2010(II)ILR – CUT-1

V.GOPALA GOWDA, CJ.

ARBP NO. 19 OF 2007 (Decided on 22.6.2010).

DURGA CONDEV PVT. LTD. ……..... Petitioner.

.Vrs.

EXECUTIVE ENGINEER,
BHANJANAGAR & ORS. ……. Opp.Parties.

ARBITRATION AND CONCILIATION ACT, 1996 (ACT NO.26OF1996) – SEC.11(4).

Appointment of Arbitrator – Petitioner was awarded contract work by O.P.1 – After execution of work final bill received by the petitioner – Due to frequent suspension of work petitioner incurred huge expenditure over and above the bid price agreed upon – O.P.1 was intimated for payment of the extra cost – O.P.1 neither accepted the claim nor referred the same to the nominated adjudicator.

Failure on the part of the Opp.Party in not persuading the nominated arbitrator or not appointing another arbitrator or not appointing any arbitrator under Clause 36.1 of I.T.B. by the Chairman, Institution of Engineers (India) Orissa State, gives rise cause of action for the petitioner to approach this Court for appointment of an arbitrator and it can not be said that there is no live claim and the contention that the claim is barred by limitation must fail – Held, the prayer of the petitioner for appointment of arbitrator must succeed.

(Para 10 &11)

Case law Referred to:-

AIR 1974 SC 158 : (Damodar Valley Corporation -V-K.K.Kar).

For Petitioner - M/s. D.K.Dwibedi, B.Guin & I.B.Satpathy.

For Opp.Parties – Addl.Government Advocate.

V.GOPALA GOWDA, C.J. The petitioner-contractor has filed this application under section 11 (4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act' in short) requesting this Court to appoint an arbitrator unconnected with the parties in any manner to settle the dispute between them urging various facts.

2. Facts in brief are stated as hereunder:

The petitioner, a Super Class contractor, was awarded with a contract work by opposite party no.1 vide agreement No.NCB-1/97-98 (Package No.1 A for improvement to Rushikulya Main Canal from RB .002 to 13.69 KM). The date of commencement and completion of work were 17.11.1997 and 16.5.2000 respectively for the contractual price of Rs.3,65,10,200.00.

3. After the contract was awarded in its favour, it mobilized man power and machineries to complete the work within the stipulated time as per the work programme furnished to him along with the agreement. In course of execution of the work, the work operation got frequent suspension by the principal for supply of water to Dhakhanipur reservoir for filling the same to cater the drinking water requirement of adjoining areas. Such suspension was made on eleven times as a result of which the work was suspended for 220 days, i.e., almost 25% of the total contract period for which the petitioner was forced to incur extra expenditure by way of mobilization, remobilization and demobilization factors of execution, shifting and commissioning of machineries, idle labour and establishment, protection of executed work, removal of silt and debris etc. and in the process the petitioner incurred huge expenditure over and above the bid price agreed upon by it. The said frequent suspension of work having not been spelt out in the contract agreement, the petitioner had not accounted for the said cost aspects arising out of the said suspension in its price bid. As such the expenses arising out of the said suspension indirectly or directly was supposed to be reimbursed by the principal for which series of correspondence were made. Finally on 11.7.2000 the petitioner intimated the opposite party no.1 that the extra cost on account of such periodical suspension of work has been assessed at Rs.1,80,56,000.00 and the same being legitimate one deserves to be released in its favour as per provisions in paragraph 44.1(f) & (g). The said letter is annexed as Annexure-3.

4. It is also its case that the "Instruction to the bidder" in the tender notification vide Clause 36.1 proposed that Sri N.C.Rout, Retired Chief Engineer, Irrigation, be appointed as an adjudicator for settlement of disputes between the parties. It further says that in the event the employer or the contractor disagrees to the same, the adjudicator shall be appointed by Chairman, Institution of Engineers (India) Orissa State Centre, Bhubaneswar vide Annexure-4. It is the further case that conditions of the contract vide Clauses 24, 25 and 26 specify the mechanism for redressal of disputes by the adjudicator Sri N.C.Rout, Retired Chief Engineer and on his failure or disagreement, on request by either of the parties, the Chairman, Institution of Engineers, Orissa State Centre shall appoint the adjudicator as per the agreement at Annexure-5. It is the further case that on 19.9.2005 the petitioner expressed its desire to opposite party no.1 that as per the condition of the contract, he having failed to take a decision in relation to the claims arising out of the contract with the petitioner, it desired to refer the matter to the adjudicator for adjudication of the claim. In one hand it has reminded to do so and on the other hand it requested in the letter that since the contract agreement does not bear the consent letter of any adjudicator

named person to be appointed as adjudicator, the address and consent letter be intimated.

5. Opposite party no.1 vide its letter dated 6.10.2005 intimated the petitioner stating that the claims raised by it were not admissible and acceptable to the department. It was further intimated that for adjudication of dispute the petitioner having accepted Sri N.C.Rout, retired Chief Engineer, as the adjudicator in its letter for requisition of advance, all correspondences may be made to him only. Thereafter, collecting the address of Shri N.C.Rout, he was requested to act upon who vide letter dated 19.11.2005 (Annexure-8) intimated the petitioner that he is not aware of the provisions of the contract in relation to the adjudication of disputes and the terms and conditions of payment to adjudicator and if both the parties offered their consent to accept him as the adjudicator, he is willing to offer his consent to work as the adjudicator. The petitioner vide its letter dated 12.1.2006 (Annexure-9) forwarded to Shri Rout, the nominated adjudicator, with reference to his letter dated 19.11.2005 the relevant portion of the contract relating to the dispute adjudication system along with the letter of the Executive Engineer, Bhanjanagar Irrigation Division dated 6.10.2005 giving his consent in favour of Shri N.C.Rout as adjudicator of the project but he has not responded to the said letter. The same was accordingly intimated to opposite party no.1 stating that the nominated adjudicator has not been positive which may be recorded as non-fulfilling his function in accordance with Clause 26.1 of the agreement and a new adjudicator may be appointed to whom the petitioner will also accept as the adjudicator. As there was no response from opposite party no.1, the petitioner once again approached him vide letter dated 6.2.2006 requesting him to suggest the name of any other adjudicator after obtaining a letter of consent from him to act as such. Opposite party no.1 failed to respond to the said letter of the petitioner. Therefore, the petitioner through its letter dated 12.5.2006 requested the Chairman of Institution of Engineers (India) Orissa State Centre wherein the sequences of event pertaining to appointment of adjudicator were brought to their knowledge and they were requested to appoint adjudicator/arbitrator as per the provisions of Clause 36.1 of ITB and Clauses 24, 25 and 26 of the General Conditions of Contract. As on the date of filing of this petition, the Chairman of the Institution of Engineers had not taken any action in relation to appointment of adjudicator, the petitioner has approached this Court. Finally by letter dated 26.10.2006 (Annexure-12), the petitioner intimated the opposite parties the sequence of events pertaining to the correspondences in regard to appointment of adjudicator and requested opposite party no.1 to find out

the way out for effective adjudication of the dispute arising out of the contract between the parties. Since the opposite parties failed to make

appointment of an arbitrator more than one and half years from the date of its reminder, the petitioner has approached this Court seeking for the aforesaid relief.

6. Opposite party no.1 has filed a detailed counter affidavit and also produced certain documents as Annexures-A to Annexure-D in support of its counter claim opposing the claim of the petitioner. The principal contention urged in this case is that the final bill has been paid vide final bill dated 31.3.2001 and the contract has also been closed. All the security dues such as bid security and performance security relating to the work have also been refunded to the contractor. It is opposite party's case that before passing the final bill, the contractor had not alleged that any dispute regarding the work or its payment and he has accepted the final bill without any protest. Five years after completion of the work in all respect, the petitioner in his application dated 19.9.2005, 12.1.2006, 6.2.2006 and 26.10.2006 respectively intimated to the opposite party no.1 regarding the extra payment of Rs.1,80,56,000.00 illegally and requested to appoint an adjudicator viz Sri N.C.Rout, retired Chief Engineer. It is further stated that there is no live contract. As the contract had come to an end on acceptance of final bill without any protest, the claim is not maintainable. The said fact was intimated to the Chief Engineer and Basin Manager, Berhampur vide letter no.5036/WE dated 9.12.2005 of the Executive Engineer, Bhanjanagar Irrigation Division. The Chief Engineer and Basin Manager, Berhampur in his letter No.7183 dated 31.12.2005 has intimated the Executive Engineer, Bhanjanagar Irrigation Division that the contract has already been closed and all the dues and the final bill have been paid and security deposit refunded which has been accepted by the petitioner. Therefore, appointment of arbitrator is not permissible.

7. Shri Mohapatra, learned Government Advocate, in support of the justification of the aforesaid stand of opposite party no.1 has placed reliance upon the Constitution Bench decision of the Supreme Court as reported in AIR 2005 SC 450 para 25 and clauses 25(1) and 25(2) of the agreement and submits that the claim having not been raised within the period stipulated therein, the same is barred by limitation. Therefore, the question of this Court appointing an arbitrator does not arise.

8. In reply submission, learned counsel for the petitioner placed reliance upon the decision of the Supreme Court reported in AIR 1974 SC 158 :Damodar Valley Corporation v. K.K.Kar in support of his contention wherein the payment including return of the security deposits by finally settling the claim of the contractor was made. After receiving those payments, claim made by the contractor for damages for repudiation of the contract is held to

be maintainable. Therefore, there is no merit in the stand taken by opposite party no.1 in its counter statement.
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9. With reference to the above said fact, this Court is required to examine as to whether there is live claim between the parties in respect of the civil work awarded under the contract, whether the claim is barred by limitation, as pleaded by the State Government and whether the case in hand warrants appointment of arbitrator. As the aforesaid points are related to each other, the same are taken up and answered together.

10. It is an undisputed fact that there is a claim with regard to suspension of work as claimed by the petitioner on 11 number of times. Work for nearly about 25% of the total contract period was suspended for operation of the work. In this regard the petitioner has already preferred a claim as per document Annexure-3 dated 11.7.2000. We have carefully perused the arbitration clause 34.7. Opposite party no.1 neither accepted the claim nor referred the same to the nominated adjudicator under clause 34.7. Therefore, the claim was pending with the opposite party no.1. Reliance placed upon Clauses 24.1 and 25.2 in support of their case that it is barred by limitation is absolutely not tenable in law as the same is contrary to the factual position, namely, the claim in respect of the suspension of work on 11 times on account of which unnecessary extra expenditure was incurred by the petitioner by way of mobilization, demobilization and remobilization factors of execution, shifting and commissioning of machineries, idle labour and establishment, protection to executed work, removal of silt and debris. The same is over and above the agreed bid amount under the contract. Therefore, it was the duty of the opposite party no.1 to refer the same to the nominated adjudicator under clause 26.1. When opposite party no.1 did not take any step, petitioner requested the nominated adjudicator to act upon who by letter dated 19.11.2005 intimated the petitioner that he is not aware of the provisions of the contract relating to adjudication of dispute and thereafter the petitioner through letter dated 6.2.2006 intimated opposite party no.1 that since the proposed adjudicator had not been positive it may be recorded as non-fulfilling the function in accordance with the provision of Clause 26.1 of GCC and requested for suggesting name of any other adjudicator. When opposite party no.1 did not respond, the petitioner vide letter dated 12.5.2006 requested the Chairman, Institution of Engineers (India) Orissa State Centre to appoint an arbitrator as per Clause 36.1 of ITB and Clauses 24, 25 and 26 of the General Condition of the Contract. The same was also not materialized. Therefore, he has approached this Court.

11. Not settling the claim by appointing the nominated arbitrator and non-appointment of adjudicator as per Clause 36.1 of ITB certainly gives the petitioner cause of action to approach this Court for appointment of the

arbitrator to resolve the dispute between the parties in respect of the claim vide document Annexure-3. Inaction on the part of the opposite party no.1

despite the fact that the claim was preferred as back as 11.7.2000 to the Commissioner-cum-Secretary, Government of Orissa, Water Resources Department-opposite party no.3 the same has not been accepted, is a dispute between the parties. Preferring claims with the Secretary of the Water Resources is not in dispute and the nominated arbitrator has not agreed to be adjudicator and the Chairman, Institution of Engineers (India) Orissa State Centre not appointed the arbitrator in spite of request made by the petitioner, it cannot be said that there is no live claim merely because the final bill is received by the petitioner. The bill amount is in relation to the work that was executed by him. The same has nothing to do with the pending claims regarding extra expenditure not covered under the agreement for execution of civil work agreed upon by the contractor. Therefore, factually receipt of the amount under the final bill is not in relation to the claims made. Therefore, it cannot be said that there is no live claim between the parties referred to supra. The decision relied upon by the learned Government Advocate has absolutely no application and reliance placed on said decision is misplaced. On the other hand learned counsel for the petitioner has placed reliance upon the decision in Damodar Valley Corporation (supra) which supports its case. Further the contention urged that the claim is barred by limitation placing reliance on Clause 24.1, 25.1 and 25.2 is not tenable in law. In view of the failure on the part of the opposite party in not persuading the nominated arbitrator or not appointing another arbitrator or not appointing any arbitrator under Clause 36.1 of ITB by the Chairman, Institution of Engineers (India) Orissa State, the said contention that claims is barred by limitation must fail. Therefore, the prayer of the petitioner for appointment of arbitrator must succeed. I, therefore, appoint Justice Shri A.K.Parichha**,** a former Judge of this Court, as the Arbitrator to decide the dispute between the parties. The arbitrator so appointed shall enter upon the reference within a period of four weeks from the date of communication of the order. The fee and other charges of the arbitrator will be fixed by the arbitrator himself. After entering upon the reference, the arbitrator shall decide the dispute between the parties within a period of six months.

The petition is accordingly allowed.

Application allowed.

