank, who appointed the petitioner was not competent under the Staff Service Rules to appoint him.

4. In answering Issue No. 3, the Tribunal held that it will be justified and equitable to award compensation at the rate of wages for 15 days for completion of every 240 days for which the petitioner has worked in the bank at the existing and prevalent scale of Rs. 80/- per day. Being aggrieved by the said award, the petitioner-workman has approached this Court in the present writ petition.

5. Admittedly, the petitioner was engaged on daily wage basis by the opposite-bank. Such workman was also being paid annual bonus and arrears of revised wages, which were being revised from time to time. The petitioner also claimed that large numbers of vacancies are available in the bank.

6. Learned counsel for the petitioner submitted that since the Tribunal found that the reference was maintainable; the establishment is an industry and the petitioner is a workman, undisputedly, the provisions of the Act are applicable to the facts of the present case. The Tribunal having found that

the petitioner was in continuous employment for more than one year under the management of the bank and his daily wage was enhanced from time to time, it is to be examined as to whether there was violation of the provisions of Section 25-F of the Act, by the management. Learned counsel further contended that the Tribunal is wrong in its conclusion that the decisions cited by the workman are only applicable to the workmen, who are under regular appointment, is unsustainable. He submitted that the Tribunal has committed an error in holding that engagement of the petitioner was ab-inito void. Learned counsel for the petitioner in support of his contentions has relied upon the decisions in the cases of ***Pottery Mazdoor Panchayat –v- The Perfect Pottery Co. Ltd. and another***, AIR 1979 SC 1356, ***State Bank of India –v- N. Sundra Money***, FLR 1976 (32) (SC) 197, ***Cuttack Municipal Council & another –v- Presiding Officer, Labour Court and others***, 65 (1988) CLT 467, ***H.D. Singh –v- Reserve Bank of India and others***, AIR 1986 SC 132 and ***Executive Engineer CAD, Kota –v- Satya Narain and others***, 1999 LAB. I.C. 3386.

7. Learned counsel for the opposite party no. 2, on the contrary, submitted that the stand of the management before the Tribunal was that the petitioner was never given appointment in terms of the Staff Service Rules, 1984 and rather he was engaged by the concerned Branch Manager, who did not have any authority to appoint any such person. The Tribunal has rightly observed that engagement of the petitioner was orally made by the concerned Branch Manager as well as his disengagement was also made orally. The terms of employment and the service condition of staff of Central Co-operative Banks in the State of Orissa are governed by a set of Rules, namely, Staff Service Rules, 1984, which has been prescribed by the Registrar Co-operative Societies, Orissa in exercise of power conferred under Section 33-A (b) of the Orissa Co-operative Societies Act, 1962. The mode of appointment and the appointing authority are prescribed in the said rules. The departure from the aforesaid provisions in engaging the petitioner, having been made, such engagement is ab-initio void and illegal for which the bank directed for recovery of the amount paid to the petitioner, from the salary of the Branch Manager. He relied upon the decision in the case of ***Eranalloor Service Co-operative Bank Ltd. –v- Labour Court and others***, reported in 1986 (2) LLJ 492. It was submitted that the Kerala High Court in the said case has held that appointments made without obtaining prior approval of the Registrar of Co-operative Societies will be declared as appointments made without the authority of law and hence ab-initio void. The contract of service in such cases can be terminated even without any enquiry. If the services of such an appointee is terminated without complying with the provisions of Section 25 F of the I.D. Act, he will not be entitled to reinstatement and retrenchment compensation because, in law, the effect of

an order sending him out will not be a termination of service but will only be a declaration that he never had been appointed to that post. Though all retrenchment is termination of service, the vice-versa is not always true. According to the learned counsel, not allowing the petitioner to work with effect from 27.7.2000 was not a voluntary act of the management rather the same was an out come of administrative measure, which was guided by the Government Circular under Exts. A, B and C issued from time to time prohibiting the bank from engaging daily rated casual workers.

8. Learned counsel for the petitioner, however, in reply, submitted that service rules will not prevail over the I.D. Act and denial on the ground that the appointment was not as per the bank's rules, is not proper. Hence, the petitioner was entitled to reinstatement with full back-wages. For the above contention, learned counsel for the petitioner relied upon the decision in the case of ***Vikramaditya Pandey –v- Industrial Tribunal and another***, AIR 2001 SC 672.

9. The findings recorded by the Tribunal on Issue No. 1 clearly shows that the petitioner was engaged to work in the Bank as a Peon on daily wage basis from 1.10.1995 to 27.7.2000. This claim was not seriously questioned by the management. Documents produced before the Tribunal prove this fact. The petitioner was in continuous services of the Bank for more than one year. The Tribunal, therefore, concluded that the petitioner was engaged in the services of the Bank on daily wage basis and worked there continuously for more than 240 days in a calendar year and his daily wage was enhanced from time to time. With regard to issue No. 2, the Tribunal held that there is no controversy that the workman was terminated from the services of the Bank with effect from 28.7.2000 but stating that there was no regular employment of the workman and no appointment letter was issued by the Bank to the workman even though the Branch Manager conducted an interview and no appointment letter was asked for by the workman, taking into consideration the Staff Service Rules of the Bank, concluded that the appointment of the petitioner was not according to the said rules. It, therefore, arrived at a finding that the workman was not entitled to regularization in services of the Bank and his retrenchment or termination or dismissal from service was justified because there has been restriction imposed by the Government from time to time on any employment whatsoever and his appointment is found to be ab-initio void. It was further held that there was no violation of the provisions of Section 25-F of the I.D. Act and the petitioner at best can be compensated by giving him wages for 15 days for completion of every 240 days @ Rs. 80/- per day.

10. The moot question, therefore, which arises in this case, is that even accepting that engagement of the petitioner was not in accordance with the Staff Service Rules, 1984, it having been found that the petitioner was a

workman who has rendered continuous service of 240 days in one calendar year, whether there was necessity for compliance of Section 25-F of the I.D. Act. A similar issue came up before the Supreme Court in the case of ***Vikramaditya Pandey*** (supra) where the Supreme Court was considering a question of denial of relief of reinstatement with back wages on the ground that recruitment of the workman was not as per the service rules. In the said case quoting Regulation 103 of U.P. Co-operative Societies Employees Service Regulations (1975), it was held that in the said Regulation 103, it has been clearly provided that the provisions of the said Regulations to the extent of their inconsistency with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen's Compensation Act, 1923 and any other Labour Laws for the time being in force, if applicable to any Co-operative Society or class of Co-operative Societies, shall be deemed to be inoperative. The Supreme Court, therefore, came to the conclusion that the High Court has misread the said provisions which lead to a wrong conclusion.

11. In the present case, the Central Co-operative Banks Staff Service Rules 1984 which was relied upon by the opp. parties to show that appointment of the petitioner was illegal, prescribes in Rule 58 thereof as follows:

> "58. **Rights and Privileges Under Any Other Law:**
>
> Nothing contained in these Staff Service Rules shall operate in derogation of any law, applicable or to the prejudice for any right under a registered agreement, settlement, or award for the time being in force or in future or contract of service, if any, as per general law applicable to the members of the staff.

A plain interpretation of the above Rule would go to show that none of the rules prescribed thereunder shall operate in derogation of any law applicable. The petitioner having been found to be a workman, by the Tribunal, who has put in more than 240 days work in one calendar year, therefore, cannot be deprived of his rights under the I.D. Act. The learned Tribunal has categorically held that the petitioner was retrenched from service. These findings have not been challenged by the management and have become final. In the case of State Bank of India (Supra), the Supreme Court while considering the case of retrenchment and the question of violation of the provisions of Section 25-F of the I.D. Act, in the facts of the said case where the workman was appointed as cashier, off and on by the Bank, held that notwithstanding the intermittent breaks, his total number of days of employment answered the test of 'deemed' continuous service within Section 25-B (2). It was further observed that statutory construction when courts consider welfare legislation with an economic justice bias, cannot turn

on cold print glorified as grammatical construction but on teleological purposes and protective intendment. In such situation, it was held that Section 25-F will facilitate the diagnostic task. Thus observing, the Supreme Court held as follows:

> "Without further ado we reach the conclusion that if the workmen swim into the harbour of Section 25-F, he cannot be retrenched without payment, at the time of retrenchment, compensation computed as prescribed therein read with section 25-B (2). But argues the appellant, all these obligations flow only out of retrenchment, not termination outside that species of snapping employment. What, then is retrenchment? The key to this vexed question is to be found in Section 2(oo) which reads thus:
>
> 2(oo) retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—
>
> (a) Voluntary retirement of the workman; or
> (b) retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
> (c) termination of the service of a workman on the ground of continued ill-health."
>
> *For any reason whatsoever*—very wide and almost admitting of no exception. Still, the employer urges that when the order of appointment carries, an automatic cessation of service, the period of employment works itself out by efflux of time, not by act of employer. Such cases are outside the concept of 'retrenchment' and cannot entail the burdensome conditions of Section 25-F. Of course, that a nine-days employment hedged in with an express condition of temporariness and automatic cessation, may look like being in a different stree (if we may use a colloquialism) from telling a man off by retrenching him. To retrench is to out down. You cannot retrench without trenching or cutting. But dictionaries are not dictators of statutory construction where the benignant mood of a law and, more emphatically, the definition clause furnish a different denotation. Section 2(oo) is the master of the situation and the Court cannot truncate its amplitude".

12. Applying the ratio of the aforesaid decisions to the facts of the present case, it is clear that the conclusion arrived at by the Tribunal is fallacious. It

is also seen that in the case at hand, the provisions of Section 25-F of the I.D.
Act have been utterly violated by the employer entitling the petitioner-workman to an order of reinstatement as the retrenchment is found to be illegal.

13. Coming to the question of back wages, since the petitioner has been retrenched with effect from 28.7.2000 and in the meantime about nine years have elapsed in view of this, the petitioner is not entitled to get full back wages but for a compensation of Rs. 50,000/-. The impugned award is thus set aside. It is directed that the petitioner be reinstated in service and a compensation of Rs. 50,000/- (Rupees fifty thousand only) be paid to him, in lieu of back wages.

The writ petition is, accordingly, allowed, but in the circumstances, there shall be no order as to cost.

Writ petition allowed,

2010 (I) ILR-CUT- 530

R.N.BISWAL,J.

NAMITARANI PRADHAN -V- STATE & ORS. & GUNANIDHI DEHURY & ANR -V- SUB-COLLECTOR, ANGUL & ANR.*

FEBRUARY 23, 2010.

ORISSA GRAM PANCHAYAT RULES, 1968 - RULE 226 r/w SEC.24(2)(a)(c) ORISSA GRAM PANCHAYAT ACT, 1964.

Procedural law – It is the handmade of justice and not its mistress – It is not a tyrant but a servant – Where non compliance of the procedure is prejudical to the parties, then only it is mandatory, otherwise not.

In the present case there was requisition for no confidence motion against Sarpanch – There is nothing in Rule 226 that in case of initiating no confidence motion against a Sarpanch, the requisition shall be made to him – However if such a requisition is made to the Sarpach he would be in an embarrassing position and he may not also call such a meeting and in that event members who signed the requisition may report the fact to the Sub-Collector who must call the meeting within seven days from the date of receipt of the report – Hence the notice of no confidence motion along with the copy of the requisition and the resolution is required to be sent to all the members including the Sarpanch – So the Sarpanch is aware of the allegation made against her and in no way she is prejudiced – Held, even if requisition was not made to the Sarpanch for holding the special meeting to initiate no confidence motion against her it would not be fatal. (Para 8)

Case laws Referred to:-

1.91(2001)CLT.734 : (Smt.Buli Das -V- State of Orissa & Ors.).
2.1988 (I) OLR.80 : (Sarat Padhi -V- State of Orissa & Ors.).
3.91(2001) CLT,159 : (Smt.Kamala Tiria -V- State of Orissa & Ors.).

For Petitioner – M/s. Sailabala Jena, K.Badhei & P.Jena.
For Opp.Parties – M.s,A.Mishra & Associates.
(Opp.Party Nos.6 to 11)
Addl.Govt. Advocate.

For Petitioner – M/s. A.K.Mohapatra & S.K.Padhi.
For Opp.Parties – Addl.Govt.Advocate.

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*W.P.(C) NO.14559 & 16024 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

R.N.BISWAL, J. Since prayer in aforesaid two cases are one and the same, and the counsel engaged by the parties are the same, both the cases were heard analogously and the following common order is passed thereon.

2. As per the writ petition in W.P.(c) No.14559 of 2009, Pokatunga Gram Panchayat consists of 15 wards. The petitioner therein is the elected sarpanch of the said Gram Panchayat**.** Since ward member Bibekananda Sahu, (opp.party no.6) did not attend three consecutive meetings of the Gram Panchayat, he ceased to be a member, and as such, vide letter dated 14.9.2009 it was communicated to the Sub-Collector, Angul to cancel his membership. In the same letter the Sub-Collector, Angul was also communicated to cancel the membership of Opp.parties 7 to 10 on different grounds. While the same was under consideration Opp.parties 6 to 11 being motivated by the Naib-Sarpanch, sent requisition to the Sub-Collector, Angul for convening a meeting of no confidence motion against the petitioner. Accordingly, the Sub-Collector, Angul convened a special meeting fixing the date to 6.10.2009 for holding of no confidence motion against the petitioner. According to the petitioner before issue of notice for no confidence motion against her, her representation to cancel the membership of opp.parties 6 to 10 ought to have been considered. Had their membership been cancelled, they could not have passed the resolution for no confidence motion. Hence, the petitioner prayed to direct the official opp.parties particularly opp.partyno.3 to act upon the letter of the petitioner dated 14.9.2009 and quash the notice of no confidence motion dated 16.9.2009 under Annexure-3.

3. In W.P.(c) No.16024 of 2009 the petitioners, who are two of the ward members of Pokatunga Gram Panchayat, also prayed to quash the notice of no confidence motion dated 16.9.2009 issued by the Sub-Collector, Angul. As per their case, to abdicate the Sarpanch from her office and to be the Sarpanch in her place, the Naib-Sarpanch motivated some ward members to bring no confidence motion against the Sarpanch. Out of 15 members, he took 13 members to Puri on 14.9.2009 and kept them away from the village till 5.10.2009. On 6.10.2009 they directly came to Pokatunga G.P. Office and voted against the Sarpanch. The petitioners also took the plea that notice only was served upon them by a special messenger. Copies of requisition and the proposed resolution to be moved in the meeting were not attached to it.

4. Learned counsel appearing for the petitioners submitted that as per Section 25(2) of the Gram Panchayat Act,1964 (hereinafter referred to as "G.P.Act") opp.parties 6 to 10 being disqualified to hold the office of ward member are not competent to sign the requisition. So the notice dated 16.9.2009 deserves to be quashed. At this stage, it would be profitable to quote Section 26(3) of the G.P.Act which reads as follows

***"26.*Procedure of giving effect to disqualifications**-

(1) xx xx xx xx xx

(2) xx xx xx xx xx

(3)Where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member is or has become disqualified such decision shall be forthwith published by him on his notice-board and with effect from the date of such publication the Sarpanch, Naib-sarpanch or such other member, as the case may be, shall be deemed to have vacated office, and till the date of such publication he shall be entitled to act, as if he was not disqualified.

In the present case, since opp.parties 6 to 10 have not been declared disqualified, they are competent to cast their votes.

5. Learned counsel for the petitioners further submitted that the petitioners in W.P.(c)No.16024 of 2009 received the notice only and not the requisition and the proposed resolution to be moved in the meeting. On the other hand, learned Addl. Govt. Advocate submitted that relevant record of the Sub-Collector, Angul shows that notices along with requisition and the proposed resolution were served on the petitioners in W.P.(C) No.16024 of 2009 through special messenger.

6. Learned counsel for the petitioners further submitted that as per section 24(2)(d) of the G.P. Act notice should be served by post under certificate of posting, and in the present case the same having not been done, it can be presumed that there was no valid service of notice. In support of his submission he relied on the decision **Smt.Buli Dash** vs. **State of Orissa & others** 91(2001) C.L.T.734. As against this, learned Addl. Govt. Advocate submitted that the mode of service or the failure by any member to receive the notice at all will not render the meeting invalid. In support of his submission, he relied on a Full Bench decision of this Court in the case of **Sarat Padhi** vs. **State of Orissa and others** 1988(I)OLR-80.