2010(II)ILR – CUT-7

V.GOPALA GOWDA, CJ L.MOHAPATRA, J.

W.P.(C) NO.9770 OF 2009.(Decided on 24.06.2010)

RUMI DWIBEDI …… .Petitioner

-V-

CHAIRMAN, ORISSA PUBLIC SERVICE COMMISSION, CUTTACK & ORS. ……. Opp Parties

ORISSA SUPERIOR JUDICIAL SERVICES & ORISSA JUDICIAL SERVICE RULES 2007 – RULE 18(1)©& 19(3)(ii).

Orissa Judicial Service – As per Advertisement Candidates to produce Oriya pass Certificate equivalent to M.E. School Standard, if not passed H.S.C. or equivalent examination having Oriya as one of the subjects –Petitioner a student of I.C.S.F., produced a Certificate issued from her school that she had Oriya as a compulsory subject from Class-IV to Class-VIII – Her application was rejected – Hence the writ petition.

Purpose of the Rule is to speak, read and write Oriya fluently and for that passing of examination in Oriya language equivalent to that of Middle School Standard is necessary – Since the petitioner had Oriya as a compulsory subject from Class IV to VIII it can not be said that she was not capable of speaking, reading and writing Oriya of the standard as required under the Rules.

Held, passing of I.C.S.E. having Oriya as a compulsory subject from Class-IV to VIII can be treated as equivalent to Oriya pass certificate of M.E.School standard.

For Petitioner – Niranjan Sing
For Opp.Parties –P.K.Khuntia

The petitioner in this writ application has prayed for acceptance of her application to appear in the examination conducted on 15.7.2009 for appointment to Orissa Judicial Service and quashed Annexure-10, in which the application of the petitioner has been rejected for want of proper evidence regarding Oriya Pass (M.E.Standar) as required under Para 7(III) (I) of the advertisement. The O.P.S.C. issued an advertisement for appointment o Orissa Judicial Service for the year 2008-09 and the last date of receipt of application was 2nd March, 2009. The petitioner submitted her application for appearing in the written examination. Her application was

however rejected for want of proper evidence regarding Oriya Pass (M.E. standard) as required under the advertisement.

It is contended by the learned counsel for the petitioner that the certificate issued by the school in which she was reading clearly shows that she had Oriya as one of her compulsory subject from Class-IV to Class-VIII and, therefore, the said certificate should have been accepted for the purpose of proving that she had Oriya Pass (M.E. standard) in terms of the advertisement.

The advertisement in Annexure-1 clearly stipulates that the candidates are required to produce the documents as indicated in Clause-7 of the advertisement which includes Oriya Pass certificate from the Board of Secondary Education, Orissa or any other Board or Council of Secondary Education approved by the Government in support of passing of Oriya Language Test equivalent to M.E. School standard, if not passed H.S.C. or equivalent examination having Oriya as one of the subjects.

Admittedly, the petitioner is a student of I.C.S.E. and, therefore, in terms of the said advertisement, could not produce the certificate issued by the Board of Secondary Education, Orissa. However, Annexure-12 shows that the school in which the petitioner had studieed has certified that the petitioner had Oriya as a compulsory subject from Class-IV to Class-VIII. The question that arises for consideration is that whether the said certificate satisfies the requirements as stated above?

It was contended by Shri Dash, learned counsel appearing for O.P.S.C. that the students, who have taken I.C.S.E. course, have to obtain a pass certificate from the Board of Secondary Education, which is conducted regularly in respect of different types of employment where knowledge in Oriya of M.E. standard is required and, therefore, in stead of passing such examination conducted by the Board of Secondary Education, the petitioner could not have produced the certificate issued by the school to indicate that she had Oriya as a compulsory subject from Class-IV to Class-VIII and the said certificate issued by the school can not be treated as equivalent to a certificate issued by the Board of Secondary Education, Orissa for the purpose.

On consideration of submissions of the learned counsel appearing for the parties and with reference to Rules 18 and 19 of OSJS and OJS Rules, 2007, we find under Rule 18(1)© of the aforesaid Rules, a candidate is required to speak, read and write Oriya fluently and must have passed the examination in Oriya language equivalent to that of Middle English School standard. Rule 19(3)(ii) provides requirement of a certificate from the Board of Secondary Education of Orissa or in any other Board or Council of

Secondary Education approved by Government in support of passing of Oriya Language Test equivalent to M.E.School standard.

RUMI DWIBEDI -V- CHAIRMAN, O.P.S.C CUTTACK

On reading of both the provisions, we find that the intention in inserting the above two provisions is that a candidate applying for the post should have knowledge in order to speak, read and write Oriya fluently and for that passing of an examination in Oriya Language equivalent to that of Middle English School standard is necessary.

Here is a case where there is no dispute that the petitioner had Oriya as a compulsory subject from Class-IV to Class-VIII and dhad secured marks in the said subject. Since the petitioner had Oriya as a compulsory subject from Class-IV to Class-VIII, if cannot be said that she was not capable of speaking, reading or writing Oridya of the standard as required under the Rules.

On harmonious reading of both the provisions, we are of the view that the certificate produced by the petitioner should have been accepted by O.P.S.C. and her application should not have been rejected only on that grounds. As it appears, by an interim order dated 14.7.2009, the petitioner had been allowed to appear in the written examination test. The Court is not informed as to whether the petitioner had succeeded in the written test examination or not. However, the written and viva-voce test examination has been completed for the year 2009 and the appointments have already been made in the meantime. Therefore, while finding the writ petition has become infructuous in the meantime, we observe that in the event, the petitioner submits any such application in pursuance of the advertisement issued by O.P.S.C. for appointment to Orissa Judicial Service, such certificate in Annexure-12, if produced by the petitioner, shall be treated as compliance of Rule-19(3)(ii) of the Rules.

The writ application is accordingly disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT-10

V.GOPALA GOWDA, CJ & L.MOHAPATRA, J.

WRIT APPEAL NO.107 OF 2009. (Decided 22.5.2010).

MAHAMMED SAUD & ANR. …… Appellants.

.V.

DR.(MAJ) SHAIKH MAHAFOOZ & ORS. …… Respondents.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – SEC.151.

F.A.O. disposed of – Misc. Case filed in the disposed of case – In Misc. Case order was passed to provide adequate protection to the receiver appointed to take possession of the property – Hence this writ appeal.

After disposal of F.A.O. learned Single Judge has become functus officio and could not have entertained any further Misc.Case for further orders – Held, the appeal is dismissed as not maintainable – This Court has also made an observation that after disposal of a case no further Misc. Cases should be entertained except for the purpose of correction or modification. (Para 6 & 7)

Case laws Referred to:-

1.AIR 2008 SC 77 : (Narpat Singh -V- Rajasthan Financial Corporation).
2.2008 (72)AIC 183 (SC) : (Sachida Nanda Lal @ Sachida Nanda Shah -V- State of Bihar (Now Jharkhand).
3.1(2008)CLT 194 (SC) : (Gaudiya Mission -V- Shobha Bose & Anr.)
4.1 (2008) CLT 199 (SC) : (State of M.P. & Ors.-V-Madhukar Rao).
5.(2008) 7 SCC 738 : (M.V.Janardhan Reddy -V- Vijaya Bank & Ors.).
6. 2003 SAR (Civil) 583 SC : (Sh.Dwark Prasad Agarwal(D) by L.Rs & Anr.-V- B.D.Agarwal & Ors.).
7.AIR 1988 SC 1531 : (A.R.Antulay -V- R.S.Nayak & Anr.).
8.2009 AIAR (Civil) 235 : (U.P.State Road Transport Corporation -V- Assistant Commissioner of Police (Traffic) Delhi).
9.AIR 2008 SC 690 : (State of Rajasthan -V- Ganesh Lal).
10.AIR 2008 SC 863 : (Government of Karnataka & Ors.-V-Gowramma & Ors.).
11.AIR 2008 SC 403 : (Oriental Insurance Co.Ltd. -V-Smt. Raj Kumari & Ors.).
12.2009(2) CCC 73 (SC) : (Rajasthan State Road Transport Corporation & Anr. -V- Bal Mukunda Bairwa).

For Appellants - M/s. R.C.Sarangi, S.Das, P.K.Singh, M.K.Patnaik & S.S.Mohanty.

For Respondents – M/s. B.Routray, D.K.Mohapatra, B.B.Routray & S.Jena (For R-1)

MAHAMMED SAUD -V- S.MAHAFOOZ [*L.MOHAPATRA,J.*]

M/s. Yeeshan Mohanty, P.C.Biswal, S.N.Mishra, M.R.Samal & B.P.Das (For R-2)

M/s. A.P.Bose (For R-3)

L.MOHAPATRA, J. This writ appeal is directed against the order dated 3.7.2009 passed by the learned Single Judge in Misc.Case No.397 of 2009 arising out of F.A.O.No.386 of 2007.

2. Learned counsel for the respondents raised a preliminary objection with regard to maintainability of the appeal. In order to determine the question as to whether this appeal is maintainable or not, it is necessary to look into the facts leading to filing of this appeal.

3. F.A.O.No.386 of 2007 had been filed before this Court challenging the order dated 9.9.2005 passed by the learned Ad hoc Additional District Judge, F.T.C.No.3, Bhubaneswar in Interim Application No.12 of 2005 arising out of C.S.No.492 of 2004 rejecting the application filed by the present respondents for appointment of receiver under Order 40, Rule 1 of the Code of Civil Procedure and directing both parties to maintain detailed accounts of the suit property and produce the same in future, if required by the Court. The learned Single Judge disposed of the aforesaid appeal by order dated 6.8.2008 directing the trial court to put the property into auction between the parties fixing the off-set price not less than Rs.50,000/- and further directing that the highest bidder, on depositing the bid amount, shall be given in possession of the property and the said arrangement shall continue each year till disposal of the suit. In pursuance of the said order passed by the learned Single Judge, the property was put to auction by the trial court and the parties participated in the auction. Defendant No.3-Shaik Mahfooz, who is respondent no.3 in this appeal, became the highest bidder, but he failed to deposit the bid amount in court. Even though time was extended up to 29.4.2009, the said respondent no.3 did not deposit the amount and plaintiff no.1, who is respondent no.1 before this Court, being the next highest bidder was directed to deposit the bid amount by 14.5.2009 and become the receiver of the property in question. He deposited the bid amount on 12.5.2009 and filed a memo for being appointed as receiver of the property. The present appellants, who are defendants 1 and 2 along with respondent no.3 objected to the said prayer on the ground that plaintiff-respondent no.1 cannot be given possession of the property in question as there is no such order. Before the said order dated 16.5.2009, Misc.Case

No.637 of 2008 was filed in the aforesaid disposed of appeal before this Court for modification and in the said Misc.Case, a clarification was made by this Court to the extent that the property shall include the hotel and restaurant running in the name and style of M/s.Hotel Sahara(Unit of Hotel Oasis(P) Ltd.) and, therefore the trial court in the said order dated 16.5.2009

appointed the plaintiff-respondent no.1 as the receiver in respect of Hotel and restaurant as stated above. The present appellants were directed to hand over possession of the said property to plaintiff-respondent no.1. The said order of the trial court was not complied with and an application was filed by the plaintiff-respondentno.1 alleging therein that though he has been appointed as receiver and the defendant-appellants were directed to hand over possession of the said hotel, they refused to hand over the possession for which the matter has been reported before the concerned Police Station and a prayer was made for police help to take possession of the said hotel. The petition was resisted on the ground that time till 22nd May, 2009 had been granted to take possession of the hotel and the said time had not expired. Therefore, by order dated 22.5.2009, the trial court rejected the petition as premature. On 22.5.2009, another similar application was filed by the plaintiff-respondent no.1 and when the matter stood thus, Misc.Case No.397 of 2009 was filed in this Court in the above disposed of F.A.O. and in the said Misc.Case, order was passed to provide adequate protection to the receiver appointed to take possession of the property in question. The said order is the subject matter of challenge in this appeal.

4. Learned counsel for the respondents relied on a Full Bench decision of this Court reported in 2008(II) OLR(FB)-725 arising out of the present case to substantiate his contention that the present appeal is not maintainable. The Full Bench in the aforesaid decision came to the following conclusions as reflected in paragraph 47 of the judgment, which is quoted below:-

> "We have heard the learned counsel for the parties patiently, noted the citations carefully, perused the materials meticulously and considered the submissions pragmatically and for the discussions made above, we have arrived at the following conclusions :
>
> (1) After introduction of Section 100-A in the Code of Civil Procedure by 2002 Amendment Act, no Letters Patent Appeal is maintainable against a judgment/order/decree passed by a learned Single Judge of a High Court.
>
> (2) The decision of a Division Bench of this Court in Birat Ch. Dagra case (supra) has not laid down the correct position of law. On the other hand, the conclusions arrived at by Division Benches of this

Court in V.N.N. Panicker and Ramesh Ch.Das cases (supra) are held to be good law and are confirmed.

(3) A writ Appeal shall lie against the judgment/orders passed by a learned Single Judge in a Writ Petition filed under Article 226 of the Constitution of India. In a Writ Application filed under Articles 226 and 227 of the Constitution, if any order/judgment/decree is passed

in exercise of jurisdiction under Article 226, a Writ Appeal will lie, whereas no Writ Appeal will lie against judgment/order/decree passed by a Single Judge exercising powers of superintendence under Article 227 of the Constitution.

(4) No Letters Patent Appeal shall lie against judgment/order passed by a learned Single Judge in proceedings arising out of Special Acts."

5. With reference to the aforesaid judgment, Shri Sarangi, learned counsel appearing for the appellants submitted that after disposal of F.A.O., learned Single Judge has become functus officio and could not have entertained any further Misc.Cases for further orders and only Misc.Cases for the purpose of correction or modification could be entertained after disposal of the appeal. It was further submitted by the learned counsel for the appellants that the order passed by the learned Single Judge after disposal of the appeal has no connection with the issue involved in the F.A.O. and, therefore, such orders could only be passed in exercise of jurisdiction under Article 226 of the Constitution of India and, therefore, the present appeal is maintainable in view of the Full Bench decision. Reference was made to several decisions by the learned counsel for the appellants in order to substantiate the above contention and the said decisions are as follows:

A.I.R.2008 S.C.77 (Narpat Singh Vrs. Rajasthan Financial Corporation), 2008(72)AIC 183(S.C.) (Sachida Nanda Lal @ Sachida Nand Shah Vrs. State of Bihar (Now Jharkhand), 1 (2008) CLT 194(SC) (Gaudiya Mission Vrs. Shobha Bose and another), 1 (2008) CLT 199(SC) (State of M.P. and others Vrs. Madhukar Rao), (2008) 7 Supreme Court Cases 738 (M.V.Janardhan Reddy Vrs. Vijaya Bank and others), 2003 SAR (Civil) 583 SC (Sh.Dwark Prasad Agarwal(D)) by L.rs. and another Vrs. B.D. Agarwal and others), AIR 1988 Supreme Court 1531 (A.R.Antulay Vrs. R.S.Nayak and another), 2009 AIAR (Civil) 235 (U.P.State Road Transport Corporation Vrs. Assistant Commissioner of Police (Traffic) Delhi), AIR 2008 SC 690 (State of Rajasthan Vrs. Ganeshi Lal), AIR 2008 Supreme Court 863(Government of Karnataka and others Vrs. Gowramma and others), AIR 2008 Supreme Court 403(Oriental Insurance Co. Ltd. Vrs. Smt.Raj Kumari and others) and 2009(2) CCC

73 (SC) (Rajasthan State Road Transport Corporation and another Vrs. Bal Mukunda Bairwa).

6. After careful perusal of the decisions cited by the learned counsel appearing for the appellants, though we find that there is no direct bearing of the issues involved in these reported cases with the issue involved in this appeal, there is substance in the submission of the learned counsel

appearing for the appellants that after disposal of F.A.O., learned Single Judge could not have entertained the Misc. Petitions for different purposes and only applications for modification or correction of orders could be entertained. Therefore, even if it is construed that the order impugned in this appeal is without jurisdiction, the learned Single Judge having became functus officio after disposal of the appeal, the said order is not appealable. The only conclusion one can arrived at is that the impugned order has been passed in exercise of inherent powers under Section 151 of the Code of Civil Procedure and, therefore, the writ appeal against the said order cannot be maintained. The learned counsel for the appellants made a reference to Section 100-A of the Code of Civil Procedure and also Clause 10 of the Letters Patent Appeal to substantiate his submission that the appeal is maintainable. The submissions made by the learned counsel Shri Sarangi in this regard were also argued by him before the Full Bench but such submissions were not accepted and the Court specifically came to a conclusion that only an order passed by the learned Single Judge under Article 226 of the Constitution of India can be subjected to an appeal, but any order passed by the High Court in exercise of its power superintendence under Article 227 of the Constitution of India is not appealable. The Full Bench also held that no Letter Patent Appeal shall lie against any judgment/order passed by the learned Single Judge in proceedings arising out of Special Acts. The F.A.O. had been filed under Order 43, Rule 1 of the Code of Civil Procedure and the order passed by the learned Single Judge after disposal of the appeal can only be construed to be one in exercise of jurisdiction under Section 151 of the Code of Civil Procedure. Therefore, applying the principles laid down by the this Court in the aforesaid Full Bench decision, this appeal is not maintainable. Accordingly, we dismiss the appeal as not maintainable.

7. Before parting with the case, we would like to make an observation that after disposal of a case, as observed by the Hon'ble Supreme Court in some of the decisions referred to above, no further Misc. Cases should be entertained except for the purpose of correction or modification.

Writ appeal dismissed.

2010(II)ILR – CUT-15

V.GOPALA GOWDA, CJ & A.S.NAIDU, J.

Writ Appeal (Civil) No.204 of 2009 (Decided 14.05.2010)

ARUN KUMAR NAHAK & ORS. ……. Appellants.

.Vrs.

STATE OF ORISSA & ORS. …….. Respondents.

EDUCATION – **Advertisement for admission in to B.Ed. Course – Applications invited only from untrained graduate teachers – Appellants are Hindi teachers, Classical teachers and Physical Education teachers of different aided schools challenged the advertisement in writ petition – Learned Single Judge held the benefit of undergoing inservice B.Ed. training was aimed for untrained teachers holding Trained Graduate Post and it was unreasonable to grant permission to the appellants for such training – Hence this appeal.**

B.Ed. training is not necessary for the appellants – Held, no infirmity in the order of the learned Single Judge – However since the appellants have taken admission in B.Ed Course as in-service Candidates by virtue of the interim order and completed the course, extending the principles of equity, they should be permitted to appear in the examination.

(Para 9 to 11)

For Petitioners - M/s. K.K.Swain & Associates.
For Opp.Parties - Standing Counsel (for Res.No.1)
Mr. B.B.Mohanty (for Res.No.6).

A.S.NAIDU, J. In this writ appeal the judgment dated 27.3.2009 passed by the learned Single Judge of this Court in W.P.(C) No.13565 of 2008 is assailed.

2. The appellants are admittedly working as Hindi Teachers, Classical Teachers and Physical Education Teachers in different aided educational

institutions. Being aggrieved by the Clause 4-C of the admission brochure under Annexure-7 inviting applications from untrained graduate teachers for taking admission in B.Ed. course for the session 2008-09, a writ petition bearing W.P.(C) No.13565 of 2008 was filed calling in question the said clause and also clause 2.3 of the corresponding advertisement. Admittedly, in consonance with the aforesaid clause, the appellants had opted to take admission as in-service candidates and after their names were sponsored, they took admission and prosecuted B.Ed. course. Respondent no .6, as

petitioner, filed the aforesaid writ petition, inter alia, challenging the brochure condition mainly on the ground that granting permission to in-service Hindi Teachers, Classical Teachers and Physical Education Teachers to take B.Ed. training was unwarranted and contrary to the rules and notifications issued by the Government. It is further contended that seats in B.Ed. course being limited, granting such privilege to Hindi Teachers, Classical Teachers and Physical Education Teachers infringes upon the rights of the Graduate teachers holding Training Graduate posts. It is also stated that training qualification was a must for a Graduate who holds the post of Trained Graduate teacher, where as such qualification is not necessary to persons holding the posts of Hindi/Sanskrit and Physical Education Teachers. Considering the fact that only Graduates with B.Ed. training are eligible to hold the post meant for Trained Graduate Teachers, the Government had fixed the dead-line and issued a notification that continuance of untrained graduate teachers bereft of B.Ed. training against Trained Graduate posts would entail de-recognition of the institution in question. Further, being conscious of the fact that many untrained teachers are holding Trained Graduate posts, the Government took a further decision to give them opportunity to undergo B.Ed. training on being sponsored by their employees, of course on seniority basis. Unfortunately, however while issuing the advertisement inviting applications for admission to B.Ed. course issued for the year 2008-09 the said decision of the Government was not kept in mind. It stipulated that un-trained teachers posted against sanctioned yardstick post in Government/Government aided/recognized High Schools appointed on regular basis and teachers appointed regular post in elementary schools, would be eligible to prosecute B.Ed. training as in-service teachers. Such a condition, it was submitted, is not tenable in law and was contrary to the object sought to be achieved. Consequently a prayer was made to quash the said broacher condition as well as the corresponding clause in the advertisement issued for taking admission in B.Ed. course as in-service candidates for the year 2008-09.

3. A perusal of the advertisement reveals that only two qualifying conditions were stipulated to avail the opportunity; (i) a person has to be an untrained teacher, (ii) he must have been posted against a sanctioned

yardstick post. Taking advantage of the said condition in the advertisement and similar conditions existing in the brochure, the appellants, who were not holding Trained Graduate post, but were appointed against Hindi, Sanskrit or Physical Education Teacher, which were sanctioned yardstick posts applied and took admission as in-service candidates. The said conditions in the advertisement and the brochure as stated earlier were assailed before this Court in the writ petition.

4. Hon'ble Single Judge after discussing the relevant provisions of the Education Act and other notifications/clarifications issued time and again by the Government, came to the conclusion that graduate teachers teaching Sanskrit, Hindi and graduate physical Education Teachers are not required to possess B.Ed. qualification to hold such posts whereas untrained teachers, who are holding the post of Trained Graduate post either in Science or in Arts subjects, as per the sanctioned yardstick, were required to possess B.Ed. training to continue in such post as well as to receive grant-in-aid. It was further held that the object to be achieved by allowing in-service candidates to take admission to B.Ed. course was, therefore, very loud and clear. In other words, only those teachers, who were holding Trained Graduate posts, as per the sanctioned yardstick on regular basis and did not possess B.Ed. training were to be given opportunity take admission in B.Ed. course, as in-service candidates in order to facilitate them to continue in such posts.

5. On the basis of such discussions, Hon'ble Single Judge held that granting permission to Classical Teachers, Hindi Teachers, Physical Education Teachers to take admission to B.Ed. course as in-service candidates was unreasonable.

6. It appears, by virtue of the interim order passed by this Court, the appellants took admission in B.Ed. course as in-service candidates, but then, such admission was subject to the final result of the writ application. Hon'ble Single Judge further held that admission of Classical Teachers, Hindi Teachers, Physical Education Teachers being unconstitutional, such admission should be held to be null and void. Being aggrieved by the said order, this writ appeal has been filed.

7. Mr. Swain, learned counsel appearing for the appellants painstakingly placed before this Court the judgment as well as relevant provisions of the Act and Rules. According to Mr. Swain, as per the conditions of the brochure as well as advertisement issued in the year 2008-09, there was no bar for a Classical Teacher, Hindi Teacher, Physical Education Teacher to take admission as in-service candidates. It is reiterated that all the aforesaid three categories of teachers were holding the post against sanctioned yardstick and are untrained. Thus, Hon'ble Single Judge lost sight of the fact that

admission of the appellants was made in connotation with the terms of broacher and advertisement of the year 2008-09 and the conclusion that the appellants were not entitled to any benefit was unjust and illegal. Further, Mr.Swain submitted that unless a Hindi or Sanskrit or Physical Education Teacher possesses training qualification, he shall not be considered for promotion to the higher post. Thus, training is a necessity and as such, the authorities rightly allowed them to take admission.

8. All these submissions are strongly repudiated by learned counsel appearing for the opposite parties. According to him training is a must for an untrained graduate holding Trained Graduate post. Unless, he acquires qualification, his service was at stake. On the other hand, training was not a necessity for a Hindi, Sanskrit or Physical Education Teacher to hold the said post. Considering the said fact, the State Government had taken a decision to grant privilege of in-service training to untrained graduate teachers holding Trained Graduate Posts. Such benefit were never meant to be extended to the teachers appointed against Hindi, Sanskrit or P.E.T. posts. According to the learned counsel Hon'ble Single Judge has vividly discussed the materials and the conclusions arrived at are just proper and in connotation with the provisions of law.

9. We have heard learned counsel for the parties at length. We have also perused the pleadings and the documents annexed thereto meticulously. We have considered the submissions diligently. After considering all the facts and circumstances, we find that Hon'ble Single Judge has considered all the aspects and discussed the same vividly in his judgment. In fact, granting opportunity to untrained teachers holding Trained Graduate post to possess B.Ed. training was a necessity and therefore, such benefit was extended to the said class of teachers, whereas B.Ed. training is not required so far as the teachers imparting Hindi, Sanskrit and P.E.T. in Government/recognized Schools. Learned Single Judge has not only taken into consideration different provisions of the Act and Rules but also has considered the notifications and clarifications issued time and again by the Government. A cumulative perusal of all the documents leads to an irresistible conclusion that the benefit of undergoing in-service B.Ed. training was aimed to grant some benefits to untrained teachers holding Trained Graduate post. It was never the intention of the Government to extend the said benefits to the appellants, who are admittedly holding the posts of Hindi Teachers, Classical Teachers and Physical Education Teachers more so because B.Ed. training is not necessary for holding such posts.

10. In view of the aforesaid facts, we find no infirmity in the order passed by the Hon'ble Single Judge and decline to interfere with the same.

11. However, fact remains, for the reasons good, bad or indifferent, the appellants were permitted to take admission in B.Ed. course for the session 2008-09. Admittedly, admission notice as well as brochure conditions did not make any distinction between the appellants and the untrained teachers holding trained graduate posts. It also appears that the names of the appellants were sponsored by different institutions according to their seniority. By virtue of an interim order passed in the writ petition, they were permitted to take admission and prosecute the training, subject to the result of the case. They have taken admission in the course and completed the

same. Therefore, though we are not inclined to interfere with the decision of the Hon'ble Single Judge and confirm the finding that the admission of the appellants in B.Ed. course at in-service candidates was not justified, considering the fact that the appellants by virtue of the interim order have taken admission and completed the course, extending the principles of equity, this Court feels that they should be permitted to appear in the examination along with the students of the coming session, i.e, 2010-11 and their result may be declared as per the Rules. It is however, made clear that this direction has been issued in view of the peculiar facts and circumstances of the present case and shall not be treated as precedent in future.

12. With the aforesaid observation, the writ appeal is disposed of.

Writ appeal disposed of.

2010(II)ILR – CUT-20

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

Writ Appeal no.198 of 2009 (Decided on 10.02.2010).

BIJU PATNAIK UNIVERSITY OF TECHNOLOGY, ORISSA, ROURKELA …… Appellant

.Vrs

SAIRAM COLLEGE …… Respondent.

Education – Examination – University granted admit card to the students for appearing at the examination – Candidates appeared at the examination and their results were declared and mark sheets had been issued – Held, University was estopped from refusing to issue them degree certificates. (Para 8 & 9)

Case laws Referred to:-

1.AIR 2005 SC 2026 : (Professor Yaspal & Anr.-V-State of Chhatisgarh & Ors.).