In the case of Smt.Buli Dash (supra) this court held:-

"Neither in the order passed by the Collector, nor in any document produced in this Court, it has been shown that as a matter of fact, notice had been served. Moreover when the rules contemplates that notice should be served by post under certificate of posting, sending of notice through special messenger, even if correct, cannot be assumed to be sufficient for the purpose of taking action regarding disqualification for alleged non-attendance of three consecutive meetings."

In the present case, record of the Sub-Collector, Angul shows that notice along with requisition and proposed resolution were served on the petitioners in W.P.(C) No.16024 of 2009 and they endorsed to have received the same. In the case of Sarat Padhi(supra), interpreting Section 24(2) (c) of the G.P.Act, a full bench of this Court held as follows:

> "The Scheme of the notice contemplated under Section 24(2)(c)may be divided into three parts (i) requirement of giving the notice, (ii) fixing the margin of time between the date of the notice and the date of the meeting and (iii) service of notice on the members, I am of the view, which is also conceded by the learned Advocate General, that the first two parts, namely, the date of issue the notice and the margin of clear 15 days between the date of the notice and the date of the meeting, are mandatory. In other words, if there is any breach of these two conditions, then the meeting will be invalid without any question of prejudice. But the third condition, i.e., the mode of service or the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting, will not render the meeting invalid. This requirement is only directory. This is also based on a sound public policy as in that event any delinquent Sarpanch or Naib-Sarpanch can frustrate the consideration of the resolution of no confidence against him by tactfully delaying or avoiding the service of the notice on him and thus frustrate the holding of the meeting. The legislation has also accordingly taken care to provide in unequivocal terms a provision to obviate such contingencies by incorporating Clause © to Sub-sec.(2) of Sec.24".

In the case at hand, since service of notice was made through special messenger and the petitioners endorsed in the copy of the notice to have received the same along with the requisition and proposed resolution, the decision in Smt. Buli Dash(supra) cannot be applicable to the present case. In view of the decision in the case Sarat Padhi (supra)it is held that notice was served on the petitioners in W.P.(C) No.16024 of 2009 as required under section 24(2)(c)of the G.P.Act.

7. Learned counsel for the petitioner further submitted that as per Rule 226 of the Orissa Grama Panchayat Rules (G.P. Rules in short), if 1/3rd of the total members of the Grama Panchayat submit a requisition to Sarpanch to hold a special meeting, he must call the meeting within thirty days of receipt of the requisition. If he failed to do so within the stipulated period, then the members who signed the requisition, if so liked would report the fact to the Sub-Collector, who would call the meeting within seven days from receipt of the report. According to learned counsel for the petitioner, in the present case, the said provision was not complied with. On the other hand, learned Addl. Government Advocate contended that no such requisition is required to be sent to the Sarpanch, for initiating no confidence motion against him.

8. In view of the submission of learned counsel for the petitioners, it would be useful to quote Rule 226 (i) of the G.P. Rules, which reads as follows:-

> "226.(i) The Sarpanch may call special meeting of the Grama Panchayat at any time and shall do so on the requisition of at least one-third of the total membership of the Grama Panchayat. If the Sarpanch fails to call a meeting within thirty days after receiving such requisition, the members who have signed the requisition may report the fact to the Sub-Collector, who shall thereupon call the meeting within seven days from receipt of the report."

As per this provision, the Sarpanch may or may not call special meeting. But, he is bound to call such a meeting when a requisition is made by at least 1/3rd of the total membership of the G.P. However there is nothing to show that in case of initiating no confidence motion against a Sarpanch, the requisition shall be made to him. If such a requisition is made to the Sarpanch, he would be in an embarrassing position. He may not also call for such a meeting, in which event, the members who signed the requisition may report the fact to the Sub-Collector, who must call the meeting within seven days from the date of receipt of the report. The notice of no confidence motion along with a copy of the requisition and the resolution proposed to be moved in the meeting for want of no confidence in the Sarpanch is required to be sent to all the members of the Grama Panchayat including the Sarpanch. So, the Sarpanch would be aware of the allegation made against him on receiving of the notice. In no way, he would be prejudiced. Learned counsel for the petitioner, at this stage, submitted that the power under a statute has to be exercised in accordance with the provision of statute and in no other manner. In the case at hand, the provision under Rule 226 (i) having not been complied with, the notice deserved to be quashed. It is also the settled principle of law that procedural law is the handmade of justice and not its mistress. It is not a tyrant but a servant. So, in the present case, even if requisition was not made to the Sarpanch for holding the special meeting to initiate no confidence motion against her, it would not be fatal, as no prejudice is caused to her thereby. Where non-compliance of the procedure would prejudice doing justice to the parties, then only it is mandatory, otherwise not.

9. As required under Section 24 (2) (a) (c) of the G.P. Act, the Sub-Divisional Officer is required to give notice along with a copy of the requisition and the resolution proposed to be moved to the members of the Grama Panchayat. Learned counsel for the petitioners contended that no such resolution was served on any of the petitioners. So, the notice as well as the meeting recording want of confidence in the Sarpanch could not be supported by law. In support of his submission, learned counsel for the petitioners relied on the decision ***Smt. Kamala Tiria v. State of Orissa and others*** 1991 (2001) C.L.T. 159, where this Court held in a case under Section 39 (2) (a) of the Orissa Zilla Parishad Act, 1999, which is pari-

materia with the provision contained under Section 24 (2) (a) (c) of the G.P. Act that unless the proposed resolution to be moved in the meeting to be specially convened by the Divisional Commissioner for recording want of confidence in the President of Zilla Parishad, resolution passed in that meeting recording want of confidence in the petitioner cannot be supported by law. On the other hand, learned Addl. Government Advocate submitted that the resolution proposed to be moved in the meeting along with requisition and notice were sent to all members of the Gram Panchayat. On perusal of the record in W.P.(C) No.14559 of 2009 it is seen that a proposed resolution was also sent to the Sub-Collector, Angul which was also received by the petitioners in W.P.(C) No.16024 of 2009 as held earlier. The petitioner-Sarpanch in her writ petition has not taken the plea that she did not receive the notice along with requisition and the proposed resolution. Had she not received any of those documents, she would not have forgotten to take such a plea in the writ petition. So, the decision cited in Smt. Kamala Tiria shall not be applicable in the present case.

10. Under such circumstances both the writ petitions are dismissed and the Collector, Angul is directed to publish the result of no confidence motion initiated against the Sarpanch, Namitarani Pradhan (petitioner in W.P.(C) No.14559 of 2009) forthwith. No cost.

Writ petitions dismissed.

2010 (I) ILR-CUT- 536

INDRAJIT MAHANTY, J.

SYED NAZAM AHMED @ SAYAD NAJAM AHMED. -V- REPUBLIC OF INDIA.*

FEBRUARY 9,2010.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.243.

Prayer to recall P.Ws.5,6 & 8 for further Cross-examination – Case registered in 2001 and charge-sheet filed 7 years ago – All the above witnesses were Cross-examined at substantial length even P.W.6 was again recalled and was further Cross-examined – Held, learned C.B.I. Judge was correct that there was no real justification to issue summons to those witnesses for the ends of justice. (Para 15)

Case laws Referred to:-

1.80(1995) CLT 410 : (Basudev Purohit -V- Republic of India & Anr.).
2.(2007)26 OCR 124 : (Dara Singh -V- Republic of India)
3.2006 (33) OCR SC 499 : (Nihar Khan -V-State of Uttaranchal).

For Petitioner - M/s.D.P.Sarangi, K.C.Baral, P.C.Patnaik & N.C.Singh.
For Opp.Party – Mr.S.K.Padhi, Sr.Advocate.

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*CRLMC NO. 1628 OF 2008. In the matter of an application under Section 482 of the Code of Criminal Procedure.

I.MAHANTY, J. In the present application under Section 482 of the Code of Criminal Procedure, the petitioner-Syed Nazam Ahmed @ Sayad Najam Ahmed has sought to challenge the order dated 17.7.2008 passed by the learned Special Judge (C.B.I.), Bhubaneswar in T.R. No.22 of 2002 rejecting a petition filed by the present petitioner-accused, under Section 243 Cr.P.C. with a prayer to issue process for compelling the attendance of P.Ws. 5, 6 and 8 in the court for cross-examination by the defence.

2. On perusal of the records, it appears that the case was registered before the learned Special Judge (C.B.I.), Bhubaneswar on 26.6.2001 against one Sri Ajay Kumar Behera, Ex-Branch Manager, Allahabad Bank, Temple Marg Branch, Bhubaneswar, as well as, Syed Nazam Ahmed (present petitioner), proprietor , Zenith Mining Pvt. Ltd., Biju Pattnaik Chhak, Tulsipur, Cuttack and charge-sheet was filed against both the accused persons under Section 120-B/420 I.P.C. and Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988.

3. Mr. Sarangi, learned counsel appearing for the petitioner submitted that the impugned order suffers from lack of application of judicial mind in rejecting the petitioner's application under Section 243 of Cr.P.C. for summoning witnesses. He further submitted that on perusal of the impugned order, it would be clear that the learned Spl. Judge (CBI) lost sight of the appropriate provisions of law i.e. Section 243 Cr.P.C and instead, relied on a judgment rendered in a case arising out of an application under Section 311 of Cr.P.C.

He asserted that even though the decision reported in 80 (1995) CLT 410 **(Basudev Purohit v. Republic of India and another)** was cited on behalf of the accused petitioner, in support of his application under Section 243 Cr.P.C., the learned Special Judge (CBI) rejected the petition, without even referring to the said decision. He submitted that in view of the decision in the case of Basudev Purohit (supra) since the application was filed under Section 248 Cr.P.C., the Special Judge had "no discretion" to refuse to issue process to compel the attendance of the witnesses sought for by the accused-petitioner.

4. Sri S.K.Padhi, learned Senior Counsel appearing for the C.B.I., on the other hand, submitted that the case records would reveal that substantial opportunity was granted to the accused-petitioner not only to cross-examine the prosecution witnesses, in the proceeding, in addition to which, the petitioner had filed a petition on 10.1.2008 seeking to recall P.Ws. 1, 2, 6 and 7, and by order dated 11.1.2008 such petition was allowed in their favour.

5. On 19.2.2008, P.Ws. 1, 2, 6 and 7 were present on recall by defence for further cross-examination and the said witnesses were further cross-examined by defence counsel and were duly discharged. Thereafter, it appears that on 1.7.2008, after the cross-examination of the Investigating Officer (I.O.) was completed and more importantly the accused statements were recorded on 2nd, 8th and 9th of July, 2008. Thereafter, the matter stood adjourned for submission of list of defence witnesses and after being adjourned from time to time, ultimately at this stage, the accused-petitioner filed a petition under Section 243 Cr.P.C. for recalling P.Ws. 5, 6 and 8 for further cross-examination and the rejection of which is the subject matter of the present challenge.

6. Sri Padhi strenuously submitted that the application of the petitioner ought to be rejected at the threshold since the petitioner has not approached this Hon'ble Court with clean hands.

He asserted that the petitioner in the present application before the High Court has merely stated that the accused was charged under Sections 120-B and 420 I.P.C., without in any manner, disclosing the fact that the accused was also charged for offence under Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988 along with the other co-accused. Learned counsel submitted that due to the aforesaid "purposeful omission" on the part of the accused petitioner, an interim order, directing stay of further proceeding in the matter was granted, obviously, this Court being unaware that the accused-petitioner is also facing trial for charges under the P.C. Act.

Sri Padhi, learned counsel for the C.B.I. further submitted that there has been no misappreciation of fact or law by the learned Special Judge

(C.B.I.) in passing the impugned order. The court below was fully aware that the accused petitioner had filed an application under Section 243 Cr.P.C., but since the guiding principles laid down thereunder being similar to the principles stipulated under Section 311 Cr.P.C., no objection can be validly raised against the learned trial courts' reliance on the judgment of the Hon'ble Supreme Court in the case of **Dara Singh v. Republic of India**, (2007) 26 OCR 124 and a later judgment of the Hon'ble Supreme Court in the case of **Nihar Khan v. State of Uttaranchal**, 2006 (33) OCR SC 499. Learned counsel asserted that, even though the aforesaid two cases were passed in the context of applications made by the accused-petitioner therein under Section 311 Cr.P.C., the principles laid down therein clearly apply to an application under Section 243 Cr.P.C. as well.

In conclusion, Mr. Padhi, learned counsel submitted that although the case was registered in the year 2001 and the charge-sheet was filed 7 years ago, under same plea or the other, the accused petitioner has managed to delay to conclusion of the trial and, therefore, asserted that the present application being devoid of any merit and the same may be dismissed.

7. Having noted the contentions of the learned counsels for the parties, it became essential to first take note of **Section 243 Cr.P.C.** which is quoted hereinbelow:

> "243. Evidence for defence.-(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.
>
> (2) If the accused, after he had entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing.
>
> Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.
>
> (3) The Magistrate may, before summoning any witness on an application under sub-section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court."

8. Learned counsel for the petitioner provided a copy of the petition filed before the Special Judge, C.B.I. (which is the subject matter of challenge herein) and the grounds of his prayer for issue of summons to P.Ws. 5, 6 and 8 cross-examination as noted at paragraph-3 is quoted hereunder for convenience:

> " 3. That, though P.Ws. 5, 6 and 8 have already been cross-examined before entering upon the defence, their further cross-examination in defence is highly necessary for the ends of justice since P.W.5 has stated that the account was opened on the strength of a Power of Attorney by the accused Syed Nazam Ahmed on behalf of Basudev Agarwal though P.W.5 was not in the concerned Bank during the relevant period; P.W.-6 has stated that Nazam Ahmed received a cheque Book by signing in the cheque issuing Register vide Ext.-10/2, though he was not working in the concerned Branch in the relevant time and P.W.8 state that the accused signed in his presence in the Power of Attorney vide Ext-13/2, though in fact he never executed any Power of Attorney in favour of Syed Nazam Ahmed."

9. It is the case of **Basudev Purohit v. Republic of India and another**, 80 (1995) C.L.T. 410, Hon'ble Justice A. Pasayat (His Lordship the then was) while granting liberty to the accused-petitioner to file a fresh petition indicating the details and the reasons seeking further cross-examination to be filed came to set aside the further direction, contained in the impugned order therein, directing deposit of Rs.3000.00 towards the expenses of the defence witnesses. It was in the context of challenge to the direction of the trial court "to deposit cost" that the Hon'ble Court proceeded analyzing **Section 243 Cr.P.C.** In the said judgment, the Court held as follows:

> " The Magistrate has a duty to issue process to compel the attendance of witnesses named by the accused except where the Magistrate considers that the object for asking for such process is to cause vexation, delay or to defeat the ends of justice. The language of this sub-section is imperative and the Court has no discretion to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence, **unless** it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record. The decisive ground under the section is that before a Magistrate refuses to summon a witness, he should ascertain from the accused briefly the substance of the witness or the point to prove which he is being summoned, and then if he comes to the conclusion that this witness is being summoned for the purpose of vexation or

delay or for defeating the ends of justice he is entitled, after giving his grounds in writing, to refuse to issue process."

After came to the aforesaid conclusion, the Hon'ble Court quashed the direction pertaining to the deposit of costs and remanded the matter for re-consideration afresh.

10. The Section 243 Cr.P.C. as noted hereinabove clearly vests in the defence a right to apply to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground of vexation or delay or for defeating the ends of justice but most importantly, in the present case, the accused petitioner has sought for issue of process for cross-examinations of P.Ws. 5, 6 and 8. In so far as this specific prayer is concerned, **Section 243 Cr.P.C**. as well as proviso thereto is quoted hereinbelow:

> "**Evidence for defence**.-(2) If the accused, after he had entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:
>
> **Provided** that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness **shall not be compelled** under this Section, **unless** the Magistrate is satisfied that it is necessary for the ends of justice."