2.AIR 1990 SC 1075 : (Sanatan Gauda -V- Berhampur University & Ors.)

For Appellant - M/s. Subir Palit, A.K.Mahana, D.Biswal, H.K.Rajsingh, A.Mishra, D.N.Pattnaik & A.Kejriwal.

For Respondent – M/s. Budhadev Routray, D.K.Mohapatra, B.B.Routray, S.Jena, P.K.Sahoo, R.P.Dalai, S.K.Samal & S.K.Ray.

For Intervenor - M/s. P.K.Ray, B.D.Tripathy & R.Acharya.

S.PANDA, J. In this writ appeal, challenge has been made to the order dated 26.10.2009 passed by a learned Single Judge of this Court in W.P.(C) No.1771 of 2009.

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

Sairam College represented through its Chairman filed W.P.(C) No.1771 of 2009 before this Court with a prayer to issue a writ of mandamus directing Biju Patnaik University of Technology (in short, "BPUT") to issue

degree certificates to 67 students of the College, who had already appeared in the University Examinations within a reasonable period and to act in terms of the decision of All India Council for Technical Education (in shor, "AICTE") for One Time Approval in respect of the said students. Sairam College was earlier affiliated to Kalinga University of Chhatisgarh. The aforesaid 67 students were prosecuting their studies in B. Tech (Bio Technology) from the session 2003 onwards. In the year 2005, the apex Court in the case of Professor Yaspal & another V. State of Chhatisgarh & others reported in AIR 2005 SC 2026 held Chhatishgarh Niji Kshetra Vishwavidyalaya (Sthapana

Our Viniyaman) Adhiniyam, 2002 as ultra vires and in order to protect the interest of the students who may be actually studying in the Institutions established by such University directed that the Institutions established by such private Unsiversity may take appropriate measures to get such institutions affiliated to the already existing State University in Chhatishgarh. Subsequently in SLP (C) No.10506 of 2005 filed by one Ray University against the State of Chhatisgarh and others, the apex Court clarified the earlier order and observed that the affiliation must necessarily be sought only with an already existing State University at Chhatisgarh. The Institutions of the erstwhile private Univerisity, if otherwise eligible, may apply and seek affiliation with any other University which has jurisdiction over the area where the institution is functioning and is empowered under the relevant Rules and Regulations and other provisions of law applicable to the said University to grant affiliation. (Emphasis supplied). In pursuance of the said decision of the apex Court, AICTE issued a policy for grant of approval to the different private Universities of Chhatisgarh wherein the Category-I relates to grant of approval for proposed new institutions and Category-II relates to grant of One Time Approval to protect the interest of the students already reading in such educational institutions/study centres. On 10.1.2006 the Registrar, BPUT issued a letter to the Regional Officer, AICTE about joint inspection to be conducted by the Director, Technical Educational & Training, Orissa. The Registrar, BPUT, for verification of enrolment of the students in various streams in Sairam College, Bhubaneswar which was the Study Centre of the erstwhile Kalinga University, intimated that BPUT had no objection to allow the students already admitted to Sairam College to complete their courses under the University, subject to the rider that certain terms and conditions had to be fulfilled. The terms and conditions contained in the said letter dated 14.1.2006 are as follows:

"(i) the college has to get one time AICTE approval for allowing the students who have already been admitted by the above college to Engineering, MBA, and MCA programme to complete the programme under BPUT.

(ii) It will be one time measure and no such provision be allowed for any student or any college in future.

(iii) An equivalence committee will be constituted for each programme and the students have to follow BPUT syllabi to complete the rest part of the course (both theory and practical) as recommended by the equivalence committee.

(iv) In case it is found that the college does not provide adequate infrastructure for laboratory or computer facility for any subject the students may be required to complete the course in any of the other affiliated colleges of BPUT on payment basis.

(v) They have to fulfil any other condition stipulated by the University to maintain good academic standard before award of the final degree."

3. As per the aforesaid terms and conditions, the Senior Professors visited the college and submitted the report to the Vice-Chancellor, BPUT giving suggestion for prosecution of further studies of 67 students of the said college. Accordingly, BPUT" provisionally allowed the said 67 students of the College to appear at a special examination conducted from 19th June to 10th July, 2006 in respect of 4th semester and another batch of students was allowed to appear in 6th semester examinations. On 25th September, 2006, AICTE intimated BPUT that one time approval had been accorded to Sairam College and the period of approval was mentioned as 2003-2007 and in to the intake capacity was stated to be 67 subject to the following conditions :

"(a) The Institution shall obtain affiliation from the concerned affiliating University for the above mentioned courses/intake for the period till the students are pass out.

(b) The Institution is liable to fulfil the conditions which may be prescribed by the concerned affiliating University and/or State Govt. in respect of conduct of the courses/programme.

© The Sairam College, Bhubaneswar Near Fire Station, Barmunda, Bhubaneswar-3 off Campus Centre of erstwhile Kalinga University, Chattisgarh shall not make any fresh admissions to the course/programme and the present approval is limited to the students who are already admitted and are undergoing the courses of study.

(d) The Council shall have the right to inspect the center/institution/with or without prior intimation to ascertain the maintenance of the norms & standard, prescribed by the Council from time to time during the period of approval of the programme."

4. The said students having successfully passed the examination, their results were declared and mark-sheets were issued. Since the degree certificates had not been issued to the said 67 students of the Sairam College, W.P.(C) No.1771 of 2009 was filed by the Sairam College before this Court wherein the present appellant-BPUT filed its counter affidavit

stating therein that in the 11th Board of Management Meeting held on 10.6.2008 it was decided for examining the course contents already done by the students of the petitioner's college (Sairam College) prior to their association with BPUT. Thereafter, an Equivalence Committee was constituted by BPUT to find out the course which the students had completed and the courses which were required to be completed. The Committee submitted its report on 5.8.2008 after considering the syllabus of both the Universities and recommended to appear the condensed/Bridged course. Finding that the students had not completed the condensed/Bridged course, it was decided by BPUT that the said 67 students cannot be issued

with degree certificates as it will violate the academic regulation of the BPUT.

5. The learned Single Judge considering the facts and circumstances of the case, held that the students had already been permitted to appear at the University examinations by way of conducting a special examination and declared their results wherein they were declared successful. Thereafter, mark-sheets had already been issued to them. It was further held that in view of such circumstances, the BPUT was estopped in that juncture from withholding their degree certificates and BPUT was directed to grant the degree certificates to the 67 students who were permitted to appear in the University examination and had been declared successful and such certificates was to be issued within a period of three weeks from the date of the order.

6. Being aggrieved, the appellant has filed this writ appeal challenging the said order dated 26.10.2008 of the learned Single Judge on the ground that as per the terms and conditions, the students had to appear in the examination according to the syllabus prescribed by BPUT. Since they had not appeared in the examination as per the prescribed syllabus of BPUT, it rightly took a decision to hold another examination in which the students would clear the courses of studies and appear in the examination as per the syllabus.

7. Learned counsel for the respondents submitted that BPUT had taken such decision after the students were permitted to appear in the examination and the examination was over and the result thereof has been declared. He submitted that the students appeared in the semester examination with the permission of BPUT and it was within the knowledge of BPUT. Since BPUT is the competent authority before allowing the students to appear in the examination, it should have considered under which syllabus the students will have to appear in the examination. He further submitted that BPUT permitted the students to appear in the examination and they were declared successful in the said examination and their mark sheets were issued.

Thereafter BPUT should not have taken a decision to further examine the students with some further additional subject.

8. From the above contentions of the parties, it is clear that Sairam College was given one time approval after a joint inspection made by the Joint Committee constituting the representatives of AICTE, BPUT and the State with regard to the 67 students. BPUT permitted the said 67 students to appear in the University examination by conducting a special examination and declared their result. The students were successful in the said examination and the mark sheets were issued to them. The University is therefore clearly estopped from taking a decision not to issue degree

certificate after the students appeared in the examination, their results were declared and mark sheets were issued to them and raising objection to the so-called examination and the syllabus recommending for another condensed/Bridged course to appear further examination.

9. The apex Court in the case of Sanatan Gauda V. Berhampur University and others reported in AIR 1990 SC 1075 has held that after the University and granted the petitioner there in the admit card for appearing at the examination and the candidate had appeared in the examination, at that stage the University was estopped from refusing to declare the result of the candidate or preventing him from pursuing further studies.

10. In view of the above, we are of the opinion that the learned Single Judge has rightly directed BPUT to declare the result of the 67 students of the college in question and hence we decline to interfere with the same.

11. In the result, the writ appear has no merit and the same is accordingly dismissed.

Writ appeal dismissed.

2010 (II) ILR – CUT- 25

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

W.P. (C) NO.3225 OF 2009 (Decided on .15. 03 10)

AKULA GARANAYAK & ORS. ……Petitioner

-V-

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

LAND ACQUISITION ACT,1894 (ACT NO.1 OF1894) – SEC.28-a(1).

Section 28-A(1) of the Act provides that even if the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector U/s.11, the person interested in all the other land covered by the same notification U/s.4(1) may file an application for enhancement of the award even though they had not made an application to the Collector U/s.18 – However, if the Court has enhanced the award on a reference of other persons then also the land outstee can file an application U/s.28-A(1) of the Act and will get the benefit of such enhancement of the award – Held, the provision should be interpreted for the benefit of the land oustee but not against his interst who has lost his property and suffered in not getting proper compensation.

Impugned order set aside and direction issued to re-determine the awarded amount. (Para 11,12)

For Petitioner – M/s. Biswa Mohan Pattnaik, Senior Advocate.
For Opp.Parties – Government Advocate.

S. PANDA, J. Challenge has been made in this writ petition to the order dated 19.12.2008 passed by the Zone Officer, Land Acquisition & Resettlement and Rehabilitation Officer, Rengali Multipurpose Project, Deogarh in LA Case No.961 of 2006.

2. In pursuance of the notification under Section 4(1) of the Land Acquisition Act (in short, "the Act") published in the year 1978, the entire village of Badaludunga of Pallahara Block including the residential houses of the petitioners was submerged in the Rengali Dam Project. Applying multiplier theory, the Land Acquisition Officer, Deogarh, fixed the compensation for the acquired land as follows:

"KISSAM	RATE
Sarad-I	Rs.4,500/- per acre
Homestead	Rs.4,500/- per acre
Sarad-II	Rs.3,800/- per acre
Sarad-III	Rs.3,300/- per acre
Goda-I	Rs.2,500/- per acre
Goda-II	Rs.2,000/- per acre"

Being aggrieved by the said award, some of the villagers filed applications under Section 18 of the Act to refer the matter to the Court. The learned Civil Judge (Senior Division), Deogarh in L.A Misc. Case No.25 of 1991 enhanced the rate of compensation at the rate of Rs.22,400/- per acre, in LA Misc. Case No.87 of 1991 at the rate of Rs.21,000/- per acre and in LA Misc. Case No.9 of 1992 at the rate of Rs.20,000/- per acre. Even though the present petitioners could not file applications under Section 18 of the Act to refer the matter to the civil court, after the court enhanced the awarded amount they filed applications under Section 28-A(1) of the Act within the stipulated time for enhancement of the award. The civil court also enhanced the awarded amount on 17.4.1995 in another case, i.e., LA Misc. Case No.3 of 1994. Being aggrieved by the said award, the State Government filed FA No.187 of 1995 before this Court which was disposed of on 19.6.2000.

3. The present petitioners filed OJC No.2546 of 2002 which was disposed of by this Court on 25.8.2005 with a direction to the Land Acquisition Officer to consider the applications of the petitioners filed under Section 28-A(1) of the Act within three months from the date of receipt of the order. As the Land Acquisition Officer did not consider the same within the stipulated time, the petitioners filed Contempt Application No.374 of 2006. During pendency of the said contempt application, the petitioners' application under Section 28-A(1) of the Act was rejected on 12.6.2007 holding that the application was filed within stipulated period as provided under Section 28-A of the Act but the applicants submitted the application along with a xerox copy of the judgment. The applicants were given opportunity to submit the certified copy of the judgment. However, they filed the certified copy in December, 2006 which was not within three months of the pronouncement of the judgment of the Civil Court, Talcher. Therefore, their application for re-determination of compensation under Section 28-A of the Act could not be considered. Challenging the said order, WP(C)

No.5089 of 2008 was filed which was disposed of by this Court on 23.6.2008 directing the Zone Officer, Deogarh to verify the records and arrive at a conclusion whether the judgment passed in FA No.187 of 1995 was available in the record and whether the petition under Section 28(A) was filed within three months from the said judgment as well as the time spent for obtaining the certified copy and dispose of the matter on merit afresh within a period of six months, if there was no other impediment.

4. After disposal of the said writ petition, the Zone Officer heard the matter on 19.12.2008 and considering the materials available on record rejected the application holding that the application dated 14.7.1995 was filed without certified copy of the judgment passed in LA Misc. Case No.3 of 1994. Hence, the petitioners were asked to file the said certified copy. They filed the said certified copy in December, 2006 which disclosed that they

applied for the same on 11.12.2006. FA No.187 of 1995 was filed by the State and the petitioners also field their cross-objection in the same. The said first appeal was disposed of on 19.6.2000 enhancing the awarded amount. Since the appeal was a continuation of the proceeding, the final order in the first appeal became the final order of the proceeding. Therefore, the limitation started from 19.6.2000. The first application dated 14.7.1995 was based on the judgment in LA Misc. Case No.3 of 1994 and it was not accompanied by the certified copy. Therefore, the same was rejected. The said technical defect was never cured by the applicants and the award had been re-fixed by this Court. Hence, the Zone Officer had to consider whether the application dated 7.12.2005 along with the certified copy of the judgment passed in LA Case Misc. No.3 of 1994 and the xerox copy of FA No.187 of 1995 was filed within the period of limitation or not. The period of three months of limitation as stipulated under Section 28-A(1) of the Act completed on 19.9.2000. The copy of the judgment in FA No.187 of 1995 showed the date of application to be 29.7.2000 and the date of delivery to be 16.8.2000 so the copy period was 19 days. Therefore, the application should have been filed by 8.10.2000. But it was filed on 7.12.2005 which was more than five years after the period of limitation. Hence, the application could not be considered and the same was rejected as it was made much beyond the period of limitation. The said order is impugned in this writ petition.

5. Learned Senior Advocate appearing for the petitioners submitted that from the order dated 12.6.2007 it appears that the petitioners filed the application under Section 28-A(1) of the Act within the stipulated time. Therefore, the authority should have considered the application on merit and re-determined the award amount as per the direction given in LA Misc. Case No.3 of 1994 as well as FA No.187 of 1995 and the Zone Officer should not have rejected the application of the petitioners on the ground that

the same was barred by limitation. Therefore, the impugned order is liable to be set aside.

6. We have called for the LCR and perused the same. Admittedly the order was passed by the Zone Officer on 12.6.2007. This Court in WP(C) No.5089 of 2008 directed the Zone Officer, Deogarh to examine whether the application of the petitioners was filed within the period of limitation after excluding the time consumed for obtaining the copy as per the certified copy. The Zone Officer though held that the application under Section 28-A(1) of the Act was filed within the stipulated time, the petitioners did not file the certified copy of the judgment along with the application.

7. Section 28-A(1) of the Act provides for re-determination of the amount of compensation on the basis of the award of the Court. For better appreciation, Section 28-A(1) of the Act is quoted below:

> "**28-A. Re-determination of the amount of compensation on the basis of the award of the Court**-(1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Sec.11, the persons interested in all the other land covered by the same notification under Sec.4, Sub-section (1) and who are also aggrieved by the award of the Collector, may, notwithstanding that they had not made an application to the Collector under Sec.18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court;
>
> Provided that in computing the period of three months within which an application to the Collector shall be made under this Sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded."

8. From the above, it is crystal clear that the aforesaid Section stipulates that an application for re-determination of the amount of compensation has to be filed within three months, but it does not strictly stipulate that the application shall be accompanied by a certified copy of the order of the Court. From a plain and simple reading of the aforesaid provision, it is clear that the petitioners' application was within the time after the Court directed to re-determine the compensation on 17.4.1995 so also as held by the Zone Officer on 12.6.2007. The said order reveals that LA Misc. Case No.3 of 1994 was disposed of on 17.4.1995 by the learned Civil Judge (Senior Division), Deogarh. An application under Section 28-A(1) of the Act was filed on 14.7.1995 and the said Section does not provide that the application must be accompanied by a certified copy.

9. This Court also considered the submissions made by the learned counsel for the State that this Court in WP(C) No.5089 of 2008 directed the Zone Officer to verify the record to arrive at a conclusion whether the application was filed within three months or not taking into consideration the certified copy of the judgment. But such a situation arose only to compute the period of limitation of three months. Had the application been filed being accompanied by the certified copy, the petitioners would have been entitled to the exclusion of the time consumed for obtaining such certified copy. But, admittedly, the petitioners along with others who were thirty in numbers had filed the application within the stipulated time along with the xerox copy of the judgment. Therefore, on that ground their application should not have been rejected though they did not file the certified copy of the judgment. The requirement of law is that as per Section 28-A(1) of the Act an application has to be filed within a period of three months for re-determining the

awarded amount and the said Section does not specifically provide that the application must be accompanied by a certified copy of the judgment.

10. To appreciate this fact, we may refer to Order 41 Rule 1 of the Civil Procedure Code wherein it is provided that a memorandum of appeal shall be accompanied by a copy of the judgment. In such a situation, a copy of the judgment should be filed. But Section 28-A(1) of the Act provides that in computing the period of three months within which an application to the Collector shall be made under this Sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded. While interpreting the said provision, it cannot be said that an application under the said provision is to be filed accompanied by a certified copy of the judgment.

11. There is no doubt that the Land Acquisition Act is a benevolent statute and the Government gives compensation to the land oustees for taking away their land by way of land acquisition. Further Section 28-A(1) of the Act provides that even if the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the other land covered by the same notification under Section 4(1), even though they had not made an application to the Collector under Section 18, may file an application for enhancement of the award. However, if the Court has enhanced the award on a reference of other persons then also the land oustee can file an application under Section 28-A(1) of the Act and will get the benefit of such enhancement of the award. Therefore, the provision should be interpreted for the benefit of the land oustee and not against the interest of the land outstee who has lost his property and also suffered in not getting the proper compensation considering the value of the property.

12. In view of the discussions made in the foregoing paragraphs, the order dated 19.12.2008 passed by the Zone Officer, Land Acquisition & Resettlement and Rehabilitation Officer, Rengali Multipurpose Project, Deogarh in LA Case No.961 of 2006 is illegal and not sustainable in the eye of law. Therefore, this Court sets aside the said impugned order dated 19.12.2008 passed in LA Case No.961 of 2006 and directs the Zone Officer, Deogarh, to re-determine the awarded amount. Since this is an old matter of the year 1995, this Court directs him to re-determine the awarded amount within a period of two months and disburse the same to the petitioners immediately thereafter.

Writ petition allowed.

2010(II)ILR – CUT-30

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

W.P.(C) No.14295 OF 2006 (Decided on 11.03.2010)

JOGENDRA PANDA …….. Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226.
Education – Order of the OAT challenged – Post of Headmaster claimed after the petitioner acquired B.Ed qualification inview of Government Resolution Dt.02.12.1991 and Dt.08.01.1996 – Held, the case of the petitioner is covered by the decision of this Court in the case of P.Bengali Patro and he is entitled to get the benefit of 1991 Resolution – Further direction issued.

(Para 7 & 8)

Case law Referred to:-
104 (2007) CLT 102 : (P.Bengali Patro & 21 Ors. -V- State of Orissa & Ors.)

For Petitioner – M/s. Dr.M.R.Panda, Chiranjib Mohapatra, M.Panda.
For Opp.Parties – Addl. Standing Counsel, School & Mass Education Department.

B. P. DAS, J. The petitioner, Jogendra Panda has come up before this Court challenging the order dated 26.4.2006 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in T.A. No. 54/91.

2. As it appears, the petitioner had filed a writ petition in the year 1988 and after coming into force of the Administrative Tribunal Act, the same was transferred to the Orissa Administrative Tribunal in the year 1991 and registered as T.A. No. 54 of 1991.

The prayer of the petitioner before the Tribunal in the aforesaid T.A. No. 54 of 1991 was to direct the opposite parties, i.e. the Secretary School & Mass Education Department, the Director Elementary Education and the Inspector of Schools, Jajpur Circle, to consider his case for appointment/promotion to the post of Headmaster computing the seniority from the date of his training. The Tribunal by the impugned order dated 26.4.2006 (Annexure-1) disposed of T.A. No.54 of 1991 along with T.A. No. 55 of 1991, filed by another teacher, namely, Abhiram Nanda, with a direction to the opposite parties to entertain and consider the representation

of the petitioner for promotion to the rank of Headmaster, if filed within one month from the date of receipt of copy of that order and pass appropriate orders within three months from the date of receipt of the representation. While disposing of the aforesaid Transfer Applications, the Tribunal observed that acquisition of prescribed qualification, i.e. B.Ed is the only relevant factor to be taken into consideration for the purpose of determining seniority amongst the teachers belonging to Lower Subordinate Education Service (L.S.E.S.) cadre. The Tribunal further observed that in the case at hand, there was no allegation if anybody who obtained B.Ed qualification later than the petitioner was promoted to the post of Junior-S.E.S. Cadre on the basis of length of service pursuant to the circulars or Resolution sought to be quashed. No counter affidavit was filed either in the earlier writ petition or in the Transfer Application, when the Tribunal adjudicated the case of the petitioner.

The petitioner has assailed the order of the Tribunal under Annexure-1 in this writ application. According to him, his case is covered by the decision of this Court rendered in the case of ***P. Bengali Patro & 21 others v. State of Orissa and others, 104 (2007) CLT 102***.

3. Case of the petitioner is that, after passing the H.S.C. Examination in 1972, he took admission in the C.T. School and completed the C.T. course in the year 1974-75. Thereafter he joined as an Asst. Teacher in Mohanpur Pranchayat Samitee M.E. School. In the year 1977 he was transferred to Bhubanpur M.E. School and thereafter to Govipur U.P. School as Head

Pandit. In the meantime he passed the Bachelor of Arts in the year 1978 and completed the B.Ed course in 1980.

4. According to learned counsel for the petitioner, the petitioner is eligible for the post of Headmaster after he acquired the B.Ed qualification as per Government Resolution Nos. 54879 dated 2.12.1991 and 1425 dated 8.1.1996. According to him, though the Resolution dated 8.1.1996 was to come into force with immediate effect, the opposite parties did not consider the case of the petitioner for which the petitioner was deprived of the benefits of the said resolution. According to the petitioner, the aforesaid being discriminatory, should be wiped out by allowing the prayer of the petitioner.

5. Opposite parties 1 and 2 did not file any counter affidavit. However, a counter affidavit has been filed on behalf of opposite party No.3, the District Inspector of Schools, Jajpur-II Education District, Jajpur. The stand taken in the said counter affidavit is that the claim of the petitioner for grant of Trained Graduate Scale of pay from the date of acquiring the B.Ed qualification is not

sustainable in the eye of law because he was not holding the Trained Graduate Teacher post.

6. In Clause-2 of the resolution dated 2.12.1991, it has been indicated thus.

> "xxx xxx xxx. After careful consideration, Government have been pleased to decide that the posts of Head Masters of Government M.E./U.G.M.E. Schools and Sub- Inspectors of Schools will in future be filled up by way of promotion from among the Primary School Teachers and Assistant Teachers of U.G.M.E. Schools having trained graduate qualification. xxx xxx xxx"

The relevant clause, i.e. Clause-3 (1) of the said Resolution is also quoted herein below:-

> "The gradation list of all Primary School and U.G.M.E./Government M.E. School teachers having trained graduate qualification will be prepared Revenue district wise by the Circle Inspector of Schools. The gradation list will be prepared on the basis of the date of their appointment."

The last line of Clause-3.1 of the aforesaid Resolution dated 2.12.1991 has been modified by the subsequent resolution dated 8.1.1996 to the following effect:-

> "The gradation list will be prepared on the basis of the date of passing the B.Ed examination. Where a person has entered into

service after acquiring B.Ed. qualification, there the date of his/ her joining in Service shall be the basis for fixing his/her seniority for promotion. Where two or more persons acquire the B.Ed. qualification on a same date, the length of service of those teachers should be taken into account for preparing the gradation list."

7. Form the aforesaid, it is seen that when 1991 Resolution speaks for preparation of gradation list on the basis of date of the appointment, 1996 Resolution modifies the same to the extent that the gradation list will be prepared on the basis of date of passing the B.Ed examination.

Similar question was raised before this Court in the case of ***P. Bengali Patro & 21 others v. State of Orissa and others, 104 (2007) CLT 102,*** wherein this Court held that the Resolution dated 8.1.1996 cannot have retrospective effect and thereby the persons, who got their B.Ed qualification and got the benefit of the policy of the State Government which was effective from the date of earlier Resolution, i.e. 2.12.1991, the seniority should be determined according to the date of appointments of the teachers having B.Ed qualifications. In that case, the petitioners were promoted prior to the

Resolution date 8.1.1996. Therefore, the Court observed that the services of those teachers would be governed by the policy laid down vide Resolution dated 2.12.1991.

8. In this case, in our considered opinion, the petitioner is entitled to get the benefit of 1991 Resolution and his case is clearly covered by the decision of this Court rendered in the case of P. Bengali Patro (supra). It would be profitable to quote the direction of this Court given in the case of P. Bengali Patro (supra).

"The seniority list of the teachers who were already promoted on the basis of the Government Resolution dated 2.12.1991 shall not be disturbed. Further, the teachers who were entitled to be considered for promotion as Headmasters before the subsequent Government Resolution dated 8.1.1996 on the basis of their seniority which was to be determined pursuant to the Government Resolution dated 2.12.1991 shall be considered with effect from the date of promotion of their next juniors under the criteria laid down in the Government Resolution dated 2.12.1991."

Accordingly, we dispose of the writ application directing the opposite parties to consider the case of the petitioner in terms of the Resolution dated 2.12.1991 and in terms of the judgment refered to above, i.e. P. Bengali

Patro (supra) and complete the entire exercise within a period of three months from today. No cost.

Writ petition disposed of.

2010 (II) ILR – CUT-34

B.P.DAS, J & B.N.MAHAPATRA, J.

O.J.C. NO.5494 OF 2001 (Decided on 22.06.2010).

NILAMBAR PATREE …… Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226 & 227.

Tahasildar in the earlier order found right, title, interest and possession of the petitioner over the suit land on the strength of Hukumnama granted by the Ex-Zamidar – After vesting of the estate Petitioner continued as a tenant under the State U/s.8 (1) of the Orissa Estate Abolition Act but the present Tahasildar declines to recognise him as a tenant and to accept rent – Hence this writ petition.

No occasion on the part of the Tahasildar to pass the impugned order negativing the findings arrived at by the previous Tahasildar which is not based with any reason and the petitioner was also not given an opportunity of hearing.

Held, the impugned order is nothing but reviewing the order passed by the previous Tahasildar which is not permissible and the same is liable to be set aside – Direction issued for acceptance of rent from the petitioner. (Para 10 & 11)

Case law Referred to:-

73(1992) C.L.T. 868 : (Smt. Basanti Kumari Sahu -V- State of Orissa & Ors)

For Petitioner - Shri R.K.Mohanty, Sr.Advocate
D.K.Mohanty, A.P.Bose, S.N.Biswal, S.K.Mohanty, & P.K.Samantaray.