In terms of the aforesaid proviso, it is clear that if an accused seeks issue of process to a witness for cross-examination of a person who has already been cross-examined on his behalf or had the opportunity to cross-examining any witness before entering his defence, the attendance of such witness shall not be compelled under this Section, unless the Magistrate is satisfied that it is necessary for the ends of justice."

11. On a bare perusal of the aforesaid provision of law while it is clear that the accused does possess a right under Section 243 Cr.P.C. to seek for issue of summons to defence witnesses, but such a right does not extend to the issue of "summons for an witness who has already been examined" or for whom, an opportunity to cross-examine had been granted. I am of the considered view that the Legislative mandate is clear and the proviso clearly

stipulates that when an accused has cross-examined or had the opportunity to cross-examine any witness before entering his defence, the attendance of such an witness, shall not be compelled under the Section **unless** the Magistrate is satisfied that it is necessary to do so for the "ends of justice".

In view of the aforesaid statutory provision, no doubt that the defence has to be afforded full opportunity to lead their defence and for such purpose, all witnesses covered under Sub-Section (2) of Section 243 Cr.P.C, an accused has a lawful right to seek the issue of summon and such a prayer could only be refused on the ground that it is made for the purpose of vexation or delay made for defeating ends of justice. But the Cr.P.C. has stipulated a separate/distinct principle for dealing with applications seeking issue of summons to those witnesses who have already been cross-examined or an opportunity of cross-examination had been afforded before entering on the defence of the accused. For such witnesses, it is clear that the Legislature has used "negative language" and has categorically stipulated that such witnesses shall not be compelled to attend unless the Magistrate is satisfied that it is necessary for the "ends of justice".

12. If an evaluation is made between the Sections 243 and 311 Cr.P.C., whereas Section 311 Cr.P.C. vests authority in the trial Court at any stage of any court trial or the proceeding, to direct any person for re-examination, the court shall issue summons or recall or re-examination of such person, only if his evidence appears to it to be essential to be just decision of the case, the proviso of Section 243 Cr.P.C. prescribes "ends of justice" as the basis on which a Magistrate may direct issue of summons to persons already examined. Section 311 Cr.P.C. uses the words "essential to the just decision of the case." Although the language used in the said provisions are different, the object of both the provisions appear to be the same since the terms "essential to the just decision of the case" and "necessary for the ends of justice" are both to subserve the cause of justice.

13. Therefore, the decision relied upon by the trial court in the case of **Dara Singh v. Republic of India, 2003 (26) OCR 124** as well as the case of **Nihar Khan v. State of Uttaranchal, 2006 (33) OCR 499** though passed in the context of an application under Section 311 Cr.P.C., in my considered view are also fully applicable to applications made under Section 243(2) Cr.P.C. Therefore, I find no justification in the argument advanced by the learned counsel for the petitioner that the judgment relied upon by the learned Special Judge in any manner indicated non-application of judicial mind and on the contrary, I am of the considered view that the said judgment fully applies to the facts of the present case.

14. Therefore, the submissions made by the learned counsel for the petitioner, as if the judgment in the case of **Basudev Purohit** (supra) laid down the principles that a Magistrate was duty bound to issue process to

compel attendance of the witness named by the accused is subject to the proviso and the said power or right is not an absolute right, for the reasons noted above.

15. On consideration of the facts as noted hereinabove and since the records indicates that P.W.5 was examined on 20.3.2006 and was cross-examined by the accused-petitioner on 21.3.2006 at substantial length and further since P.W.6 was examined on 18.5.2006 and substantial cross-examined for two days and whereafter, on an application made by the accused-petitioner, he was again recalled on 19.2.2008 and had also been afforded further opportunity of cross-examination. It also appears that P.W.8 was examined on 1.11.2006 and had been cross-examined at length by the petitioner on the same day, there appears to be no real justification for recalling the said witnesses and I am in respectful agreement with the views expressed by the learned C.B.I. Judge in the present case. The issues noted in paragraph-3 of the petition filed by the accused petitioner, do not satisfied the requirement of Section 243 Cr.P.C. that it is not necessary for the ends of justice, to issue summons to P.Ws. 5, 6 and 8. Therefore, the rejection of the said petition is wholly justified both in fact as well as in law.

15. Accordingly, the CRLMC stands dismissed.

2010 (I) ILR-CUT- 543

INDRAJIT MAHANTY, J.

SISTER MEENA LALITA BORWA -V- STATE & ORS. & THOMAS CHELLAN & ORS. -V- STATE OF ORISSA & ORS.*

MARCH 30,2010.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF1974) – SEC.407.

Transfer of Session Trial from the Court of Addl.Sessions Judge, Fast Track Court-I at Phulbani to Cuttack – Large scale communal violence in Kandhamal district – Petitioner was allegedly sexually assaulted, raped and paraded naked by the mob – Petitioner claiming threat to her life so also the witnesses.

Law is well settled that the State has a definite role to play in protecting the witnesses, especially in sensitive cases, involving those in power, who have political patronage and could wield muscle and money power in order to avoid the trial getting tainted and de-railed and truth becoming a casualty – The State as a protector of its citizens has to ensure that during a trial in Court the witnesses could safely depose the truth without any fear of being hunted by those against whom he has deposed – The object of the Criminal trial is not only to mete out justice to accused but also to protect the innocent – A Criminal trial is in essence a search for truth – In our Criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if such witnesses, who are the eyes and ears of justice system can come fearlessly and depose the truth in Court – So the witnesses need to be protected by the state to ensure that Criminal proceedings do not become mere mock trials – Held, transfer applications are allowed with certain directions.

(Para 14,15)

Case laws Referred to:-

1.(2008)3 SCC 602 : (Himanshu Singh Sabharwal -V-State of Madhya Pradesh &Ors

2.(1979) 4 SCC 167 : (Maneka Sanjay Gandhi -V- Rani Jethmalani).

3.AIR 1958 SC 309 : (G.X.Francis & Ors. -V-Banke Bihari Singh & Anr.).

4.(2004) 4 SCC 158 : (Zahira Habibulla H.Sheikh & Anr.-V- State of Gujrat & Ors.)

For Petitioners – Mrs. J.Choudhury, Sr.Advocate.
M/s.Sujata Jena, B.P.Chhualsingh, R.R.Jena & S.Bindhani.

For Opp.Party No.1 – Mr. Ashok Mohanty, Sr.Advocate (Advocate General)

For Opp.parties 2,3,4 - M/s.D.P.Dhal, K.Das, S.K.Tripathy, A.R.Mishra & 6,7,8 & 11. S.Mohpatra.

For Opp.Parties 5 & 9 – None
For Opp.Party No.10 - Mr.B.K.Dash.

*TRP (CRL.) NOS. 15 & 17 OF 2009. In the matter of an application under Section 407 read with Section 482 of the Code of Criminal Procedure.

I.MAHANTY, J. These transfer applications under Section 407 read with Section 482 of the Code of Criminal Procedure have been filed by Sister Meena Lalita Borwa (Petitioner in TRPCRL No.15 of 2009) and Thomas Chellan and others (Petitioners in TRPCRL No.17 of 2009) seeking transfer of Sessions Trial No.1 of 2009, arising out of Balliguda P.S. Case No.70 of 2008, corresponding to CID CB Case No.39 of 2008 and G.R. Case no.188 of 2008 of the court of learned S.D.J.M., Balliguda, pending trial in the court of learned Additional Sessions Judge, Fast Track Court-1, at Phulbani to Cuttack. Whereas Sister Meena Lalita Borwa (Petitioner in TRPCRL 15 of 2009) is the victim/informant and Thomas Chellan and two others (Petitioners in TRPCRL No.17 of 2009) are witnesses in the aforementioned G.R. Case for the alleged commission of offence under Sections 147, 148, 324, 354, 355, 294, 506, 376(2)(g) read with Section 149 of the Indian Penal Code.

2. Mrs. J.Choudhury, learned Senior Advocate, appearing for the petitioner-Sister Meena Lalita Borwa submitted that, while the petitioner was working as a nun in the Catholic Church at Kandhamal, she became a victim of a ghastly rape and sexual assault, which is the subject matter for trial.

It is submitted that, in the month of December, 2007 communal violence broke out in Kandhamal District, Orissa and while tension continued to prevail in the said area, Swami Laxmanananda Saraswati was murdered in August 2008, once again, resulting in large scale violence in Kandhamal district and other parts of Orissa. During such violence, on 25.8.2008, Sister Meena Lalita Borwa was allegedly sexually assaulted, raped and paraded naked by a mob of 40-50 persons. Complaint in this regard was lodged at Baliguda P.S. on 26.8.2008 and was registered as P.S. Case No.70 of 2008, corresponding to CID CB Orissa Case No.39 of 2008 dated 4.10.2008.

Ms. Choudhury stated that, Sister Meena Lalita Borwa was brought to Delhi for treatment, since she was suffering from serious Post-traumatic Stress Disorder and was undergoing treatment in St Stephen's Hospital, Delhi. It is further stated that the petitioner-victim Sister Meena Lalita Borwa had been summoned to appear at a T.I.Parade to be held at Balliguda, to identify the accused persons. The petitioner claiming threat to her life moved before this Court in Crl.M.C. No.2777 of 2008 praying therein to transfer the T.I.Parade from Balliguda to Cuttack and by order dated 5.12.2008, directions were issued allowing the said petition by directing conduct of the T.I.Parade at Cuttack.

2. Ms. Choudhury submitted that the petitioners were still being threatened not to go to Baliguda or to participate in the trial and the witnesses were also threatened with dire consequences and hence are scared to attend the trial in Phulbani. She has alleged that the situation in Phulbani continues to be tense and the friends and relatives of the accused being residents of Phulbani, the petitioners apprehend danger to their lives and also the possibility of hampering a free and fair trial. Ms. Choudhury submitted that the situation in Kandhamal continues to be communally volatile and has cited various instances where witnesses have either turned hostile and/or have approached the trial court seeking protection. In the light of the aforesaid facts, learned counsel for the petitioners submitted that this Court is empowered under Section 407 Cr.PC. to transfer the trial if there is any apprehension of an impartial or fair trial and also keeping in view the convenience of the parties and witnesses.

4. Reliance was placed by the learned counsel for the petitioners on various judgments of the Hon'ble Supreme Court in the cases of (i) **Himanshu Singh Sabharwal v. State of Madhya Pradesh and others,** (2008) 3 SCC 602 (ii) **Maneka Sanjay Gandhi v. Rani Jethmalani**, (1979) 4 SCC 167 (iii) **G.X.Francis and others v. Banke Bihari Singh and another**, AIR 1958 SC 309 and (iv) **Zahira Habibulla H. Sheikh and another v. State of Gujrat and others**, (2004) 4 SCC 158.

5. Sri Ashok Mohanty, learned Advocate General, on behalf of the State, placed reliance on an affidavit filed by the State, denying all the allegations made by the petitioners regarding the law and order situation in Kandhamal district. He also denied all allegations regarding the competence of the Investigating Agency or the Public Prosecutor as well as the allegations against the manner in which the trial is conducted. It is contended by the learned Advocate General that the situation in Kandhamal district is now completely normal and peaceful and two Fast Track Courts have been set up for expeditious trial of all the cases arising out of communal violence in the year 2007 as well as the violence that followed the death of Late Swami Laxmanananda. It is stated that trial of a number of cases are being conducted in a free and fair manner and since the Crime Branch has taken over the charge of investigation, there should not be any doubt for the impartiality of the said investigating agency.

Learned Advocate General further stated that as Special Public Prosecutors have been appointed, their impartiality cannot be doubted and extensively argued that a substantially large number of trials have ended with conviction. It is further stated that the Investigating Agencies are providing all necessary assistance in cases where witnesses seek security or directions were issued by the tria court. The learned Advocate General also reiterated the offer made by the State to provide all necessary

assistance/security to the prosecutrix as well as witnesses, as may be required.

6. Sri D.P.Dhal as well as Sri B.K.Das, learned counsels for the opposite parties state that, they have no objection to the prayer of the petitioners for transfer of the trial of the case to any other place, but since a number of accused persons continue to remain in custody pending trial, the learned counsels pray that directions may be issued for early conclusion of the trial.

7. Ms. Choudhury, learned Senior Advocate appearing for the petitioner drew the attention of the Court to the averments made by the petitioners in Paragraphs 11, 12 & 13 of the transfer petitions and asserted that the same have not been specifically controverted nor denied in the counter affidavit of the State, sworn to by Sri Dillip Kumar Mohanty, Inspector of Police, CID CB. Relevant Paragraphs both of the writ petition and the counter affidavit are noted hereinbelow:

(In petition)	**(in counter affidavit)**
11. That under Section 407 of Cr.P.C. this Hon'ble Court is empowered to transfer the trial if there is an apprehension of impartial or fair trial and also this Hon'ble Court can direct for transfer of case keeping in view the convenience of the parties and the witnesses.	11. That the averments made in Paragraph-11 of the affidavit needs no comments.
12. That in this case as it has been stated in the forgoing paragraphs not only the informant but also the witnesses are threatened by the accused persons who are the local people of Phulbani and the aggressors of the said communal violence. Therefore they are apprehending danger to their lives and limbs if they will go to Phulbani. This fact is been further fortified from the fact that the informant and the witnesses are still staying out side the Kandhamal District.	12. That in reply to the averments made in Paragraph-12 of the affidavit, it is humbly stated that if any witness being apprehensive of any offensive activities from the side of the accused persons, solicits security, the State is committed to provide the same without any sense of fear and favour.

13. That it has been held by the Hon'ble Supreme Court of India in a decision as reported in AIR 2008 (SC) page 1943 at Paragraph (a) at page 1947: "fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, witnesses or the cause which is being tried is being eliminated. If the witnesses are threatened or are found to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial".	13. That in reply to the averments made in Paragraph-3 of the affidavit, it is humbly stated that if a witness, in course of trial turned hostile to the prosecution, the State machinery has nothing to do with that, only the conducting Public Prosecutor with leave of the court can be permitted to put leading questions to such witnesses u/s 154 Evidence Act. The witness who denies his examination by the I.O., his veracity is open to be tested by the court while scrutinizing the evidence in toto.

8. The learned counsel for the petitioners submitted that in view of the law settled by the Hon'ble Supreme Court in the judgments cited above, the transfer applications of the petitioners may be allowed and directions be issued, similar to the directions issued by the Hon'ble Supreme Court in the case of **Himanshu Singh Sabharwal** (supra), especially in connection with the directions pertaining to those witnesses who have already been examined and had resiled from their earlier statements.

9. Learned Advocate General on behalf of the State sought for an adjournment, in order to obtain further instructions from the State and on 25.3.2010 filed a memo to the following effect:

> "In view of the averments made in this application that the petitioner is undergoing physical, mental and traumatic stress, the Government, for the larger interest of justice and transparency, has no objection for transfer of this particular case. However, the allegations regarding the overall law ad order situation in Kandhamal District and partiality of the Investigating Agency or the Public

Prosecutor and the manner of trial is categorically denied. This non-objection may not be construed as a reflection or acceptance of the allegations made in the transfer application as the situation in Kandhamal is now completely normal and peaceful and in fact two Special Fast Track Courts have been set-up for expeditious trial of these type of cases and the trials are conducted in a free and fair manner. The Crime Branch has taken over the charge of investigation and there should not be any doubt on the impartiality of the said Investigating Agency. Similarly, Special (cader) Public Prosecutor has been appointed whose sincerity and impartiality can not be doubted. As such the concession for transferring the case should not be construed as acceptance of the allegation regarding over all law and order situation prevalent in Kandhamal District and/or the impartiality of the Investigating Agency or the Public Prosecutor or non-existence of conducive atmosphere for free and fair trial in the district. Since the concession is made by taking into consideration the peculiar facts and circumstances of the case, this should not be treated as a precedent for other cases on same or similar grounds."