For Opp.Parties – Shri M.S.Sahoo, Addl. Standing Counsel.

B. P. DAS, J. The petitioner has come up before this court challenging the order dated 25.9.2000 passed by the Tahasildar, Rourkela in Revenue Misc. Case No. 24 of 1975 under Annexure-4, wherein the Tahasildar declined to recognize the petitioner as a tenant in respect of the suit land and to accept rent thereof from him. and praying to quash the impugned order dated 25.9.2000 and to direct the opposite parties to recognize him as a tenant in respect of the suit land in question and to accept rent from him for the suit land in terms of the order dated 23.3.1979 passed by the Tahasildar, Kuanrmunda vide Ans-2..

2. The brief facts leading to the writ application tend to reveal that in 1952,

the petitioner, who was a High school teacher and the Palace tutor, applied to the Ex-intermediary of Nagra Estate, Kuanrmunda, in the district of Sundergarh for grant of lease of the suit land measuring Ac. 0.88 decimals in Sabik Plot No. 623, under Khata No. 132 of village Raghunathpalli in the district of Sundergarh. On 15.10.1952, a Hukumnama was granted to the petitioner in respect of the suit land in Reclamation Case No. 243/1952-53 vide Annexure-1. By virtue of the said Hukumnama , the petitioner became a tenant under the Ex-Zamindar of Nagra Estate. On 27.11.1952, a notification was issued under Section-3 of the Orissa Estates Abolition Act, wherein the intermediary interest of Nagra Estate in Mouza Raghunathpalli vested in the State Government.

3. According to the petitioner, by operation of law, the petitioner being a tenant under the Ex-intermediary prior to such date of vesting, he continued as a tenant under the State as per Section 8 (1) of the Orissa Estate Abolition Act. The Estate of the Ex-Intermediary after vesting, he submitted the Register of Hukumnama to the Tahasildar showing the names of the tenants including that of the petitioner. On 4.8.1975, the petitioner submitted an application before the Sub-Collector, Panposh, Rourkela to accept rent from him, because the Revenue Authorities were time and again making attempt to demolish the house standing over the suit land. The S.D.O.,

Panposh, Rourkela, forwarded the application of the petitioner to the Tahasildar, Kuanrmunda, who registered the same as Revenue Misc. Case No. 24/1975 for fixation of rent in respect of the suit land. On 18.8.1975, the Tahasildar, Kuanrmunda issued notice to the petitioner directing him to produce the relevant documents..The petitioner appeared before the Tahasildar and produced the relevant documents such as Hukumnama granted to him in Reclamation Case No. 243/1952-53,vide Annexure-1 and the rent receipts granted by the Ex-intermediary. After receiving the documents, the Tahasildar made an inquiry through the Revenue Inspector to know the truth on the claim of the petitioner, and as to whether the petitioner has reclaimed the suit land and is continuing in possession of the same and has paid the rent to the Ex-intermediary. Thereafter on 24.2.1976, after a number of adjournments, the R.I. submitted the report and the Tahasildar directed the Bench Clerk to verify the same. About three years after, on 12.2.1979 the Tahasildar directed the petitioner to file original Hukumnama and rent receipts and the Bench Clerk was also directed to produce the register of Hukumnama. On 23.3.1979, the Tahasildar passed the following orders:-

> "Petitioner Sri Patri is present. Seen the Register of Hukumnama available in Tahasil office. Petitioner files the Original Hukumnama and 2 rent receipts in support of payment of rent to Ganju.

> It is seen that the petitioner Shri Patri was granted a Hukumnama vide Case No.243 of the year, 1952-53 for reclamation of Anabadi land measuring Ac.0.88 in Plot No.623 (Sabik Plot). The Register of Hukumnama produced by the B.C. is verified. There is entry in the Hukumnama Register maintained in the Tahasil office. The Hukumnama for reclamation was granted by the ex-Zamindar, Nagra Estate. Thus there is no reason to disbelieve the Hukumnama.
>
> It is seen from the case record that the R.I. Raghunath Pali was asked to enquiry into the case and submit a detailed report. His report has been received. It reveals that one Dibakar Mohanty of Panposh was previously cultivating the reclaimed land on behalf of the petitioner. Further, out of the area of Ac. 0.88, an area measuring Ac. 0.26 was under encroachment by Indra Singh and 2 others of Rourkela. Subsequently they have been evicted from the encroachment as seen from the report of the R.I.
>
> As to the present position of the case, the R.I., Raghunathpali, as well as the petitioner state that there has been Dakhal note in favour of Nilambar Patri on the strength of Hukumnama for Ac. 0.57½ of land. The rest Ac.0.31½ has been in favour of Dibakar

Mohanty as "Jabar Dakhal". The Kisam of the land at present is "Gharbari".

For want of present settlement records it cannot be said that such notes are left in the Hal settlement records. Neither the R.I. nor the petitioner is able to furnish the Hal Khata and plots etc., which correspond to the sabik plot no. 623 of Raghunathpali village.

However, from the records available before, I am satisfied that the petitioner is in possession of a portion land out of the Sabik Plot No.623. No doubt, the petitioner has perfected his right, title and possession over the same land on the strength of the Hukumnama. As regards the Jabar Dakhal by Dibakar Mohanty, the petitioner if he so likes, may take shelter in proper court of law for eviction of the encroachment.

As the position of the reclaimed land in question according to the Hal settlement is not clear, the prescribed rent for the reclaimed land cannot be assessed on royati status at this stage. Before passing any such order, Hal settlement records such as draft khatian, order of the settlement officer, etc. are to be verified. After verification of such records, rent will be assessed.

Further the petitioner, Sri Patri is directed to file certified copies of the above settlement records for reference. Case to 21.5.1979."

Sd/-
Tahasildar (P)"

NILAMBAR PATREE -V- STATE [*B.P.DAS,J.*]

On 5.3.1980, the petitioner filed certified copies of the Hal Settlement Records, but no action was taken on the same long thereafter . on 26.7.1982, the Tahasildar passed the following orders:-

"Petitioner appeared and prayed for settlement of the land and assessment of rent. It reveals from the order dated 23.5.79 that rent shall be assessed and royati status shall be devolved, after completion of settlement operation and after verification of field with Sabik and Hal ROR. Ask R.K. to indicate the position with regards to current ROR and Amin Shri Sahu to report present position of the field with reference to Hal settlement.

Case to 29.7.1982.

Sd/
Tahasilsdar"

On 29.09.1999 the following order was passed by the Tahasildar:

" The case is put up today. Ask Sri Negi, Amin to visit field and submit his field enquiry report by 7.10.99. At the same time issue notice to the applicant, Shri Nilambar Patri to be present in my court

with all relevant papers/documents, if any for hearing. Put up the C/R on 8.10.99."

Sd/-
Addl. Tahasildar

4. Ultimately the Tahasildar passed the impugned order dated 25.9.2000 vide Annexure 4 rejecting he prayer of the petitioner for assessment of rent and holding that the petitioner is not a tenant under the Hukumnama and the said Hukumnama is not legal and .valid and does not convey any right ,title and interest to the petitioner .

5. The contention of learned counsel for the petitioner is that the Tahasildar has no jurisdiction to annul the order passed on 23.3.1979, and the impugned order amounts to review of his own order, which is not permissible under law and the order dated 25.9.2000 was passed without any adjudication and backed by no reason and hence, the same cannot withstand the judicial scrutiny.

6. Perused the counter affidavit filed by the Addl. Tahasildar, Rourkela, wherein it is indicated that the contention of the petitioner to the extent that the case has reached its finality is not correct. The matter is still open and no illegality has been committed by the Tahasildar in making further inquiry of the same and passing the impugned order. The further grounds taken in the counter affidavit is that though by order dated 23.3.1979 the petitioner was directed to produce the Hal settlement records including certified copies of the draft Khatian and orders of the Settlement Officer, the same had never done before passing the final order. The Tahasildar has framed seven

issues and the outcome of the same is the order impugned. The further stand of the State is that the Tahasildar has rightly observed that Hukumnama is not in printed form, the rent receipts granted by the Gountia although bears the thumb impression, but the name has not been mentioned.

7. Before going into the merit of the case , we make it clear that the genuineness of the Hukumnama, the Hukumnama Register and the rent receipts granted by the Gountia has never been doubted at any point of time. With the aforesaid background, Mr.Mohanty ,learned counsel for the petitioner, draws our attention to a Full Bench decision of this Court reported in 73(1992)C.L.T. 868 (Smt. Basanti Kumari Sahu vr. State of Orissa and others).in paragraph 14 of which it was held thus :-

> "Though the petitioner may have misconceived the position in law and made application under section 8(1), the officer i.e., the Tahasildar, should have considered the same on the administrative side with a view to satisfying himself if the petitioner was a tenant under the State prior to vesting having regard to the provisions contained in section 8(1) and the State was obliged to accept rent

from her. The misconceived application did not absolve the Tahasildar from proceeding in the right manner. Hence, the application filed by the petitioner should be treated as such and not as one under section 8(1) for settlement of land. Hence, while upholding the decision of the Board of Revenue annulling the order dated 17.12.1977 as per Annexure 6, I would vacate the findings recorded by it so that the Tahasildar would bring an independent mind to bear on the matter and act independently."

8. So the law is well settled that if no application is filed under section 8 (1) of the Orissa Estate Abolition Act by a tenant or if a misconceived application is filed, it is the Tahasildar to consider the same on the administrative side with a view to satisfying himself if the applicant was a tenant under the State prior to vesting having regard to the provisions contained in section 8 (1) and the State is obliged to accept rent from him.

So with the above legal position, let us find out whether the Tahasildar was satisfied that the petitioner was a tenant under the State. The order dated 23.3.1979 is nothing but a clear and cogent satisfaction of the Tahasildar as regards his finding that the petitioner was a tenantunder the State prior to vesting and his name also found place in the Hukumnama and he was in uninterrupted possession of the land. The nextt ground, which was raised in the counter affidavit that the petitioner could not produce the ROR for verification of the Tahasildar in terms of the order dated 23.3.1979 is also not tenable because on perusing the L.C.R. produced by the learned

counsel for the State, we find that in the marginal note of the order sheet dated 26.7.1982, the following endorsement has been made:-

"Verified the ROR (Hal) and report submitted separately"

But at the time of perusal of the order sheet, we came across a document which was prepared by the Tahasildar, Panposh on 16.10.1984 under the heading "my observation in the case", The observation is reproduced herein below:-

"On perusal of the documents filed by the parties, the report dated 12.2.76 of the R.I. and statements of the parties and the witnesses, besides the observation by my predecessor vide order sheet dated 23.3.79, I agree that the Hukumnama has been duly granted by the Ex-Zamindar, Kuanrmunda.

Perusal of the compromise petition dated 14.10.78 filed before the Inspector-in-Charge, Raghunathpali P.S. by Sri Guru Charan Sahoo and Nilamber Patri and witnessed by Dibakar Mohanty and others, clearly shows that, the disputed plot was under the possession of the petitioner, Nilamber Patri. The report

of the R.I. dated 12.2.76 is specific that the petitioner was all along in possession of the disputed land.

I have also examined the oral evidence tendered by both the parties. As it appears that the petitioner is consistent in his statement regarding title, ownership and possession over the disputed land. The objector although claims possession over the disputed land since 1945, has not been able to produce any documents so far in support of his possession, whereas the petitioner has filed Hukumnama and rent receipts and as such there is no reason to disbelieve the case of the petitioner.

As regards the objector Wariam Singh, it will suffice to say that he has got no case. He has neither examined himself nor any witnesses produced by him in support of his case so far. He has also not taken any care to prove the document filed by him.

Hence I am of the opinion that, I should have disposed of the case in the light of my observation above, but I feel that in order to do justice to the case, I should visit the spot and conduct local inquiry before I deliver my final order in this case.

Put up for my local enquiry on 14.11.84 and inform the parties accordingly.

Dictated,
Sd/-16.10.84
Tahasildar, Panposh"

9. This being an inquiry on administrative side also confirms the claim of the petitioner that he was in uninterrupted possession of the land and the Hukumnama had been duly granted by the Ex-Zamindar, Kuarmunda and that too the then Tahasildar was fair enough to say that "I should visit the spot and conduct local inquiry before I deliver my final order in this case".

10. In the aforesaid premises, the question which arises for consideration is as to whether the impugned order is sustainable . As indicated above, the finding recorded in the order dated 23.3.1979 relating to the right ,title land interest of the petitioner over the suit land is on the strength of Hukumnama duly granted by the Ex-Zamidar ,Kuarmunda as well as the physical possession and the same has also reached its finality. The matter was only kept pending for assessment of the rent on filing of the certified copies of the Hal settlement records, which were also filed. Thus there was no occasion on the part of the Tahasildar to pass the impugned order negativing the findings conclusively arrived at by the previous Tahasildar after taking into consideration the oral evidence. That apart, the impugned order has been passed without assigning any reason and without giving opportunity of hearing to the petitioner.

11. We can go to the extent of saying that the impugned order is nothing but to review the order which was passed by the previous Tahasildar, which is not permissible and there is no power with the Tahasildar to review the order. Resultantly, the impugned order dated 25.9.2000 under annexure-4 is set aside and the Tahasildar, Uditnagar, Rourkela-O.P.2 is directed to asses the rent after verifying the ROR of the corresponding Hal Plot with that of Sabik Plot and accept the rent.

The entire exercise shall be completed within a period of three months from today.

12. The writ application is accordingly allowed, but without any order as to costs.

Writ application allowed.

2010(II)ILR – CUT-41

B.P.DAS, J & R.N.BISWAL, J.

W.P.(C) NOS.5413 OF 2005, 13287/2004, 4202/2004, & O.J.C. Nos.966 of 2001 & 2682 of 2002.(Decided on 06.05.2010)

M/S. INDIAN METALS & FERRO ALLOYS LTD. & ANR. …….. Petitioner

.*Vrs.*

STATE OF ORISSA & ANR . ((With batch of Cases). ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.226.

Vires of Sec.2,3 & 5 of Orissa Electricity Duty Act, 1961 challenged – So also the Notification increasing Electricity duty – Plea that the Action of the authority is beyond the scope of Entry 53, list II of Schedule VII of the Constitution of India – Further plea that the petitioners not being consumers they are not liable to pay the same –

Moreover petitioners generate electricity for their own consumption – No provision to show that non-laying the notification before the State Legislature would render the notification invalid – Increase of duty from 0.12 paise to 0.20 paise after long gap of 9 years is not unreasonable – The classification was not discriminatory and violative of Article 14 – NALCO is not liable to pay duty for the energy lost during the process of transmission – Held, the words "so however, that such modifications shall be without prejudice to the validity of any electricity duty levied or collected under the notifications," deserve to be strike out from Section 3(ii) of the Orissa Electricity Duty Act, 1961.

(Para 10,14 &17)

Case laws Referred to :-

1.AIR 1963 SC 414 : (Jiyajeerao Cotton Mills Ltd.,Birlanagar, Gwalior -V- State of Madhya Pradesh).
2.67(1989)CLT 693 : (M/s. Orient paper & Industries Ltd. -V- Orissa Electricity Board & Ors.).
3.AIR 1958 SC 909 : (Pandit Banarsi Das Bhanot -V- State of Madhya Pradesh).
4.AIR 1975 SC 1007 : (N.K.Papiah & Sons -V- Excise, Commissioner & Anr.).
5.AIR 2007 (sc) 2696 : (General Insurance Council & Ors. -V- State of Andhra Pradesh & Ors.).
6.AIR 1982 (SC) 1500 : (Ibrahim Ahmad Batti -V- State Of Gujarat & Ors.).

7.AIR 1979 (SC) 1149 : (Atlas Cycle Industry Ltd. -V- State of Haryana).
8.AIR1992OrissaP.100 : (M/s.IndianAlumiumCo.Ltd. -V- State).
9.2004 (ii) OLR 673 : (Orissa Consumers Association. -V- OERC).
10.AIR 1986 SC 515 : (Indian Express News papers(Bombay) Pvt.Ltd.&Ors.etc.-V-UnionofIndia & Ors.).
11.AIR 1969 SC 378 (Vol-56 c-74) : (The State of Kerala-V- Haji K.Kutty Naha & Ors.)
12.AIR 1989 SC 1230 : (Ayurveda Pharmacy & Anr.-V- Tamilnadu).
13.49 (1993) Delhi Law Times 83 : (Delhi Cloths & Gen. Mills Company Ltd.-V- M.C.D & Ors.)
14.AIR 1988 (SC) : (State of U.P. & Ors.-V-Renusagar Co.& Ors.).
15.AIR 1990 (SC) 1277 : (M/s.Shri Sitaram Sugar Co.Ltd.& Anr.-V-Union of India & Ors.).
16.AIR 1958 (V-45, C-80) : (Shri Ram Krishna Dalmia -V- Shri Justice S.R.Tendolkar)
17.AIR 1961 (SC) 1731 : (P.J.Erani -V- State of Madrass & Anr.)
18.AIR 2000 (SC) 1741 : (Dai-Lchi Karia Ltd.-V-Union of India & Ors
19.AIR 1998 SC 1761 : (GRID Corporation of Orissa Ltd.

-V-Indian Charge Chrome Ltd.).
20. AIR 1975 SC p.5 : (State of Mysore-V-West Coast Papers Mills Ltd. & Anr.).

For Petitioners – M/s. S.S.Das, Miss A.Dutta, B.R.Das, S.Modi, K.Behera & D.Tripathy.
For Opp.Parties – M/s. N.C.Panigrahi, S.R.Panigrahi, N.K.Tripathy & G.S.Dash.
For Petitioners – M/s. Manoj Mishra, P.K.Das & d.Mishra.
For Opp.Parties – M/s,.N.C.Panigrahi,S.R.Panigrahi, N.K.Tripathy & G.S.Dash.
For Petitioners M/S- Jayanta Das ,A.N Das,A.N.Pattnaik, N.Sarkar ,E.A .Das,B.P Sahu
ForOpp.Parties –M/S. N.C.Panigrahi,S.R.Panigrahi,N.K.Tripathi,G.S.Dash
For Petitioners – B.K.Sharma,B.K.Dash,A.K.Mohanty,S.R.Mohanty ,S.K.Jee,K.A.Guru &R.K.Rath.
ForOpp.Parties– M/S.N.C.Panigrahi, S.R.Panigrahi,N.K.Tripathi,G.S.Dash

R.N.BISWALI,J. The facts and law involved in all the writ petitions being the same, albeit IMFA and NALCO raised some extra points of facts and laws, they are heard analogously and the following common judgment is passed thereon.

2. In all the writ petitions, the petitioners, all of whom generate energy for their own consumption, challenge the vires of the Orissa Electricity Duty Act, 1961 (hereinafter referred to as 'the Act') in so far as Sections 2, 3 and 5 thereof are concerned. They also challenge the notification No.7721-P-II-

Ed.15/92 E wherein Electricity Duty was fixed @ 12 paise for a person not being licencee or board who generate such energy for his own use or consumption. They further challenged the Notification No.GRIDCO-ED-3/2001-18237, dated 10.10.2001 issued by State Government in their Department of Energy, wherein electricity duty was increased from 0.12 paise to 0.20 paise per unit. According to the petitioners, the impugned impost is expressly on generation/production of electricity, which is beyond the scope and ambit of Entry 53, List-II of Schedule VII of the Constitution of India. In fact, it falls within the legislative field under Entry 84, List-I, Schedule-VII of the Constitution of India. The impost being beyond the legislative competence of the State Legislature, it is ab-initio void and non-est. The petitioners, who do not consume electricity pursuant to any supply, are not liable to pay the duty imposed. Furthermore, the petitioners being not consumers, as defined in Section 2 (c) of the Act, they are not liable to pay the same. If Section 3 (1) of the Act is allowed to sustain, it would amount to be an uncanalized, unguided and uncontrolled delegation of power on the Executive. The petitioners further question the validity of categorization of the consumers. The impugned enhancement is

discriminatory, as it singles out the petitioners, who generate electrical energy from their captive power plants for their own consumption. In terms of Section 3 (ii) of the Act 1961, the impugned notification having not been laid before the State Legislature, it is wholly invalid in the eye of law. So, the petitioners pray to declare Sections 2, 3 and 5 of the Act ultra vires; to quash the notifications dated 25.4.1992 and 10.10.2001 prescribing payment of electricity duty to be paid by them and the demand notice for deposit of Electricity Duty @ 0.20 paise and to direct the opp. parties to refund the excess amount of Electricity Duty paid and for consequential relief. It is the further prayer of ICCL to set aside the order dated 14.5.2004 rejecting their claim as licensee. Similarly NALCO has further prayed to strike out the words "so however, that such notifications shall be without prejudice to the validity of any electricity duty levied or collected under the notifications," from Section 3(ii)of the Act.

3. Opp. parties 1 and 2 in their joint counter affidavit contended that the impugned impost being on consumption of electrical energy, it is covered under Entry 53, List-II of Schedule VII of the Constitution as such the State Legislature is competent to legislate thereon. The Notification dated 25.4.1992 and 10.l0.2001 prescribing payment of Electricity Duty by the petitioners is most rational and reasonable. Similarly, situated units have been paying the enhanced electricity duty without any grumble. The petitioners were paying Electricity Duty @ 0.12 paise per unit with effect from 25.4.1992. After long 10 years, it was enhanced to 0.20 paise. In the meantime, tax rate in the other Government Sectors has been increased

manifold. In a welfare State, the revision in the rate of tax is inevitable to meet the increasing burden on the State Exchequer. In Central Government Undertakings like RSP, NTPC and State Government undertakings like OHPC and OPGC are paying Electricity Duty @ 0.20 paise per unit. It is the further case of the opp. parties that as per Section 3 (1) (d) of 1961 Act, Electricity Duty is being levied at different rates on different types of consumers. Accordingly, the electricity duty @ 20 paise per unit cannot be said as arbitrary and unjustified. The classification being reasonable, there is no violation of any constitutional provision. The notification was laid before the State Legislature in the session held on 10.12.2004. Accordingly, the opp.parties prays to dismiss the writ petitions.

4. In view of the nature of dispute, it would be prudent to give the historical background of Legislation on Electricity Duty in the State of Orissa. Duty on consumption of electrical energy was first introduced by the Orissa Electricity (Duty) Act, 1961, which came into force on 14.10.1961. Under Section 3 thereof, the duty was payable on rate charged at different percentage basis. In Orissa Electricity (Duty) Amendment Act, 1986, section 3 of the Principal Act was amended and electricity duty was fixed in the

schedule of the Act prescribing different rates for different categories of consumers. The next amendment was introduced in the year, 1992, in which, Section 3 of the Act was fully substituted and legislature delegated powers to the State Government to levy duty on different types of consumers. On the basis of the said amended provision, the notification dated 10.10.2001 was issued, wherein the petitioners were to pay 20 paise per unit instead of 12 paise, which they were paying earlier.

5. At the outset, it was argued by learned counsel for the petitioners that the impugned impost is expressly on generation of electricity, which is beyond the scope and ambit of Entry-53, List-11 of Schedule-VII to the Constitution of India. In fact, it falls under Entry 84, List-1 of Schedule-VII of the Constitution and as per Article 246 (1) thereof, Parliament has exclusive power to legislate thereon. Entry 84 of List 1 of Schedule VII enumerates duties of excise on tobacco and the other goods manufactured or produced in India except alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics. Since the petitioners-company generate/manufacture electrical energy from their captive power plants and electrical energy comes under the category of goods, duty can be imposed in respect of generation of electrical energy by the Parliament and not the State Legislature. As such, the impugned impost is ab-initio, void and non-est in the eye of law. On the other hand, Mr. N.C. Panigrahi, learned senior counsel appearing for opp. parties contended that as per Article 246 (3) of the Constitution, State Legislature can impose tax on the

consumption of electricity, under Entry 53, Schedule VII of the State list. He further contended that Orissa Electricity Act was passed in the year, 1961. There was no challenge to it till these cases were filed in the year, 2004. So, at such a belated stage, it cannot be challenged.

6. Taxes on consumption or sale of electricity with reference to Entry 53 of Schedule VII, List II should be read as 'taxes on consumption or sale for consumption of electricity within the State. Sale of electricity for consumption outside State is subject to provision of Entry 92-A of the List. Since tax is imposed under the impugned Act on consumption of electricity in side the State, State Legislature is competent to pass such an Act. It cannot be held the impugned Act imposes duty on generation or production of electricity as submitted by learned counsel for the petitioners. In the decision ***Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior vs. State of Madhya Pradesh,*** AIR 1963 SC 414 (V-50 C-54), the appellant, a Textile Mill owner was generating electricity for running his mills. Under the provisions of the Central Provinces and Berar Electricity Duty Act, 1949 as amended by the Madhya Pradesh Taxation Laws amended Act, 1956 the Government of Madhya Pradesh levied upon the appellant electricity duty

on consumption. One of the grounds taken by him before the apex court that if the act permitted the levy of duty on electricity consumed by the producer himself it was ultra vires the Constitution because in substance it would be a duty of excise which can be levied only by parliament under Entry 84 of List I and that even if it was not excise duty it was beyond the competence of the Madhya Pradesh Legislature to levy it in the absence of any appropriate entry in List-II. The apex court turned down the argument, holding as follows:-

> "(6) It is difficult to see the levy of duty upon consumption of electrical energy can be regarded as duty of excise falling within Entry 84 of List-I. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The taxable event with respect to a duty of excise is "manufacture" or 'production'. Here the taxable event is not production or generation of electrical energy but its consumption. If a producer generates electrical energy and stores it up, he would not be required to pay any duty under the Act. It is only when he sells it or consumes it that he would be rendered liable to pay the duty prescribed by the Act".

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Similarly, in the case of ***M/s. Orient paper and Industries Ltd.*** **vs. Orissa Electricity Board and others** 67 (1989) CLT 693, it was held that the State legislature can impose duty on consumption of electricity under Entry 53 list-II of the VII schedule of the constitution of India. So, it is cleared that electricity duty can be imposed on consumption of electrical energy by the

State legislature under Entry 53 list-II of the VII schedule of the constitution of India.

7. Next, it was submitted by learned counsel for the petitioners that Section 3 of the Act empowers the State Government to impose electricity duty at such rate not exceeding 25 paise per unit by issuing notification from time to time. By invoking power under sub-section (2) of Section 12 of the Act, the State Government has framed Orissa Electricity Duty Rules, 1961, but there is no guideline for imposing duty while giving effect to Section 3 of the Act. There is also no administrative instruction to that effect. So, according to learned counsel for the petitioners, in absence of any Rules or guidelines, the matter is left to the total discretion of the Energy Secretary, who can pick and choose the category of consumers and decide the rate of duty by notification, particularly when there is no provision for appeal or revision in the Act, against such notification. There being excessive delegation of power, the notification can be arbitrary, unreasonable and discriminatory of which the impugned notifications are examples. On the other hand, Mr. Panigrahi, learned Senior counsel appearing for the opp. parties contended that guidelines have been provided under Section 3 itself

by fixing the maximum duty @ 25 paise per unit and by providing that the notification should be laid before the State Legislature as soon as the same is issued for a total period of fourteen days and if during the said period, the State Legislature makes modification therein, the notification shall thereafter have effect only in such modified form.