10. In the light of the aforesaid contentions of the parties, it now becomes necessary to deal with the various citations relied upon by the petitioners:-

In the case of **G.X.Francis and others** (supra), Hon'ble Vivian Bose, J. of the Supreme Court dealt with an application filed under Section 527 of Cr.P.C. (old Code) for the transfer of a criminal case from Jashpurnagar in the State of Madhya Pradesh to some other State, preferably New Delhi or Orissa and after taking note of the averments made by the appellants and respondents, came to the conclusion in Paragraph-17 which is quoted herein below:

"17. We desire to emphasis that we are taking this step because what would otherwise be a petty defamation case has been magnified by the complainant and by local passion into a communal conflict in which large sections of the local population appear to be ranged on one side or the other, and the words that are bandied back and forth are not aimed at this individual or that but are by one community against another."

11. In the case of **Maneka Sanjay Gandhi** (supra), Hon'ble Justice Krishna Iyer dealt with a case of transfer of a criminal case of defamation from Bombay to Delhi and came to hold that while it may be true that the petitioner attracts a crowd in Bombay and indeed, it is true that many controversial figures in public life their presence in a public place gathers partisans for and against, leading to cries and catcalls or 'Jais' or 'zindabads

and when such crowds press into a court hall, it is possible that some pushing, some nudging, some brash ogling or angry staring may occur in the rough and tumble resulting in ruffled feelings for the victim, yet, the same shall be a far cry from concluding that the peace inside the court has broken down, that calm inside the court is beyond restoration or that a tranquil atmosphere for holding the trial is beyond accomplishment or that operational freedom for judge, parties, advocates and witnesses has ceased to exist. While rejecting the application for transfer Hon'ble Krishna Iyer, J. concluded in Paragraph-9 of the said judgment which is quoted herein below:

> "9. The Magistrate is the master of the orderly conduct of court proceedings and his authority shall not hang limp if his business is stalled by brow-beating. It is his duty to clear the court of confusion, yelling and nerve-racking gestures which mar the serious tone of judicial hearing. The officials whose duty is to keep the public peace shall, on requisition, be at the command of the court to help it run its process smoothly. When the situation gets out of hand the remedy of transfer surgery may be prescribed. Every fleeting rumpus should not lead to a removal of the case as it may prove to be a frequent surrender of justice to commotion. The magistrate shall take measures to enforce conditions where the court functions free and fair and agitational or muscle tactics yield no dividends. If that fails, the parties have freedom to renew their motion under Section 406 of the Criminal Procedure Code. For, where tranquil court justice is a casualty the collapse of our constitutional order is an inevitability."

12. In the case of **Zahira Habibulla H. Sheikh and another** (supra)**,** Hon'ble Dr. Arijit Pasayat, J. came to hold in Paragraphs 38 to 44 of the said judgment as follows:

> "38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

41. "Witnesses", as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and

money power, to avert the trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals/terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conduct which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this courts have a vital role to play.

43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The

prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In Mohanlal v. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object or getting the evidence in aid of a just decision and to uphold the truth."

13. In the latest judgment of the Hon'ble Supreme Court, in the case of **Himanshu Singh Sabharwal** (supra)**, Dr. Arijit Pasayat, J.,** once again reiterated His Lordship's view expressed in the case of **Zahira Habibulla H. Sheikh** (supra), and allowed the application for transfer with the following directions:

"6. We appreciate the fair stand of the State as presented by Mr. Sorabjee and learned counsel for the accused persons. Without, therefore, examining the correctness of the allegations made, we

direct that the case in question i.e. Sessions Case No.291 of 2006 pending in the Court of Sessions Judge, Ujjain be transferred to the Court of Sessions Judge, Nagpur, Maharashtra. It shall be open to the learned Sessions Judge to either deal with the case himself or to allot it to an appropriate court. The trial will commence from the stage at which it was when the order of stay was passed by this Court. The petitioner who is the son of the deceased in the peculiar facts of the case is permitted to suggest two names to function as Public Prosecutor. Similarly, two names shall be given by the respondent State. It shall be for the learned Sessions Judge, Nagpur to appoint a Public Prosecutor from the names to be suggested. The fees and other expenses of the Public Prosecutor shall be borne by the State of M.P. It shall be open to the Public Prosecutor to be appointed to seek recall of any witness already examined in terms of Section 311 of Code. This shall be in addition to P.Ws 32, 33 and 34 about whom directions have been given earlier in this order."

14. It is now well settled principle of law that the State has a definite role to play in protecting the witnesses, especially in sensitive cases, involving those in power, who have political patronage and could wield muscle and money power in order to avoid the trial getting tainted and de-railed and truth becoming a casualty. The State as a protector of its citizens also has to ensure that during a trial in court, the witness could safely depose the truth without any fear of being hunted by those against whom he has deposed. This is a prime requirement of law and the criminal justice system, since the object of the criminal trial, is not only to mete out justice to accused, but also to protect the innocent. A criminal trial is in essence a search for truth. In our criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if such witnesses, who are the eyes and ears of justice system can come fearlessly and depose the truth in Court. Therefore, witnesses need to be protected by the State (in appropriate cases) in order to ensure that the interest of justice are best served and to ensure that criminal proceedings do not became mere mock trials.

15. In the light of the aforesaid circumstances as narrated hereinabove and various settled issues of law pertaining to an application for transfer of a criminal trial, as laid down by the Hon'ble Supreme Court, in the judgments referred hereinabove, since a very fair stand has been taken by the State of Orissa as exhibited in the memo filed on its behalf, by Sri Ashok Kumar Mohanty, Advocate General, as well as, the consent given by Sri Dhal and Sri Dash, learned counsels appearing for the accused persons, I am not called upon nor required to examine the correctness or otherwise of the allegations made by the petitioners, which has been strongly denied by the

State. Hence for the ends of justice, I allow the transfer applications by issuing the following directions:

(i) The Sessions Trial No.1 of 2009 pending trial in the court of learned Additional Sessions Judge, Fast Track Court-1, at Phulbani be transferred to the Court of Sessions Judge, Cuttack.

(ii) It shall be open for the learned Sessions Judge to either deal with the case himself or to allot it to an appropriate court.

(iii) The trial shall commence from the stage at which it was when the order of stay was passed by this Court.

(iv) The learned Sessions Judge, Cuttack shall appoint a special Public Prosecutor having adequate standing in the Bar. The fees and other expenses of the Public Prosecutor shall be borne by the State of Orissa.

(v) The Special Public Prosecutor shall seek recall of the Prosecution Witness Nos. 2, 5, 6 and 9 in terms of Section 311 of the Code, apart from any other witnesses whose recall may also be deemed necessary in the interest of justice.

(vi) The Special Public Prosecutor may also seek examination of the victim/prosecutrix 'in camera' if circumstances so warrant.

(vii) Orissa State Police shall also provide all necessary assistance and security/escort to both the Prosecutrix as well as all witnesses and when necessary also provide them suitable/safe accommodation at safe location prior to their production before the trial court for recording their evidence.

All efforts should be made by the learned Sessions Judge or the trial court to whom the matter is transferred, to take up trial on a day-to-day basis and to conclude the same at the earliest.

16. It would be relevant to note herein that these directions have been issued keeping in view of the concession given by the State of Orissa in its memo dated 25.3.2010 as well as the consent of the learned counsels appearing for the accused-opposite parties.

17. The transfer petitions are accordingly allowed in terms of the directions noted in Paragraph-15 hereinabove.

Writ petition allowed.

2010 (I) ILR-CUT- 555

I.MAHANTY, J & C.R.DASH, J.

STATE OF ORISSA, REP.BY THE COMMISSIONER OF SALES TAX, ORISSA -V-
M/S. BANITA, JAIL ROAD, CTC.*

OCTOBER 30, 2009.

ORISSA SALES TAX ACT, 1947 (ACT NO.14 OF 1947) – SEC.24(1).

(A) ***Reference – Whether an assessee deals with pure silk saree or not is a question of fact –Yes.***

(Para 13)

ORISSA SALES TAX ACT, 1947 (ACT NO.14 OF 1947) – SEC.12(5) & 12(8)

(C) ***"Sale suppression" – Meaning of – Artificial silk sarees sold by the dealer with the label of "pure silk" – Such a course has been adopted by the dealer for promotion of sale even if the same is admitted by the dealer before the authority - Held the same will not amount to "sale suppression".***

(Para 6)

Case law Referred to:

AIR 1957 SC 49 : (Shree Meenakshi Mills Ltd.,Mdurai.-V-Commissioner of Income-tax, Madras).

For Petitioner – M/s. Mr.R.P.Kar
Addl. Standing Counsel (C.T.)

For Opp.Party – Mr.M.Agrawal.

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*TREV. NO.120 OF 2001. In the matter of an application for reference filed under section 24(1) of the Orissa Sales Tax Act, 1947 by the State arising out of the order dated 25.01.1995 passed by the Accounts Member, Orissa Sales Tax Tribunal, Cuttack in Second Appeal No.556-561 of 1990 and Second Appeal No.765-766 of 1990-91.

C.R. DASH, J. The question referred to by the Orissa Sales Tax Tribunal under Section 24(1) of the Orissa Sales Tax Act, 1947 (before amendment by Act 8 of 2000) runs thus

> "Whether on the facts and in the circumstances of the case learned Sales Tax Tribunal is justified to conclude that the assessee has no dealing on pure silk sarees merely because such pure silk sarees costs Rs.250/- per piece during that period and thereby annulling the assessment made for the year 1986-87 under Section 12(8) of the Orissa Sales Tax Act, 1947 which is contrary to the facts admitted by the assessee ?"

2. In view of the amendment of the Orissa Sales Tax Act, 1947 (hereinafter referred to as 'the Act'), the reference numbered earlier as SJC No 131 of 1995 has been registered as revision and renumbered as TREV No. 120 of 2001.

3. It is submitted at the Bar that irrespective of the nomenclature, an order of the Tribunal can be impugned before the High Court under Section 24 of the Act only on the ground that the Tribunal has either failed to decide or decided erroneously any question of law. Such being the admitted position, the question of law raised in the reference as quoted supra is reiterated before us by Mr. R.P. Kar, learned counsel for the revenue in course of hearing of this revision.

4. Facts relevant to the question referred to supra may be stated in short. On the basis of new case report No. 42 dated 22.09.1986 submitted by the Inspector of Sales Tax, Vigilance Wing, Cuttack (hereinafter referred to as 'Inspecting Officer') assessment proceeding under Section 12(5) of the Act for three assessment periods viz 1984-85, 1985-86 and 1986-87 were initiated against the opposite party. This revision is concerned with the assessment period 1986-87 only. The Inspecting Officer visited the business premises of the opposite party on 07.08.1986. He happened to detect 39 pieces of pure silk sarees (which are the subject matter of dispute in the present revision) among other articles in the stock of the opposite party kept for sale. In course of the inspection, the Inspecting Officer recorded statement of the opposite party who is alleged to have admitted that there was 39 pieces of pure silk sarees in the stock for sale which he (opposite party) sells at Rs. 250/- per piece. The Inspecting Officer on the basis of the aforesaid statement of the opposite party and other materials collected by him during inspection submitted the new case report No. 42 dated 22.09.1986 alleging suppression of regular business transaction of embroidery sarees and pure silk sarees by the opposite party.

5. In course of assessment contents of new case report was confronted to the opposite party. The opposite party denied to have any dealings in pure silk sarees during the relevant period under assessment i.e. 1986-87. He also produced his book of account before the Assessing Officer in course of assessment and explained that though he (opposite party) is dealing mainly in cotton saree and other artificial silk sarees, he is using the term 'pure silk' like other fellow businessman to attract consumers. Learned Assessing Officer on consideration of the material on record eschewed the explanation offered by the opposite party and held him guilty of suppression during the relevant assessment period i.e. 1986-87 on the basis of the following materials:-

I. Admission by the opposite party before the Inspector of Sales Tax (Vigilance) on 07.08.1986 to the effect that he deals in pure silk sarees.

II. Detection of 39 pieces of pure silk sarees by the aforesaid Inspecting Officer on physical verification of stock in trade in the business premises of the opposite party.

III. Sale memos produced by the opposite party showing sale price of each sarees which varies between Rs. 235/- to Rs. 860/-.

6. The opposite party assailed the order of the Assessing Officer in First Appeal before the learned Assistant Commissioner, Commercial Taxes who confirmed the order appealed so far as the assessment year 1986-87 is concerned. The opposite party then preferred Second Appeal before the Sales Tax Tribunal. The Tribunal on consideration of the materials on record held thus:

"…….. As regards assessment for the year 1986-87 is concerned the assessment depends on the fact of detection of 39 numbers of saree found in the stock of the dealer. On examination of the saree I feel that the same are not of pure silk made. Besides this an enquiry was caused to ascertain the lowest price of pure silk saree during the year 1986-87 and it was ascertained that during the year 1986-87 pure silk sarees were not available in the market at a cost of Rs. 250/- per piece. In view of this I feel that merely because the words pure silk was printed on the body of the sarees, the nature of sarees cannot be changed from the artificial silk saree to pure silk saree particularly when the price was Rs. 250/- only. Law envisages that tax be imposed on pure silk saree but not on artificial silk saree. In view of this there is no material to conclude that the dealer was carrying business in pure silk saree and as such it would not be proper to assess him to tax for possession of artificial silk saree only. I am therefore inclined to accept the contention of the learned advocate and accordingly the taxable turnover determined by the forums below for imposition of tax during the year 1986-87 is also annulled.

It is pertinent to mention here that in course of hearing of the Second Appeal learned counsel appearing for the dealer (present opposite party) produced before the Tribunal one pure silk saree and one piece of saree found by the Inspecting Officer on the date of his inspection i.e. 7.8.1986 and he advanced the submission that 39 pieces of sarees alleged to be of pure silk make are only artificial silk sarees with the label "pure silk", and such a course had been adopted by the dealer (opposite party here) for promotion of sale only. Learned Tribunal on inspection and comparison of both the

pieces of sarees found that the disputed sarees are much more inferior in quality compared to the pure silk saree. On such facts inter alia learned Tribunal seems to have passed the order quoted supra.

7. The statement of case by the Tribunal for reference has dwelt solely on the admission by the opposite party before the Inspecting Officer. Learned Tribunal in the impugned order on the other hand has come to the conclusion that the opposite party was not dealing in pure silk sarees during the relevant assessment period i.e. 1986-87. Such conclusion is based on following materials:-

(i). Admitted fact that the opposite party was selling the disputed sarees at Rs. 250/- per piece.

(ii) As ascertained from the market, pure silk saree was not available at Rs. 250/- per piece in the market during the relevant period.

(iii) On physical verification it was found by the Tribunal that the disputed saree is much more inferior in quality compared to the pure silk saree.

8. Mr. R.P. Kar, learned counsel for the Revenue submits that the order passed by the Tribunal is perverse inasmuch as learned Tribunal has not taken into consideration the admission made by the opposite party before the Inspecting Officer on 07.08.1986 and factum of detection of 39 pieces of pure silk sarees in course of physical stock in trade from the business premises of the opposite party. It is further contended by Mr. Kar that in reaching his conclusion the Tribunal has erred in taking into consideration the make and texture of sarees produced by the opposite party before him in course of hearing of the Second Appeal after eight and half years of the detection by the Inspector of Sales Tax (Vigilance).

Mr. M. Agrawal, learned counsel for the opposite party oppugns such contentions on the ground that the alleged admission of the opposite party before the Inspecting Officer is not sacrosanct inasmuch as from the very beginning the opposite party has been consistent on his assertion that he is not dealing in pure silk sarees. He further submits that the sarees detected by the Inspecting Officer from the Business premises of the opposite party cannot be made exigible to tax as pure silk saree, without further materials to prove that those sarees are actually pure silk sarees but, however, there is no material worth the credence to conclude that the sarees kept for sale by the opposite party on the relevant date of inspection are pure silk sarees. He further submits that the Tribunal being the final

forum of facts, has got every authority and jurisdiction to satisfy itself about the legality of the assessment; the saree in question was produced by the opposite party before the Tribunal in presence of the State representative and Tribunal in presence of State representative without objection by him, has examined the saree; the Tribunal has further compared that saree with a pure silk saree and has come to the conclusion that the saree alleged to be detected from the stock in trade of the opposite party is of inferior quality and is not a pure silk saree; and above all in reaching such a conclusion, the Tribunal has further relied on the minimum price of pure silk saree available in the market then. In view of such fact, it is submitted by learned counsel for the opposite party that the conclusion arrived at by the learned Tribunal is not perverse and there subsists no question of law to answer the reference.

9. Hon'ble Supreme Court in the case of ***Shree Meenakshi Mills Ltd. , Madurai, Vrs. Commissioner of Income-tax, Madras***; A.I.R. 1957 S.C. 49 while dealing with Section 66 of the Income-tax Act, 1922 has discussed in detail as to when a reference to the Court can be made. The position as enunciated by Hon'ble Supreme Court in the case supra for making a reference under Section 66 of the Income-tax Act may be summed up thus:

> (1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court under Section 66(1).
>
> (2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.
>
> (3) A finding on a question of fact is open to attack under Section 66 (1) as erroneous in law when there is no evidence to support it or if it is perverse. And
>
> (4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact;
>
> Viewed in the light of the aforesaid proposition of law(which also applies to the present case) it is to be seen whether the question referred by the Tribunal is one of fact or it is a mixed question of fact

and law as asserted by Mr. R.P. Kar, learned counsel for the Revenue.

10. In reaching the conclusion that the opposite party had dealings in pure silk sarees learned Assessing Officer has relied on the material facts as quoted in Paragraph-5 supra. So far as detection of 39 pieces of pure silk sarees by the Inspecting Officer on physical verification of stock in trade in the business premises of the opposite party on the relevant date is concerned, there is admittedly no material to sustain the conclusion that those are pure silk sarees except the admission by the opposite party before the Inspecting Officer on 07.08.1986. The Assessing Officer has relied on some sale memos produced by the opposite party before him showing sale prices of sarees sold by him that varies between Rs. 235/- to Rs. 860/-. There is, however, nothing on record to show or suggest that the opposite party has sold any saree like the bulk detected with the label of "pure silk" saree at a price more than Rs. 250/- per piece. The finding of the Assessing Officer on this aspect regarding variance of sale price of sarees between Rs. 235/- to Rs. 860/- is too far fetched inasmuch as there is nothing to connect the sale memos with a higher price tag with the sale of sarees like the bulk detected with the label of "pure silk". In view of such position, findings of learned Assessing Officer has no basis except the alleged admission of the opposite party recorded on 07.08.1986 and it is fairly submitted by Mr. R.P. Kar, learned counsel for the Revenue that the aforesaid alleged admission by the opposite party before the Inspecting Officer is the sole basis of assessment and the same is also the sole basis of reference to this Court by the Tribunal as found from the question for reference.

11. Learned authorities of fora below taking into consideration the number of facts and especially the admission of the opposite party as recorded by the Inspecting Officer on 07.08.1986 have come to two divergent conclusions. As discussed supra making the aforesaid statement/admission of the opposite party the sole basis for consideration, learned Assessing Officer and the First Appellate Authority have concluded that the opposite party was dealing in pure silk saree during the relevant period of assessment i.e. 1986-87. The Tribunal on the other hand, taking some more materials as discussed supra into consideration has held that the opposite party was not dealing in pure silk saree during the relevant period. Such conclusions are outcome of inference from a bundle of facts, probative effect of which we refrain ourselves from discussing in view of the nature of present lis and scope of our revisional jurisdiction. The resultant inference as to whether the opposite party was dealing in pure silk saree during the relevant period of assessment is itself is a question of fact. It is well settled in law as discussed by Hon'ble Supreme Court in the case of Shree Meenakshi Mills Ltd. supra that where a finding is given on a question of fact based upon any inference

from facts, that is not always a question of law. The proposition that a inference from facts is one of law will be correct in its application to mixed question of law and fact, but not to pure question of fact.

12. The assertion by Mr. R.P. Kar, learned counsel for the Revenue to the effect that the Tribunal has reached the conclusion on no evidence does not commend to us in view of our discussion supra. The further assertion by the Revenue that the Tribunal has erred in acting ad-libitum in reaching the conclusion by comparing one of the alleged detected saree with one of the pure silk saree produced by the learned counsel for the opposite party before the Tribunal is also too far fetched inasmuch as such a course has been adopted by the Tribunal to reach a just decision about the legality of the assessment order and such fact has been collected and verified in presence of the representative of the Revenue in course of hearing admittedly, without any objection by the State representative present at the time of hearing of the Second Appeal. In view of such fact it cannot also be said that the Tribunal has stepped out of his jurisdiction in the matter.

13. Another peculiar feature which rather reinforce our view is the statement of the reference by the leaned Tribunal which is entirely based on facts only and the question that is raised in the reference is nothing but inference of facts from facts as suggested by the question of reference formulated by the Tribunal. Further learned Tribunal in formulating the question for reference has acted as if it has sat to review the earlier order, forgetting to find out as to whether any question of law actually arises out of the order impugned.

14. In view of our discussion supra we are of the view that the reference made by the Tribunal and for that matter the contentions raised by the learned counsel for the Revenue in the revision are pure question of facts and they are not mixed question of fact and law.

In the result, the reference is discharged and for that matter the revision is dismissed.

Revision is dismissed.

2010 (I) ILR-CUT- 562

SANJU PANDA,J.

SMT.SATYABATI PRADHAN -V- SHYAM SUNDAR NAYAK & ORS.*

MARCH 11,2010.

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

Amendment of Plaint – Application allowed in part – Order challenged – Impugned order if allowed to stand will be an error apparent on the face of the record as the Court below has not considered the amendment application on its proper prospective and further it will cause injustice to the parties – Held, this Court sets aside the impugned order and allowed the amendment application of the plaintiff subject to payment of cost to O.P.1 to 4 before the trial Court.

(Para 11)

Case laws Referred to:-

1.AIR 1974 SC 1178 : (Shikharchand Jain -V- Digamber Jain Praband Karini Sabha & Ors.).

2.AIR 1985 Orissa 120 : (Gopal Chandra Choudhury -V- The Life Insurance Corporation of India).

For Petitioner - M/s. Samir Kumar Mishra, M.R.Dash, A Kejariwal & S.K.Samantaray.

For Opp.Parties – M/s. N.C.Pati,A.K.Dash, M.R.Dash, N.Singh & S.Giri.

*W.P.(C) NO.12404 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

SANJU PANDA, J. In this writ application, the petitioner has challenged the order dated 19.8.2008 passed by the learned Civil Judge (Senior Division), Balasore in Civil Suit No.80 of 2007-I partly allowing an application for amendment and partly rejecting an application for incorporating paragraphs 2 to 6 of the proposed amendment filed by the petitioner.

2. To appreciate the contentions of the parties, the following facts of the case are necessary to be stated:

The petitioner as plaintiff filed C.S. No.80 of 2007-I before the learned Civil Judge (Senior Division), Balasore for declaration of right, title, interest, injunction and possession in respect of the suit schedule lands appertaining to Plot No.873 measuring Ac.2.45 decimals and Plot No.872 measuring Ac.0.06 decimals, in total Ac.2.47 decimals under Consolidation Khata No.355/23 in Mouza-Silada. As per the settlement record, the said lands belonged to opposite party nos.5 to 6, who sold the same to the petitioner on payment of proper consideration by virtue of registered sale deed no.7 dated 3.1.2007 and handed over the possession of the lands in question to the petitioner from that date. The petitioner possessed the same continuously and uninterruptedly. The said lands were described as 'Sarada' land in the

registered sale deed dated 20.1.1993 when the vendor of the petitioner purchased the said lands from one Basant Kumar Nayak. The petitioner further explained that the description of the area where the lands situated was recorded as "Lunipani". Due to such description, the Kissam of the lands was erroneously described in the plaint as 'Lunipani'. After purchasing the said lands, the petitioner made a palla house over Plot Nos.872 and 873 but on 14.1.2007 opposite party no.1 to 4 created disturbance in her peaceful possession and threatened to dispossess and alienate those lands. Therefore, she filed the suit.

3. The petitioner also filed I.A. No.31 of 2007 for injunction under Order 39, Rules 1 and 2, CPC. On 7.4.2007 the court below directed both the parties to maintain status quo over the suit land till disposal of the original suit. As opposite party nos. 1 to 4 tried to violate the status quo order, the petitioner filed another application for implementation of the said order and police help. On 18.4.2007, the court below allowed the said application and directed the O.I.C., Basta Police Station to implement the said order. On 19.4.2007, opposite party nos.1 to 4 forcibly caused to flow saline water into the suit lands by using diesel water pump in order to make those lands unfit for agricultural purpose. Therefore, the petitioner filed an application for mandatory injunction to drain out the saline water from the suit lands. The said application was allowed by the court below on 8.5.2007 and as opposite party nos.1 to 4 created disturbance, the petitioner also filed an application for police help which was allowed by the court below on 17.5.2007.

4. Being aggrieved by the order dated 8.5.2007 opposite party nos. 1 to 4 filed F.A.O. No.207 of 2007 before this Court. On 24.7.2008, this Court disposed of the F.A.O directing the court below to dispose of the suit as expeditiously as possible preferably within a period of four months from the date of that order, if there was no other impediment. Further this Court directed the parties to cooperate for disposal of the suit. Prior to the said disposal, the petitioner filed an application for amendment of the plaint on 17.7.2008 to avoid multiplicity of the proceeding and incorporate certain subsequent events which are necessary to be adjudicated. In the said application the petitioner sought a relief of damage of Rs.3,00,000/- from opposite party nos.1 to 4 for the loss sustained by her due to the saline water drained into her suit lands and an alternative relief of recovery of possession. However, it was found that she was dispossessed during the pendency of the suit. Due to subsequent recording of the lands in favour of the petitioner by the Tahasildar by virtue of a mutation proceeding, the description of the lands was 'Sarada'. Therefore, she wanted to substitute the word 'Sarada' in place of 'Lunipani'. Opposite party nos.1 to 4 filed their objection on 13.8.2008 stating therein that the petitioner wanted to prolong the litigation and the proposed amendment will change the nature and

character of the suit. Therefore, the same should not be allowed. After hearing both the parties, on 19.8.2008, the learned Civil Judge (Senior Division) allowed paragraph-1 of the proposed amendment subject to payment of cost of Rs.200/- and payment of rent to Government but rejected the rest of the proposed amendment regarding damages and substitution of the word 'Sarada' in place of 'Lunipani'.

5. Learned counsel for the petitioner submitted that the proposed amendment was sought due to subsequent events during pendency of the suit, the cause of action is connected to the dispute between the parties and also to avoid multiplicity of proceedings. Therefore, the court below should have allowed the application.

6. Learned counsel for the opposite parties submitted that in order to linger the litigation the plaintiff filed the application for amendment and if the amendment to incorporate the prayer for damage is allowed, it would amount to change the nature and character of the suit. Therefore, the court below rightly rejected the amendment application and the impugned order need not be interfered with by this Court.

7. On perusal of the plaint, written statement and amendment application and the objection thereto, it appears that flow of saline water into the suit lands caused damage to it. The same was not fit for agricultural purpose. In the case of lands situated near the coastal area, a new tendency of doing prawn culture by using saline water has developed and for this purpose, the local people are converting the agricultural land to one for prawn culture. In the present, due to the subsequent events the plaintiff filed an application for the proposed amendment to insert the additional prayer and to substitute the word 'Sarada' in place of 'Lunipani' and she explained her inadvertency.

8. Order 2, Rule 3, CPC provides for joinder of causes of action and due to changed circumstances it would be necessary to add such cause of action and claim such relief in the same suit to avoid multiplicity of proceeding. The apex Court in a decision reported in **AIR 1974 SC 1178** (**Shikharchand Jain** v. **digamber Jain Praband Karini Sabha and others**), has held that ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court including a Court of appeal to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief clamed originally has (1) by reason of subsequent change of circumstances become inappropriate, (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation; or (3) to do complete justice between the parties.

9. This Court, in a decision reported in **AIR 1985 Orissa 120** (**Gopal Chandra Choudhury** v. **The Life Insurance Corporation of India**), allowed the amendment of the plaint wherein the plaintiff had made a prayer for damage to wall and floor of his building and held that the Court cannot shut its eyes to the facts that the western wall of the plaintiff's building had a crack from the bottom to the top which, as apprehended by the plaintiff, might have been caused on account of the massive construction of the defendant's multistoried building close to it, as well as, construction of projections almost touching the plaintiff's wall on the western side.

10. In the present case, the act of causing flow of saline water into the suit lands, as alleged by the plaintiff, during pendency of the suit cannot be a fact disconnected to the cause of action in the suit. The plaintiff got an order of mandatory injunction also and from the event of facts it appears that the plaintiff's application for amendment was filed on 17.7.2008 prior to disposal of the F.A.O. by this Court. Therefore, it cannot be assumed that she filed an application to linger the proceeding.

11. In view of the above decisions of the apex Court as well as this Court, the impugned order passed by the learned Civil Judge (Senior Division), Balasore, if allowed to stand is an error apparent on the face of record as the court has not considered the amendment application of the plaintiff on its proper prospective and further, it will cause injustice to the parties. Hence, this Court sets aside the impugned order and allows the amendment application of the plaintiff, subject to payment of cost of Rs.200/- (Rupees two hundred) which shall be paid to opposite party nos.1 to 4 before the trial court within a period of one month from the date of order.

12. The writ application is accordingly allowed.

2010 (I) ILR-CUT- 566

B.P.RAY, J.

SARAT KU.MOHANTY & AFTER HIM HIS LEGAL HEIRS HARIPRIYA DEVI & ORS. -V- STATE OF ORISSA & ORS.*

MARCH 9, 2010.

ORISSA PENSION RULES, 1977 – RULE 186 & 36.

Power of Government Under Rule 186 is discretionary – While exercising the discretionary power Government should be judicious and the order should not be arbitrary and discriminatory.

In this case the deceased petitioner entered into Government service prior to 23.11.1982 and under Rule 36 he is entitled to the benefit of additional 5 years service –Same benefit extended to similarly situated person –Held, impugned order refusing the said benefit to the deceased –Petitioner is discriminatory – Direction issued to the Govt. to add five years towards the qualifying service of the deceased -Petitioner for superannuation pension.

(Para9,10,11)

Case law Referred to:-

AIR 1983 SC 130 : (D.S.Nakara & Ors.-V-Union of India).

For Petitioners - Mr.U.C.Patnaik & Associates.

For Opp.parties – Addl.Govt. Advocate.

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*O.J.C.NO.995 OF 2002. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.P.RA Y,J. This writ application was filed under Articles 226 & 227 of the Constitution of India by Sarat Kumar Mohanty, a retired District Judge. During pendency of the writ application, the petitioner having expired on 26.11.2003, his legalheirs have been substituted by order dated 10.7.2009 in Misc. Case No. 2557 of 2003.

2. Challenge in this writ application is to the order passed by the Government in Home Department refusing to exercise the power conferred in the State Government under Rule 186 of the Orissa Pension Rules, 1977 (hereinafter called as "the Rules") for extending the benefit of addition of qualifying service to the service period of the deceased-petitioner as visualized under Rule 36 of the Rules. This order of the State Government has been impugned in this writ application and annexed as Annexure 10 to the writ application.

3. The impugned order under Annexure-10 is a fall out of the judgment of this Court rendered in O.J.C. No. 18287 of 1998 disposed of on 23.11.2000. The prayer in O.J.C. No. 18287 of 1998 was primarily based upon the judgment of this Court rendered in O.J.C. No. 1937 of 1986 which is reported in 1995 (I) OLR 597 (Sarat Kumar Mohanty v. State of Orissa & Ors.). To put it differently, the State Government having rejected the representation of the

deceased-petitioner to grant him benefits under Rule 36 of the Rules, the writ application in O.J.C. No. 18287 of 1998 was filed. This Court having taken note of all the relevant facts into account passed the following directions:

> "I, therefore, direct the opposite parties to consider the case of the petitioner in the light of the Rule 186 of the Orissa Pension Rules, 1977 and also take into consideration the statement of the petitioner that late G.H. Panda who had also entered into Government service prior to 23.11.1962 had been extended benefit of addition of 5 years of service under Rule 36 of the said Rules. The case of the petitioner be considered in the light of the observation made above within a period of four months from today and necessary orders be passed. In the event, a decision is taken to extend benefit to the petitioner under Rule 36 of the Orissa Pension Rules, 1977 on consideration of the case of the petitioner under Rule 186 of the said Rules, consequential benefits with regard to pension as directed by this Court in OJC No. 1937 of 1986 be extended to the petitioner within a period of four months from the date when such a decision is taken by the State Government. The second relief claimed is not considered as the opposite parties are directed to reconsider the claim of the petitioner."

4. After the aforesaid judgment was delivered by this Court, the State Government by the impugned order under Annexure-10 has refused to extend the benefit of addition of 5 years as the qualifying service under Rule 36 of the Rules. This order has been passed in purported exercise of the power under Rule 186 of the said Rules.

5. Return has been filed on behalf of opposite parties 1 to 3 justifying the impugned order. It was stated in the counter affidavit that pursuant to the direction of this Court in OJC No. 1937 of 1986 the deceased-petitioner was allowed to retire from Government service with effect from 30.6.1978 on attaining the age of superannuation by Home Department Notification No. 20787 dated 12.4.1996. It was stated in the counter affidavit that the State Government has treated the period from 16.6.1971 to 17.1.1974 as duty and the period from 18.1.1974 to 30.6.1978 as extraordinary leave. Referring to Rule 36 of the Rules it was stated in the counter affidavit that the benefit of the said provision can be extended to a person appointed to the service or post under the Government after 23.11.1962; whereas the petitioner entered into Government service on 10.12.1947, which was prior to 23.11.1962. Therefore, the provision of Rule 36 was of no assistance to the petitioner. So far as Rule 186 of the Rules it was stated that the case of the petitioner does not justify and warrant any relaxation by I nvoking the said provision

inasmuch as the case of late G.H. Panda cannot be pressed into service to relax the rule in favour of the petitioner. It was further stated in the counter that no undue hardship was caused to the petitioner to exercise power under Rule 186 of 1977 Rules. It was also stated in the counter affidavit that the case of the petitioner is not akin to that of late G.H. Panda, so far as their date of retirement and manner of retirement are concerned. Having stated thus it was contended in the counter affidavit that the Government did not find any undue hardship to have been caused to the deceased-petitioner, which necessitates exercise of power conferred on the State Government under Rule 186 of 1977 Rules for extending the benefit finding place in Rule 36 of the said Rules. Accordingly, it was stated that the writ application was devoid of merit.

6. During the course of hearing of the writ petition it was brought to my notice by the learned counsel for the petitioners that the State Government while passing the impugned order has not taken into account the case of late G.H. Panda though it was specifically directed to take the same into consideration in the judgment rendered in O.J.C. No. 18287 of 1998. Therefore, by order dated 21.7.2009, I had directed the learned Additional Government Advocate to file a better affidavit to resolve the dispute. Thereafter the matter was taken up on 7.8.2009, 10.8.2009 and 12.8.2009 when time was sought on behalf of the State to file such affidavit. But when the matter was listed on 19.8.2009, the learned Additional Government Advocate expressed his inability to file the affidavit as directed. Accordingly, learned Advocate General was requested to remain present in the Court at 2.00 P.M. on the same day and to suggest remedial measures. Accordingly, learned Advocate General appeared and assured the Court that the affidavit as required by order dated 21.7.2009 shall be filed. Unfortunately, despite the assurance of the learned Advocate General, no such affidavit was filed on behalf of the State Government. Therefore, I proceeded to dispose of the writ application on the basis of the materials available on record.

7. Undisputedly, Rule 36 of the Rules, 1977 on which reliance is placed by the learned counsel for the petitioner authorizes the State Government to extend the benefit of addition of 5 years as qualifying service of the pensioner subject to satisfying the conditions enumerated therein. True it is the deceased-petitioner was appointed prior to 23.11.1962, which is the appointed date under sub-rule (1) of Rule 36 of the Rules. The question arises as to whether the State Government has power to relax any of the provisions of the Rules, 1977 so far as it causes undue hardship in any particular case. Such a power has been vested in the State Government under Rule 186 of the Rules. This Court in the judgment passed in O.J.C. No. 18286 of 1998 had specifically directed the State Government to consider this aspect of the matter taking into consideration the fact that late

G.H. Panda, who had entered into service prior to 23.11.1962 was also extended the benefit of additional 5 years service under Rule 36 of the aforesaid Rules. The State Government appears to have passed the impugned order stating inter alia that it did not notice any hardship to have been caused to the deceased-employee warranting exercise of the power under Rule 186 of the Rules. But the State Government did not take into consideration the case of late G.H. Panda who was extended the benefit of addition of 5 years service, though he had entered into the service prior to 23.11.1962 alike the petitioner. The impugned order on the face of is being not in consonance with the directions of this Court referred to above, I am of the considered view that the impugned order has been mechanically passed and there has been no application of mind by the State Government.

8. In the counter affidavit the order was sought to be justified on the reasoning that the case of the petitioner was not identical with the case of late G.H. Panda, so far as their date of retirement and manner of retirement are concerned. Further it was stated in the counter that such benefit was allowed to late G.H. Panda while he was in service about 22 years back. It needs no emphasis that the case of Late G.H. Panda has not been noticed by the State Government while passing the impugned order. But the same was sought to be justified in the counter affidavit. When a statutory functioning makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise (see the case of Mohinder Singh Gill and another, V. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851).

9. Referring to the power of the State Government under rule 186 of the Rules 1977, it was submitted by the learned counsel for the petitioner that there has been an arbitrary exercise of power by the State Government apart from the fact that the same is discriminatory. To appreciate the contentions of the petitioner, it is necessary to notice Rule 186 of the Orissa Pension Rules, 1977, which is as follows:

> "Where the Governor is satisfied that the operation of the provisions of these rules cause undue hardship in any particular case, he may, by order, dispense with or relax the requirements of the said provisions to such extent and subject to such condition as he may consider necessary for dealing with the case in a just and equitable manner."

The power under the aforesaid provision can be exercised by the State Government when the State Government feels that the operation of the provisions in the Rules causes undue hardship. The State Government was of the view that no undue hardship was caused to the deceased-

employee. The power under Rule 186 is undoubtedly discretionary. But while exercising the discretionary power, the State Government was required to be judicious and the order should not be arbitrary and discriminatory. As has been indicated in the preceding paragraph the impugned order is clearly discriminatory in view of the fact that the person similarly situated having been extended the benefit, there is no rational behind the decision of the State Government not to extend such benefit to other similarly situated employees alike the petitioner. By addition of 5 years towards qualifying service would make the deceased-petitioner eligible to receive full pension and refusal thereof deprives the deceased-employee of such benefit. Therefore, it cannot be said that the same do not cause any undue hardship.

10. From the records it appears that the deceased-employee has 30 years 6 months and 21 days service to his credit. By addition of the period of service as provided under Rule 36 of the Rules, 1977 would make the deceased-petitioner eligible to receive full pension which he was deprived of on unjust and unreasonable grounds. In this connection reliance is placed on a decision of the Hon'ble Supreme Court in the case of **D.S. Nakara and others v. Union of India,** reported in AIR 1983 SC 130 wherein it has been laid down that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer. It has also been held therein that pension is not an ex-gratia payment but it is a payment for the past service rendered and the same was a social welfare measure rendering socio-economic justice to those who in the hey day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. Therefore, the State Government is expected to exercise the discretionary power uniformly to all the pensioners for the purpose of computation of pension irrespective of the date of retirement and the manner of retirement. The impugned order suffers from the vice of discrimination apart from the fact that the same has not taken into consideration the earlier order of this Court indicated above.

11. Therefore, I am of the considered view that the State Government has not acted in bona fide in refusing to exercise the power under Rule 186 of the Orissa Pension Rules, 1977. For the reasons stated above, the impugned order under Annexure-10 is quashed and the State Government is directed to add 5 years towards the qualifying service of the deceased-petitioner for superannuation pension. Such exercise shall be undertaken and completed within a period of six months from the date of receipt of this order and necessary financial benefits accrued thereunder shall be released in favour of the legal heirs of the deceased-petitioner within a period of 3 months thereafter.

The writ petition is accordingly allowed. There shall be no order as to cost. Writ petition allowed.

2010 (I) ILR-CUT- 571

S.C.PARIJA,J.

SMRUTI RANJAN PARIDA -V- TARAMANI DAS & ORS.*

FEBRUARY 8,2010.

MOTOR VEHICLES ACT, 1988 (ACT NO. 59 OF 1988) – SECS.2 (21), 147.

"Light Motor Vehicle" can also mean a light passenger carriage vehicle and light goods carriage vehicle when the gross vehicle weight or unladen weight does not exceed 7500 kgs.

In the present case the offending vehicle is an Auto rickshaw Delivery Van but since the driver possess a DL to drive an Auto rickshaw, the learned Tribunal held that the driver does not possess a valid Dl and fixed the liability on the owner.

This Court held the Auto rickshaw had been constructed solely for carriage of goods and as such does not cease to be a "light motor vehicle" as the gross vehicle weight does not exceed 7500 kgs – Hence the driver of the Auto rickshaw Delivery Van was holding a valid and effective DL and there being no violation of policy condition, the Insurance Company is held liable to pay the compensation amount.

(Para 16,17 & 18)

Case laws Referred to:

1.AIR 1999 SC 3181 : (Ashok Gangadhar Maratha -V- Oriental Insurance Co.Ltd.)
2.AIR 2001 SC 3356 : (Nagashetty -V- United India Insurance Co.Ltd.)
3.AIR 2004 SC 1531 : (National Insurance Co.Ltd.-V-Swaran Singh & Ors.).
4.AIR 2008 SC 1418 : (National Insurance Co.Ltd.-V- Annappa Irappa Nesaria & Ors.).
5.AIR 2008 SC 614 : (New India Assurance Co.Ltd.-V- Prabhu Lal).
6.AIR 2008 SC 22 : (New India Assurance Co.Ltd. -V- Roshan Ben RahemenshFakir & Anr.).

For Appellant – M/s. P.Mishra & P.K.Mishra.
For Respondents – Smt.P.Mishra (For Respondent no.3)
M/s. B.N.Samantray, D.Patnaik (For Respondents 1 & 2)

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*M.A.C.A. NO.311 OF 2009. In the matter of an appeal under Section 173 of the Motor Vehicles Act, 1988.

S.C. PARIJA, J. This appeal by the owner of the vehicle (insured) is directed against the judgment/award dated 22.01.2009 passed by the Motor Accident Claims Tribunal-IV, Bhadrak, in MAC No.54 of 2005, holding the owner-appellant to have violated the policy condition and is therefore liable to indemnify the loss and accordingly directing the insurer to pay the compensation amount, with the right to recover the same from the owner.

2. Learned counsel for the owner-appellant submitted that as the offending vehicle is a Auto-rickshaw Delivery Van and the driver had a driving licence, authoring him to drive a Auto-rickshaw, the said driving licence was valid and effective at the time of the accident and therefore, there was no violation of policy condition. In this regard, it was submitted that as the evidence on affidavit filed by the owner-appellant clearly revealed that the offending Auto-rickshaw had a unladen weight of 470 kgs and the driver Prasanta Muduli had a valid driving licence bearing D.L. No.12361/04-05, issued by the Licensing Authority, Cuttack, authorizing him to drive a Auto-rickshaw only, learned Tribunal erred in holding that the said driving licence did not authorize the driver to drive the offending vehicle and that the driver had no valid and effective driving licence to drive the offending vehicle. It was accordingly submitted that as the driving licence was issued in respect of a Auto-rickshaw and admittedly the offending vehicle was a Auto-rickshaw Delivery Van bearing No.OR-05-U/7812, which is a light motor vehicle, the said driving licence was valid and effective and therefore the findings of the learned Tribunal is erroneous and illegal.

3. In support of the aforesaid contention, learned counsel for the owner-appellant has relied upon a decision of the Apex Court in the case of ***Ashok Gangadhar Maratha –vrs.- Oriental Insurance Co. Ltd.,*** AIR 1999 SC 3181, wherein the Hon'ble Court came to find as under:

> "For a vehicle to be a transport vehicle, it must be a goods carriage which in turn means any motor vehicle constructed or adapted for use solely for the carriage of goods or when not so constructed or adapted when used for the carriage of goods. We have the definitions of "heavy goods vehicles" and "medium goods vehicle". There is no definition of "light goods vehicle". Instead the definition is of "light motor vehicle". If we apply the definition of a "light motor vehicle" as given in clause (21) of Section 2 of the Act to mean a "transport vehicle" in turn means a "goods carriage" then we have nowhere the definition of a "light motor vehicle" without it being a "goods carriage". Section 2 of the Act begins with the words "unless in this Act the context otherwise requires". We have, therefore, to give a meaningful interpretation to "light motor vehicle" as given in clause (21). Clause (e) of Rule 2 of the Central Motor Vehicle Rules, 1989 defines "non-transport vehicle" to mean a motor vehicle which is not a transport vehicle (clause (e) renumbered as clause (h) by 1993 Amendment to Rules). This definition would, therefore, take out of the definition of "transport vehicle" as given in clause (21) light motor vehicles which are not goods carriage."

Accordingly, the Hon'ble Court proceeded to hold as follows:

"To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle."

4. Learned counsel has further relied upon a subsequent decision of the Apex Court in the case of ***Nagashetty –vrs.- United India Insurance Co. Ltd.,*** AIR 2001 SC 3356, wherein it has been observed as under :

"xx xx xx Undoubtedly under Section 10 a licence is granted to drive specific categories of motor vehicles. The question is whether merely because a trailer was attached to the tractor and the tractor was used for carrying goods, the licence to drive a tractor becomes ineffective. If the argument of Mr. S.C. Sharda is to be accepted then every time an owner of a private car, who has a licence to drive a light motor vehicle, attaches a roof carrier to his car or a trailer to his car and carries goods thereon, the light motor vehicle would become a transport vehicle and the owner would be deemed to have no licence to drive that vehicle. It would lead to absurd results. Merely because a trailer is added either to a tractor or to a motor vehicle by itself does not make that tractor or motor vehicle a transport vehicle. The tractor or motor vehicle remains a tractor or motor vehicle. If a person has a valid driving licence to drive a tractor or a motor vehicle he continues to have a valid licence to drive that tractor or motor vehicle even if a trailer is attached to it and some goods are carried in it. In other words a person having a valid driving licence to drive a particular category of vehicle does not become disabled to drive that vehicle merely because a trailer is added to that vehicle."

5. Further reliance has been placed on another decision of the Apex Court in the case of ***National Insurance Co. Ltd. –vrs.- Swaran Singh and others,*** AIR 2004 SC 1531, wherein the Hon'ble Court observed as under:

"Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (20 of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) Motor cycle without gear, (b) motor cycle with gear, (c)

invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are ' goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motor cycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer', and 'transport vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for 'motor cycle without gear', for which he has no licence. Cases may also arise where a holder of driving licence for 'light motor vehicle' is found to be driving a 'maxi-cab', 'motor-cab' or 'omnibus' for which he has no licence. In each case on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence."

6. Learned counsel has also relied upon the decision in the case of ***National Insurance Co. Ltd. –vrs.- Annappa Irappa Nesaria and others,*** AIR 2008 SC 1418, wherein the Hon'ble Court came to hold as under :

> **"**From what has been noticed hereinbefore, it is evident that transport vehicle has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, light passenger carriage vehicle and light goods carriage vehicle.
>
> A driver who had a valid licence to drive a light motor vehicle, therefore, was authorized to drive a light goods vehicle as well."

7. Learned counsel for the insurer-respondent no.3 while supporting the impugned award, has forcefully submitted that as the offending vehicle was an Auto-rickshaw Delivery Van and was registered as a 'transport vehicle' and was insured as a goods carrying commercial vehicle, the driving licence

held by the accused driver, which authorized him to drive a Auto-rickshaw only, was not valid and effective, which was in violation of the policy condition and therefore the owner is liable to indemnify the loss. In this regard, learned counsel submits that as the offending vehicle was a Auto-rickshaw Delivery Van which is a 'transport vehicle', meant for carriage of goods only and the driver did not possess a driving licence authorizing him to drive such a 'transport vehicle', the findings of the learned Tribunal given in the impugned award cannot be faulted.

8.In support of her aforesaid submission, learned counsel for the insurer has relied upon a decision of the Apex Court in the case of ***New India Assurance Co. Ltd. –vrs.- Prabhu Lal,*** AIR 2008 SC 614, wherein the Hon'ble Court came to hold as follows :

> **"**The matter can be looked from another angle also. Section 14 referred to above, provides for currency of licence to drive motor vehicles. Sub-section (2) thereof expressly enacts that a driving licence issued or renewed under the Act shall, "in the case of a licence to drive a transport vehicle, be effective for a period of three years". It also states that "in the case of any other licence, if the person obtaining the licence, either originally or on renewal thereof, had not attained the age of fifty years on the date of issue or, as the case may be, renewal thereof, be effective for a period of twenty years from the date of such issue or renewal". It is thus clear that if a licence is issued or renewed in respect of a transport vehicle, it can be done only for a period of three years. But, in case of any other vehicle, such issuance or renewal can be for twenty years provided the person in whose favour licence issued or renewed had not attained the age of 50 years. In the present case, the licence was renewed on November 17, 1995 up to November 16, 2015 i.e. for a period of twenty years. From this fact also, it is clear that the licence was in respect of 'a motor vehicle other than the transport vehicle'."

9. Learned counsel has also relied upon a subsequent decision of the Apex Court in the case of ***New India Assurance Co. Ltd. –vrs.- Roshan Ben Rahemensha Fakir and another,*** AIR 2008 SC 226, where in a similar case, the Hon'ble Court has come to hold that as the Auto-rickshaw Delivery Van was a transport vehicle and the driving licence issued to the driver of the said vehicle authorized him to drive a three wheeler, the said licence was not meant for driving a transport vehicle and therefore the insurer is not liable. The observation of the Hon'ble Court is as follows:

> "Section 10 of the Act provides for classes of the driving licence. Different classes of vehicle have been defined in different provisions of the Motor Vehicles Act. The 'transport vehicle' is defined in Section 2(47) of the Act to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. We have noticed hereinbefore the provisions of sub-section (4) of Section 41. We have also noticed the notification issued by the Central Government in this behalf. The said notification clearly postulates that a three wheeled vehicle for transport of passengers or goods comes within the purview of class 5 of the table appended thereto. The licence granted in favour of the said Salim Amadbhai goes to show that the same was granted for a vehicle other than the transport vehicle. It was valid from 13.05.2004 to 12.05.2024. Section 14(2)(a) provides that a driving licence issued or renewed under the Act shall, in case of a licence to drive a transport vehicle will be effective for a period of three years whereas in the case of any other vehicle it can be issued or renewed for a period of 20 years from the date of issuance or renewal. The fact that the licence was granted for a period of 20 years, thus, clearly shows that Salim Amadbhai, driver of the vehicle, was not granted a valid driving licence for driving a transport vehicle."

10. In the present case, with regard to the liability to pay the compensation amount, learned Tribunal has come to the following findings :

> "The insurance policy Ext.B undisputely (sic. undisputedly) covers the date of incident (sic. accident). The driving licence as seen from the document filed by O.P. No.2 vide Ext.A-1 the policy condition. As per the condition the driver was duly authorized to drive Auto Rickshaw and not the offending vehicle and the driver has no valid and effective licence to drive the offending vehicle. So the owner O.P. No.1 has violated the policy condition and liable to indemnify the loss as the D.L. of the driver is a fake one. The insurer in view of the statutory obligation must first compensate retaining right to recover the same from the owner or from the insured."

11. Admittedly, the offending vehicle No.OR-05-U/7812, is a Auto-rickshaw Delivery Van, which was registered as a transport vehicle, having a unladen weight of 470 Kgs and laden wight of 995 Kgs. The insurance policy issued in respect of the said vehicle describes it as a goods carrying commercial vehicle and was valid from 25.5.2005 to 24.5.2006, covering the date of accident, which took place on 15.6.2005. The driving licence issued

to the driver Prasanta Muduli authorized him to drive a Auto-rickshaw only, which was valid from 12.01.2005 to 11.01.2025 (N T).

12. Section 2(14) of the M.V. Act defines "goods carriage" as any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods.

The term "light motor vehicle", as defined in Section 2(21) of the M.V. Act, 1988, means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7500 kilograms.

Section 2(23) of the M.V. Act defines "medium goods vehicle" to mean any goods carriage, other than a light motor vehicle or a heavy goods vehicle.

A 'transport vehicle' has been defined under Section 2(47) of the M.V. Act as follows :

"transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle"

13. Section 3 of the M.V. Act provides for necessity of driving licence, which reads as under :

> "(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorizing him to drive the vehicle; and no person shall so drive a transport vehicle other than a motorcab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75 unless his driving licence specifically entitles him so to do.
>
> (2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

14. Section 10 of the M.V.Act deals with form and contents of licences to drive, which reads as under:

> "(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15. On a reading of the aforesaid provisions clearly goes to show that the definition of a 'light motor vehicle', as given in Section 2(21) of the M.V. Act would also include a transport vehicle, whose gross vehicle weight does not exceed 7500 Kgs. It can apply only to a 'light goods vehicle' or a 'light transport vehicle'. A 'light goods vehicle' having not been defined in the M.V. Act, the definition of 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle, whose gross vehicle weight does not exceed 7500 Kgs. Therefore a 'light motor vehicle' can also mean a light passenger carriage vehicle and light goods carriage vehicle.

16. In the present case, merely because the offending Auto-rickshaw had been constructed or adapted for use solely for carriage of goods, the same does cease to be a 'light motor vehicle'. The use of the vehicle for carriage of goods does not take the offending Auto-rickshaw outside the definition of a 'light motor vehicle', which includes a 'transport vehicle', when the gross vehicle weight or unladen weight does not exceed 7500 Kgs. Moreover, the insurer has nowhere pleaded or proved that the offending Auto-rickshaw Delivery Van being a transport vehicle, was issued with a permit for carriage of goods, as required under Section 66 of the M.V. Act.

17. Applying the principles of law as discussed above to the fact of the present case, I am of the considered view that as the driver of the offending Auto-rickshaw Delivery Van was holding a driving licence authorizing him to

drive a Auto-rickshaw, which is admittedly a 'light motor vehicle', the same was valid and effective and there was no violation of policy condition.

18. For the foregoing reasons, the findings of the learned Tribunal holding the owner of the vehicle liable to pay the compensation amount and directing the insurer to pay the same, with liberty to recover from the owner is set aside. The Insurance Company-respondent no.3 is held liable to pay the compensation amount.

Appeal allowed.

2010 (I) ILR-CUT- 580

B.K.PATEL, J.

MAHESH CHANDRA PATTNAIK -V- STATE

FEBRUARY 24,2010.

CONSTITUTION OF INDIA, 1950 – ART.21.

Right to speedy trial – Pendency of proceeding against the petitioner for possessing assets disproportionate to his known sources of income – There is no explanation with regard to delay of seven years in investigation – There after it took long twelve years for preparation of copies of police papers – No circumstances is brought to the notice of the Court to indicate that the delay in investigation as well as commencement of trial is attributed to the petitioner – No exceptional circumstances exists for overlooking such inordinate delay – Held, in order to ensure propriety and to secure the ends of justice , the proceeding against the petitioner is quashed.

Case law Relied on:-

AIR SCW 1418 : (Vakil Prasad Singh -V- State of Bihar).

Case laws Referred to:-

1.(1980)1 SCC 81 : (Hussainara Khatoon & Ors.-V-Home Secretary, State of Bihar).

2.(1992) 1 SCC 225 : (Abdul Rehman Antulay & Ors.-V-R.S.Nayak & Anr.).

3.(2002)4 SCC 578 :(P.Ramachandra Rao -V- State of Karnataka).

For Petitioner - M/s.C.Choudhury, B.Mohanty, D.Chhotray, S.Mohanty, D.R.Das & B.Moharana.

For Opp.Party - Standing Counsel (Vigilance Department)

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*CRIMINAL REVISION NO.1153 OF 2007. From an order dated 9.3.2007 passed by the learned Special Judge, Vigilance, Bhubaneswar in T.R.No.40 of 2007.

B.K. PATEL,J. In this Criminal Revision, the petitioner has assailed the order dated 9.3.2007 passed by the learned Special Judge, Vigilance, Bhubaneswar in T.R. No. 40 of 2007 taking cognizance of alleged commission by the petitioner of offence under section 13(2) read with section 13(1)(c) of the Prevention of Corruption Act, 1988.

2. In view of the limited nature of grievance raised by the learned counsel for the petitioner in course of hearing, the back ground facts of the case may be narrated in brief as follows:

The petitioner entered into service on 5.5.1962 and worked in various capacities under the Revenue Department of the State Government till he retired on superannuation on 30.11.1997. When the petitioner was in service, search operation was conducted by the officers of the Vigilance Department on 16.10.1998. On the basis of search, FIR was lodged on

7.11.1988 alleging that the petitioner was found to have acquired and possessed pecuniary resources worth Rs. 4,69,150.90 paise which was disproportionate to his known sources of income. On completion of investigation, charge-sheet was filed in the court of C.J.M., Cuttack against the petitioner on 27.3.1995, i.e., 7 years after lodging of the FIR. In the charge-sheet it was alleged that the disproportionate assets of the petitioner was calculated at Rs. 78,240.54 paise. On 3.4.1995 original documents were sent to copying section for preparation of copies of police papers. On 7.3.2007, on receipt of copies of police papers, the case record was submitted to the court of Special Judge, Vigilance, Bhubaneswar, upon which order dated 9.3.2007 taking cognizance of offence was passed. On appearance of the petitioner in Court on 9.8.2007 the case was posted to different dates for supply of copies of some police papers as requested by the petitioner. It is stated that copies of police papers which were requested to be supplied, have not been made available inspite of filing of this revision on 24.9.2007.

3. It was strenuously contended by the learned counsel for petitioner that the case was registered in the year 1988 and after lapse of 19 years, in the year 2007, the petitioner was supplied with an incomplete set of police papers. Inspite of the prayer made by the petitioner, copies of vital documents relied upon by the prosecution have not been supplied so far. Even after a lapse of more than two decades trial has not commenced.. There is no likelihood of conclusion of the trial within a reasonable period. Therefore, the petitioner has been deprived of his right to speedy trial under Article 21 of the Constitution. Relying upon the decision of the Hon'ble Supreme Court in ***Vakil Prasad Singh v. State of Bihar*** reported in AIR SCW 1418 it was strenuously contended that as the delay in investigation and prosecution is not at all attributable to the petitioner, the impugned order as well as criminal proceeding is liable to be quashed in exercise of revisional jurisdiction under section 397 read with 401 as well as inherent jurisdiction under section 482 of the Code of Criminal Procedure.

4. In reply, it was contended by the learned counsel for the State that as the prosecution against the petitioner relates to commission of offence under Prevention of Corruption Act, on the allegation that he was found to be in possession of assets disproportionate to known sources of income, investigation was bound to be time consuming. Delay occurred in court after submission of charge sheet as the petitioner wanted copies of some of the documents which were not supplied to him with the police papers. Therefore, to some extent the petitioner also contributed to the delay.

5. It is now well settled that Article 21 of the Constitution includes a right in the accused to be tried speedily. Upon reference to decisions in ***Hussainara Khatoon and others vs. Home Secretary, State of Bihar.***

(1980) 1 SCC 81, ***Abdul Rehman Antulay and others vs. R.S. Nayak and another*** : (1992) 1 SCC 225 and ***P. Ramachandra Rao vs. State of Karnataka*** : (2002) 4 SCC 578, the Hon'ble Supreme Court in ***Vakil Prasad Singh vs. State of Bihar*** (Supra), in which prosecution had been launched against the appellant for alleged commission of offences under Sections 161 (before its omission by Act 30/2001), 109 and 120-B of the Indian Penal Code and Section 5(2) of Prevention of Corruption Act, 1947, held and concluded as follows:

> "15. It is, therefore, well settled that the right to speedy trial in all criminal prosecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial.
>
> 16. Tested on the touchstone of the broad principles enumerated above, we are convinced that in the present case appellant's constitutional right recognized under Article 21 of the Constitution stands violated. It is manifest from the facts narrated above that in the first instance investigations were conducted by an officer, who had no jurisdiction to do so and the appellant cannot be accused of delaying the trial merely because he successfully exercised his right to challenge an illegal investigation. Be that as it may, admittedly the High Court vide its order dated 7th September, 1990 had directed the prosecution to complete the investigation within a period of three months from the date of the said order but nothing happened till 27th February, 2007 when, after receipt of notice in the second petition preferred by the appellant complaining about delay in investigation, the Superintendent of Police, Muzaffarpur directed the Deputy Superintendent of Police to complete the investigation. It was only

> thereafter that a fresh chargesheet is stated to have been filed on 1st May, 2007. It is also pertinent to note that even till date, learned counsel for the State is not sure whether a sanction for prosecuting the appellant is required and if so, whether it has been granted or not. We have no hesitation in holding that at least for the period from 7th December, 1990 till 28th February, 2007 there is no explanation whatsoever for the delay in investigation. Even the direction issued by the High Court seems to have had no effect on the prosecution and they slept over the matter for almost seventeen years. Nothing could be pointed out by the State, far from being established to show that the delay in investigation or trial was in any way attributable to the appellant. The prosecution has failed to show any exceptional circumstance which could possibly be taken into consideration for condoning a callous and inordinate delay of more than two decades in investigations and the trial. The said delay cannot, in any way, be said to be arising from any default on the part of the appellant. Thus, on facts in hand, in our opinion, the stated delay clearly violates the constitutional guarantee of a speedy investigation and trail under Article 21 of the Constitution. We feel that under these circumstances, further continuance of criminal proceedings, pending against the appellant in the court of Special Judge, Muzaffarpur, is unwarranted and despite the fact that allegations against him are quite serious, they deserve to be quashed.
>
> 17. Consequently, the appeal is allowed and the proceedings pending against the appellant in Special Case No. 29 of 1987 are hereby quashed."

6. In course of hearing, a report was called for from the Special Judge, Vigilance, Bhubaneswar which reveals that though the case record was sent by the C.J.M., Cuttack for copying of the documents on 3.4.1995, copies of police papers were received on 7.3.2007. After appearance of the petitioner before the Special Judge, Vigilance, Bhubaneswar, copies of police papers received from the court of C.J.M., Cuttack were supplied to him on 10.1.2008 and the case was posted to 14.2.2008 for consideration of charge. On 14.2.2008 a memo was filed on behalf of the petitioner requesting for supply of copies of some other documents and for supply of legible copies of some of the police papers which had been supplied to him. Learned Special Judge, Vigilance directed the prosecution to supply legible copies of police papers and copies of documents as prayed for. But the prosecution did not supply the same on the ground that the said documents had not been received from the court of C.J.M., Cuttack. Thereafter the prosecution submitted legible copies of some of the police papers on

5.5.2009 with an undertaking to file copies of remaining documents soon after receipt thereof from the court of C.J.M., Cuttack.

7. On consideration of facts and circumstances of the present case in the light of principles enumerated in ***Vakil Prasad Singh vs. State of Bihar*** (supra) I am of the considered judgment that the petitioner's constitutional right under Article 21 of the Constitution has been violated. There is no explanation with regard to delay of seven years in investigation. It took long twelve years thereafter for preparation of copies of police papers. Moreover, petitioner's grievance to have not been supplied with copies of some of the relevant documents and to have been supplied with some illegible copies of police papers was also not attended to for redressal with promptitude inspite of court's direction. It is pertinent to observe that though on the basis of an enquiry preceding lodging of the FIR it was alleged in the FIR that the petitioner was in possession of disproportionate assets worth Rs. 4,69,150.90 paise, in the charge sheet he was alleged to have possessed disproportionate assets worth Rs. 78,240.54 paise approximately. No circumstance is brought to the notice to indicate that delay in investigation as well as commencement of trial may be attributed to the petitioner. Also, it is not at all shown that any exceptional circumstance exists for over looking the inordinate delay. Therefore, further delay by allowing continuance of criminal proceeding against the petitioner, being violative of Article 21 of the Constitution, is unwarranted. In order to ensure propriety and secure the ends of justice, the proceeding is liable to be quashed.

8. Consequently, the revision is allowed. The impugned order is set aside and proceeding against the petitioner in T.R. No. 40 of 2007 in the court of learned Special Judge, Vigilance Bhubaneswar is quashed.

Criminal revision is allowed.

2010 (I) ILR-CUT- 585

S.K.MISHRA, J.

MADAN MOHAN SAHU -V- M/S. CENTRAL AGENCIES.*

FEBRUARY 2,2010.

NEGOTIABLE INSTRUMENT ACT, 1881 (ACT NO.26 OF 1881) – SEC.138 r/w SEC.319 CR.P.C.

Issuance of two cheques on different dates – Dishonour of both the cheques – Held, both the offences can be tried in a single trial and it is not necessary to start two separate complaints for the two cases.

(Para 9)

For Petitioner – Mr.Sk.Zafarulla.

For Opp.Party – Mr.Jayadeep Pal.

*CRIMINAL REVISION NO.883 OF 2007. From the judgment 17.07.2007 passed by the Addl.Sessions Judge, Rourkela in Crl. Appeal No.43 of 2005 dismissing the appeal and confirming the judgment dated 27.08.2005 passed by learned Sub-Divisional Judicial Magistrate, Panposh in 1 C.C. Case no.16 of 2000 (Trial No.916 of 2000).

S.K. MISHRA,J. Petitioner assails the confirming judgment passed by the learned Addl. Sessions Judge, Panposh in Criminal Appeal No. 43 of 2005, wherein she confirmed the order of conviction and sentence passed by learned Sub-Divisional Judicial Magistrate, Panposh in 1 C.C. Case No. 16 of 2000 for the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act" for brevity).

2. Briefly stated, the facts of the case are as follows:

The complainant M/s. Central Agencies is a firm engaged in execution of different contracts. It owns a JCB Machine bearing Regn. No. OR-14-A-9433. The petitioner entered into an agreement with the complainant to take the JCB Machine on hire for utilization of the same for execution of a contract work. For such hire, the Company was to pay a sum of Rs. 3,50,000/- to the complainant and for payment of the same, issued post dated cheques bearing no. 921837 dated 18.10.1999 of Rs. 1,70,000/- in favour of the complainant firm drawn on the State Bank of India, Kalinga Nagar Branch, Jajpur. Accordingly, the complainant presented both the cheques in the Bank, which were dishonoured for the reason "insufficient funds". Then the complainant issued a notice to the accused demanding payment of the cheque amount. Although, the notice was received, the accused did not respond to the same and did not comply the demand to repay the amount due. Thereafter, the complainant preferred the complaint petition against the present petitioner in the Court of learned S.D.J.M., Panposh, who after due trial convicted the petitioner under section 138 of the Act and sentenced him to undergo simple imprisonment for a period of one year and to pay a compensation of Rs. 3,50,000/-. The learned

Magistrate also ordered that the said amount should be deposited by the accused forthwith, failing which the court will resort to recover the same as fine as provided under Section 431 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code" for brevity). For default of payment of the compensation amount, the accused-appellant was sentenced to undergo simple imprisonment for a period of three months.

3. The present petitioner challenged the conviction and sentence passed by the learned S.D.J.M. before the learned Addl. Sessions Judge, Rourkela and as per judgment dated 17.07.2007, the learned Addl. Sessions Judge dismissed the appeal holding that there is no infirmity or error in respect of the findings of the learned court below.

4. In course of hearing of the revision application, learned counsel for the petitioner submitted that since M/s. Anjay Construction is owned by one Renubala Sahoo, who is the sole Proprietor of the said firm, the courts below without application of mind held the petitioner liable for dishonour of the cheques. The learned counsel also raised the points that for two cheques, one complaint case has been initiated and for that reason conviction should be set aside.

Learned counsel for the opposite party, on the other hand, supported the findings recorded by the learned trial court and the learned lower appellate court.

5. The scope in a revision against such confirming judgment is very limited. If the revisional court does not find any perversity in the findings recorded by the learned trial court as well as the learned appellate court, it would stay its hand from interfering with the findings recorded. Having gone through the lower court records, this Court comes to the conclusion that Mahendra Kumar Talwar, one of the partners of M/s. Central Agencies has been examined as P.W. 1 and the complainant has relied on Ext. 1, the original agreement executed between the complainant and the accused for contract work of M/s. Mukund Engineering Ltd., Angul. Exts. 2 and 3 are the dishonoured cheques, Ext. 4 is the intimation of the Bank, Ext. 5 is the copy of the Pleader's Notice, Ext. 6 is the A.D. card, Ext. 7 is the Deed of Partnership and Ext. 8 is an affidavit sworn to by the present petitioner. One Ajaya Kumar Talwar has also been examined as P.W. 2. From these evidence on record, the learned trial court and the learned appellate court have come to the findings that the accused-appellant utilized the JCB Machine as per agreement and assured to pay an outstanding dues amounting to Rs. 3,50,000/- against him. Further, the accused had issued two cheques drawn on the State Bank of India, Kalinga Nagar Branch, Jajpur proved as Exts. 2 and 3, towards repayment of the dues outstanding against him. The accused took the plea that he had not issued the cheques in favour of the complainant, much less in discharge of the liability. Further,

the plea of the accused-appellant is that the accused no.1 M/s. Anjay Construction and its proprietor transacted with the other firms and he had no nexus with that firm. However, learned courts below relying on Ext. 1 the agreement, held that the accused on14.08.1998 entered into an agreement that the Central Agencies have hired the JCB Machine for execution of the work at Angul. The learned appellate court also relied upon an affidavit sworn to by the present petitioner-Madan Mohan Sahoo, Ext. 8, wherein he admitted his liability of Rs. 3,50,000/- payable to the complainant. In that affidavit, he has admitted for issuance of two cheques and approached for compromise. These documents have been accepted as evidence and have been relied upon by the learned appellate court as well as learned trial court. The documentary evidence supports the testimony of P.Ws. 1 and 2. Thus, it is proved beyond all reasonable doubt that the accused issued the two cheques in question in favour of the complainant.

6. Moreover, under Section 139 of the Act, a presumption arises in favour of the drawee on the holder of the cheque that he received the cheques for discharge of, in whole or in part, any debt or other liability. This presumption is a rebuttable presumption but a heavy burden lies on the accused to prove to the contrary. In this case, there is no evidence worth the name to rebut the presumption arising in favour of the complainant, who is the holder of the cheques.

7. Though the accused no.1 in the complainant case is a firm, learned appellate court resorting to Section 141 of the Act held that the petitioner, who was in charge of and was responsible for the firm for conduct of the business of the Company as well as the Company shall be deemed guilty of the offence and shall also be liable to be proceeded against.

8. Finding no cogent reasons for disturbing the concurrent findings of fact, this Court is of the opinion that the finding of fact relating to the liability of the petitioner cannot be disturbed. Hence, the first contention raised by the learned counsel for the petitioner is unacceptable.

9. Coming to the second contention raised by the learned counsel for the petitioner, this Court takes note of the provision of sub-section (1) of Section 219 of the Code, which provides that when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offence, whether in respect of the same person or not, he may be charged with and tried at one trial, for any number of them not exceeding three. In this case, the cheques were issued on 7.8.1999 and 18.10.1999, therefore, both the offences can be tried in a single trial. It is not necessary to start two separate complaints for the two cases of dishonour of the cheques.

10. The petitioner has been sentenced to undergo simple imprisonment for one year and to pay a compensation for Rs. 3,50,000/-.The maximum

punishment prescribed under section 138 of the Act is for a term, which may be extended to two years or with fine, which may extend to twice the amount of the cheques or with both. So keeping in view the peculiar circumstances of the case, this Court is of the opinion that a substantive sentence of three months simple imprisonment for the offence under section 138 of the Act and compensation of Rs. 3,50,000/- (Rupees three lakhs fifty thousand) shall be sufficient to meet the ends of justice.

Accordingly, the revision is dismissed with modification of sentence as aforestated.

Criminal revision is dismissed.

2010 (I) ILR-CUT- 589

S.K.MISHRA, J.

AKURA NAYAK -V- STATE OF ORISSA.*

FEBRUARY 19,2010.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.389 (3), 446.

Conviction by trial Court – Trial Court allowed the accused persons to remain on bail and obtain bail from the appellate Court within thirty days – Order of the appellate Court could not be obtained in time – Prayer made before the trial Court for extension of time for obtaining order of bail and for dispensing with the presence of the convicts – Prayer refused – Notice issued to the bailer to show cause as to why the bail amount shall not be realized from him – Show cause filed by bailer – Show cause not accepted without even discussing the grounds taken there in – Order challenged.

Held, it was within the jurisdiction of the learned trial Court to extend time for obtaining bail order from the appellate Court – This Court also sets aside the order directing realization of bail amount from the appellant. (Para 6)

Case law Referred to:-

1988(II) OLR 308: (Purna Chandra Pradhan -V-State of Orissa & Anr.)

For Appellant - M/s. Prakash Chandra Jena & S.J.Das.

For Opp.Party – Addl. Standing Counsel.

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*CRIMINAL APPEAL NO.25 OF 2007. From an order dated 8.12.2006 passed by Sri S.K.Mohanty, learned Adhoc Addl.Sessions Judge, Fast Track Court, Khurda in S.T.Case No.94/535 of 2004.

S.K.MISHRA, J. In this Appeal, the appellant calls in question the order passed on 18.12.2006 by the learned Adhoc Addl. Sessions Judge, Fast Track Court, Khurda in S.T. Case No.94/535 of 2004, wherein the learned court below forfeited the bail bond filed by him and ordered for realisation of the bail amount from him.

2. The appellant stood as surety for the accused persons in S.T. Case No.94/535 of 2004 for bail bond of Rs.10,000/- each. After completion of trial, the learned Adhoc Additional Sessions Judge, Khurda, as per his judgment dated 9.11.2006 convicted the four accused persons. On their application, learned court below allowed them to remain on bail by resorting to the provision under section 389 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Code" for brevity) and to obtain an order of bail from the High Court within thirty days. Accordingly, on 9.11.2006, the appellant stood as surety for the convicts for bail amount of Rs.10,000/- each with an undertaking to produce the accused persons at the end of the period. The convicts preferred Appeal before this Court in Criminal Appeal No. 521 of 2006 and this Court took up the matter on 13.12.2006. This Court

admitted the Appeal, called for the L.C.R. and in Misc. Case No. 1116 of 2006 directed to release of the convict-appellants. In the meantime, period of thirty days as stipulated by the learned Adhoc Addl. Sessions Judge, Khurda had expired. On 8.12.2006 the convicts were absent. An application under section 317 of the Code was filed along with one application for extending time. Rejecting both petitions, the trial court issued Warrant against the convicts and also noticed the present appellant to show cause why the entire bail amount of Rs.40,000/- shall not be realized from him. The case was then posted to 19.12.2006.

3. While the matter stood thus, after obtaining the certified copies of the orders passed by this Court in Criminal Appeal No.521 of 2006, the convicts appeared before the learned Addl. Sessions Judge on 18.12.2006 and prayed to be released on bail on such terms and conditions as deemed just and proper. On the same date, the appellant filed a written show cause in reply to the notice issued to him. Main cause shown by the appellant was that he had instructed the convict-accused persons to appear before the court below but the convicts could not obtain the certified copies of the order of the appellate court in time and prayed for adjournment before the learned Addl. Sessions Judge. It is also pleaded by the appellant that the convicts had already surrendered before the trial court at his behest and hence, he had already discharged his duties. Learned Addl. Sessions Judge considered the cause shown by him as not satisfactory and hence, he ordered for initiating a separate Misc. Case against the delinquent for realisation of the bail amount from him. Such portion of the order dated 18.12.2006 is challenged in this appeal.

4. Law is well settled that, before a surety is made liable to pay the amount of the bond forfeited, it is necessary to give notice to show cause why the amount should not be realized from him and if he fails to show sufficient cause, only then can the court proceed to recover the amount from him. (***Purna Chandra Pradhan Vs. State of Orissa and another***, 1988 (II) OLR 308). In this case, learned Adhoc Addl. Sessions Judge, Khurda issued notice to the surety. The surety filed a show cause. Learned Addl. Sessions Judge, however, did not accept the grounds shown by him to be satisfactory, and hence he ordered that a separate Misc. Case be started against the bailer for realization of the bail amount.

5. The Section 446 of the Code embodies the principle of natural justice and the maximum *audi alteram partem rule.* It is evident from the expression "to show cause why it should not be paid". Before any adverse order is passed against any person, a reasonable opportunity must be given to him to put forth his case. Such rule does not mean that only a notice to show cause will be sent to the person concerned to file his written show cause. It

also means that the court must give a hearing and consider the cause shown by him and then decide whether it is sufficient or not.

6. Learned Adhoc Addl. Sessions Judge adopted the correct procedure by issuing notice to the bailer. However, while disposing the matter, he has not applied his mind to consider, if the cause shown by him is sufficient or not. In fact, in the impugned order, he has not reflected the cause shown by the appellant. There is no discussion of the grounds taken by him, which in the considered opinion of this Court, is not proper. The requirement under Section 446 provides that after recording ground forfeit the bond, the court may call upon the person bound by such bond to pay the penalty thereof or show-cause why it should not be paid is not an empty formality. Rather, it is a very substantive right in favour of the bailor.

7. It is evident from the record, in this case, that after convicting the accused persons on 09.11.2006, learned Adhoc Addl. Sessions Judge allowed the appellant to remain on bail by resorting to the provision of sub-section (3) of Section 389 of the Code. The court allowed the convicts to prefer an appeal and to apply for bail by granting time till 08.12.2007. In fact, the appellants have preferred an appeal before this Court on 20.11.2006. Instead of filing of appeal, learned counsel preferred, inadvertently, a Criminal Revision, which was registered as Criminal Revision No.1043 of 2006. Thereafter, on 28.11.2006, on the prayer in Misc. Case No.1685 of 2006, this Court allowed the Criminal Revision to be registered as a Criminal Appeal. Again, the case could be taken up only on 13.12.2006, wherein the application for bail under Section 389 of the Code filed by the appellants could be considered and they were allowed to be released on bail on such terms and conditions as deem just and proper by learned Adhoc Addl. Sessions Judge.

8. In the meantime, on 09.12.2006, learned counsel for the convicts filed a petition under Section 317 of the Code for dispensing with the presence of the convicts and also filed a time petition for extending time of obtaining the order of bail from this Court. Their petitions were rejected by the learned Adhoc Addl. Sessions Judge. Non-bailable warrants were issued against the convicts and the present appellant was noticed to show cause why the bail amount shall not be realized from him. On 18.12.2006 the convicts appeared before the learned trial court and they were released on bail. But the show cause filed by the bailor was not accepted by the learned Adhoc Addl. Sessions Judge. Ultimately, the accused persons appeared before the learned trial court. Their non-appearance in the court on 09.12.2006 does not seem to be intentional because their counsel was present in the court and in fact, he had filed a petition under Section 317 of the Code for representation. In view of the fact narrated above, the order of the appellate court could not be obtained in due time and for that reason,

the learned counsel for the appellant prayed for extension of the time. It was within the jurisdiction of the learned trial court to extend such time. It is noted that in sub-section (3) of Section 389 of the Code it is provided that on fulfilling of certain conditions the convict persons be released on bail for such period as will afford sufficient time to present the appeal and obtain orders of the appellate court. So, in that view of the matter, the approach adopted by the learned Adhoc Addl. Sessions Judge does not appear to be justice oriented, and hence requires interference. Thus, holding that the cause shown by the surety to be sufficient, this Court sets aside the order dated 18.12.2006, inasmuch as, it relates to the realization of the bail amount from the appellant.

The Criminal Appeal is accordingly allowed.