8. In the case of **Pandit Banarsi Das Bhanot v. State of Madhya Pradesh AIR 1958 SC 909**, it has been held that the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as, selection of persons on whom the tax is to be paid, the rate at which it is to be charged in respect of different classes of goods and the like. In the case of **N.K. Papiah and Sons v. Excise, Commissioner and another AIR 1975 SC 1007**, it has been held that the laying of rules before the legislature is controlling power on the delegated legislation. The legislature may also retain its control over its delegate by exercising its power of repeal of the Act. So, it can not be said that there was no guidelines.

9. Learned counsel appearing for the petitioners, next submitted that as per Section 3 (ii) of the Act, all notifications issued by the State Government from time to time under sub-section (1) should be laid before the State Legislature as soon as may be for a period of 14 days, which may be comprised in one or more sessions. The notification dated 10.10.2001 even though was issued on 10.10.2001 itself, it was laid before the State Legislature in the year, 2004. In the case of **General Insurance Council and others vs. State of Andhra Pradesh and others**, AIR 2007 (SC)

2696, so also in the case of **Ibrahim Ahmad Batti vs. State of Gujarat and others**, AIR 1982 (SC) 1500, it was held by the Apex Court that “as soon as ” means, do it within a shortest possible time. According to learned counsel for the petitioners, it is the established principle of law that if a statute requires a thing to be done in a particular manner, it must be done in that manner. The statute in the present case requires that the notification should be placed before the Assembly as soon as it is issued. The executive authority, which is a creature under the statute, cannot stall the statutory provision and obstruct the process of the statute. In this context, Mr. Panigrahi learned senior counsel contended that the notification was laid before the State legislature in the sessions held on 10.12.2004. As required under laws, since it could not be laid before the Assembly for 14 days, it was again re-laid on 7.3.2005. The aforesaid fact of laying before the Legislative Assembly sufficiently established that the rates of duty as amended vide notification No.18237 dated 10.10.2001 was accepted and approved by the State Legislature. Moreover, laying the notification before the Assembly is directory and not mandatory. Violation of the said principle does not invalidate the notification. In support of his submissions, Mr.

Panigrahi relied on the decisions ***Atlas Cycle Industry Limited v. State of Haryana,*** AIR 1979 (SC), 1149, M/s. **Indian Aluminum Co. Ltd. v. State**, AIR 1992, Orissa, page 100, and **Orissa Consumers Association v. OERC** 2004 (ii) OLR 673.

10. In **M/s. Atlas Cycle Industries Limited** (supra), pursuant to Section 3 of Essential Commodities Act, Iron and Steel Control Order fixing maximum ceiling price on various categories of irons and steel was passed by the Central Government. Sub Section (6) of Section 3 of the Essential Commodities Act reads as follows:-

"Every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made".

The point for consideration before the Supreme Court in the said case was whether laying down of the order of the Central Government, fixing maximum ceiling price on various categories of iron and steel including black plain iron sheets, before both Houses of Parliament was mandatory or merely directory. The Apex Court in Para 22 of their Judgment held as follows:

> "In the instant case, it would be noticed that sub-section (6) of Section 3 of the Act merely provides that every order made under Section 3 by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made. It does not provide

that it shall be subject to the negativeor the affirmative resolution by either House of Parliament. It also does not provide that it shall be open to the Parliament to approve or disapprove the order made under Section 3 of the Act. It does not even say that it shall be subject to any modification which either House of Parliament may in

> its wisdom think it necessary to provide. It does not even specify the period for which the order is to be laid before both Houses of Parliament nor does it provide any penalty for non-observance of or non-compliance with the direction as to the laying of the order before both Houses of Parliament. It would also be noticed that the requirement as to the laying of the order before both Houses of Parliament is not a condition precedent but subsequent to the making of the order. In other words, there is no prohibition to the making of the orders without the approval of both Houses of Parliament. In these circumstances, we are clearly of the view that the requirement as to laying contained in sub-section (6) of Section 3 of the Act falls within the first category i.e. "simple laying" and is directory not mandatory."

Section 3 (ii) of Orissa Electricity (Duty) Act, reads as follows:-

> "All notifications that may be issued by the State Government from time to time under sub-section (1) shall, as soon as may be after they are issued, be laid before the State Legislature for a total period of fourteen days which may be comprised in one or more sessions and if during the said period the State Legislature makes modification if any, therein, the notifications shall thereafter have effect only in such modified form, so however, that such modifications shall be without prejudice to the validity of any electricity duty levied or collected under the notifications."

In this provision, the period of laying down before the Legislature has been specified. The Legislature can also modify the said order. If it is so modified, then the notification shall have effect only in such modified form. But no penalty has been prescribed for not laying down the notification before the State Legislature. A similar provision is there under Section 44 of the Orissa Survey and Settlement Act which reads as follows:

> "44.**Rules to be laid before Assembly**-All rules made under Section 43 shall, as soon as may be after they are made, be laid before the State Legislature for a total period of fourteen days which may be comprised in one or more sessions, and if during the said period the State Legislature makes any modifications therein, the rules shall thereafter have effect only in such modified form, so,

> however, that such modification shall be without prejudice to the validity of anything previously done under the rules.

Here, the period of laying the order before the State Legislature is fixed and the legislature has also been vested with power to modify the Rules. In context of this provision, this Court held in the case of M/s. **Indian Alluminium Company Ltd** (Supra), as follows:

> "The Orissa Legislature never intended that the noncompliance of the requirement of laying the Rules as envisages in Section 44 of the Survey and Settlement Act would render the Rules invalid. In this view of the matter even after the Rules framed had not been laid before the Assembly the same remained valid and therefore the authorities had jurisdiction to fix a fair and equitable rent in respect of nonagricultural land under the Rules in question."

Similarly, in the case of **Orissa Consumers Association** (supra) this court held that:

> "Where a statute directs that the rules shall be laid before the legislature whether direction is mandatory or directory depends upon

several consideration notwithstanding the use of expression ”shall” and the requirement can be held to be directory, where no penalty is attached under the statute for non-laying of the Rules before the Legislature.”

In the case at hand, no penalty has been attached to the relevant provision for non-laying of the notification before the State Legislature. There is also no provision to show that non-laying of the notification before the State Legislature would render the notification invalid. But, as we have stated earlier the impugned notification was laid before the State Legislature, albeit at a belated stage, so the notification dated 25.4.1992 and 10.10.2001 prescribing payment of electricity duty to be paid by the petitioners cannot be quashed.

11. Next, it was submitted by learned counsel for the petitioners that vide impugned notification dated 10.10.2001 the rate of electricity duty has been enhanced from 0.12 paise per unit to 0.20 paise, only in respect of the companies, those who generate energy for their own consumption. Charging higher rate of electricity duty upon the industries having captive source is discriminatory and violative of Article 14 of the constitution of India. The petitioners' companies are all power intensive industries. As per the schedule appended to Orissa Electricity Duty Act, 1986 electricity was levied @ 0.18 paise on the power intensive industries and @ 0.12 paise on any person not being a licensee or Board, who generates such energy for his own use or consumption. The notification dated 25.4.1992 prescribed levy of duty @ 0.15 paise on power intensive industries. So, the intensive

units gained @ 0.03 paise per unit. At the same time the captive generators were levied with same duty @ 0.12 paise. The notification dated 25.4.1992 has now been amended by notification dated 10.10.2001 whereby rate of duty payable by a person not being licensee or the Board who generates energy for his own use or consumption has been increased from 0.12 paise per unit to 0.20 paise –an increase by 67%. Under the circumstances, the duty now being levied on the consumers with their own captive source of energy is higher than the duty levied on the power intensive units who purchase electricity from the distribution companies. So, it was argued that the classification of power intensive industries having their own captive source of power and the power intensive industries who purchase energy from out source is arbitrary, unreasonable and discriminatory, as it bears no reasonable nexus with the object of the legislation. The petitioners' industries, which are power intensive units cannot be discriminated only because they consume electricity from their own source. According to learned counsel for the petitioners, the impugned notification being violative of Article 14 of the constitution of India is liable to be struck out. In support of such submission, learned counsel for petitioners relied on the decision

Indian Express News papers (Bombay) Pvt Ltd and others etc. etc. Vrs. Union of India and others, A I R 1986 S.C.515**, The State of Kerala vs.Haji K.Haji K.Kutty Naha and others etc,** AIR 1969 S.C. 378 (Vol-56 c-74), **Ayurveda Pharmacy and another Vs. Tamilnadu** AIR 1989 S.C.1230**, Delhi Cloths and Gen. Mills Company Ltd. Vs. M.C.D and ORS** 49 (1993) Delhi Law Times 83 and the decision in **Associated Cement Company Ltd. vs. State of Chhattisgarh** decided on 15.12.2006 by Chhattisgarh High Court, Mr. Panigrahi, learned senior counsel appearing for opp. parties contended that the classification was reasonable and as such there was no question of violation of Article 14 of the Constitution.

12. In the decision **Indian Express News papers (Bombay) Private Ltd. and others** (supra), the apex court held that classification of the newspapers small, medium and big for levying custom duty is not violative of Article 14 of the Constitution. So, this decision is not helpful to the petitioners. In the case of **State of Kerala** (supra), Kerala Buildings Tax Act (Act 19 of 1996) was challenged on the ground that it infringed Articles 13, 14 and 265 of the Constitution since Section 4 of the said Act, which was the charging section read with schedule of the Act was violative of the equality clause of the constitution as there was no rational classification. In that case the Legislature adopted merely the floor area of the building as the basis of tax. It did not take into consideration the class to which the buildings belong, the nature of construction, purpose for which it was being used, its situation, its capacity for profitable user and other relevant

circumstances which have a bearing on matters of taxation. So, the Act was rightly declared ultra vires. The said decision cannot be applicable to the present case.

In the case of **Ayurveda Pharmacy and another** (supra) higher rate of tax was levied on two medicinal preparations, namely, Arishtams and Asavas on the ground that they contained high percentage of alcohol in comparison to other medicinal preparations. So, the apex court held that as those two medicines continue to be identified as medicinal preparations, they must be treated in a like manner as other medicinal preparations those which contained lower percentage of alcohol. Accordingly, it was held that levying of higher rate of sales tax on those two ayurvedic preparations was discriminatory. In our considered opinion this decision is also not applicable to the present case.

In the case of ***Delhi Cloths and Gen. Mills Company Ltd.*** (supra)the Delhi High Court held that it was an admitted case that MCD was unable to supply electricity to the petitioner as per its requirement .Per focre the petitioner installed its own Turbo Generators at a cost of rupees ten crores. The MCD proposed to increase the tax on consumption of

electricity in respect of the petitioner therein, who was generating electricity from its own source, but not on those who were supplied with electricity by the MCD. The petitioner was required to pay tax @ 0.05 paise per KWHR and a consumer who was supplied with electricity by the MCD was to pay tax @ 0.03 paise per KWHR .So Delhi High Court held that imposition of tax @ 0.05 paise per KWHR on the consumers of electricity, generated by themselves vis-à-vis those consumers, who got energy from MCD is per se unreasonable, arbitrary and discriminatory.

In the case of ***Associate Cement Co. Ltd vrs. State of Chhatisgarh*****,** the notification, which required generator of electricity to pay a higher cess when the energy was consumed by the generator itself was under challenge. On examining the national electricity policy, national tariff policy and various measures taken by the State to engage captive generators, it was held by Chhatisgarh High Court that the impugned notifications was discriminatory, unreasonable and violative of Article 14 of the Constitution of India and as such vide their judgment dated 15.12.2006 struck out the notification.

13. But, in the case of ***State of Uttar Pradesh and others vrs. Renusagar Co. and others***, AIR 1988 (SC), the Apex Court has held that the exercise of power whether legislative or administrative will be set aside, if there is manifest error in exercise of such power or the exercise of power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to the relevant factors, the exercise of power will be regarded as manifestly erroneous. In the case of ***M/s. Shri***

Sitaram Sugar Co. Ltd. and another vrs. Union of India and others, AIR 1990 (SC), 1277, the Apex Court has held that judicial review is not concerned with the matter of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. When the legislature acts within the sphere of its validity and delegates powers to an agent, it may empower the agent to make findings of fact which conclusively provides that such findings specified the basis of reasonableness. In all such cases, judicial enquiry is confined to the question whether the findings of fact is reasonably based on evidence and whether such findings are consisted with the laws of land. Price fixation is not within the province of the Court. Judicial function in respect of such factor is exorbitant when it is found to be a rational basis for the conclusion reached by the concerned authority. In that case, the Central Government classified the sugar factories for the purpose of determining the price of levy sugar in terms of Section 3 (c) of the Essential Commodities Act (10 of 1999), on the basis of their geographical location. Factories were classified with due regard to the geographical-cum-agro economic consideration. Such classification in absence of the evidence to the contrary can not be

characterized as arbitrary or unreasonable or not found on intelligible differentia having a rational nexus with the object sought to be achieved. The persons assailing such classification carries heavy burden for convincing that it is invalid because it is unjust and unreasonable. **In the case of Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar AIR 1958 SC 538 (V-45,C-80)**, the apex court has held that Article-14 of the constitution does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual is treated as class by himself. In the case of ***P.J. Erani vrs. State of Madras and another***, AIR 1961 (SC), 1731, the vires of Madras Building (Lease and Rent Control) Act, 1944 was under challenge. The purpose of the Act was to prevent any unreasonable alienation and also to control rent. The Apex Court has held that in considering whether the reasons given by the Government are sufficient to prove the order within the object of the Act, the High Court had no power to act as if it was sitting in appeal over the Government decision. A court cannot set aside an order under Section 13

on the ground that it would not itself have made the order for the reasons for which the Government had made it. All that the court has to see whether the power was used for an extraneous purpose, i.e., to say not for achieving the object for which the power had been granted. When it is alleged that the power was used for a purpose other than achieving an object for which the power is granted, initial onus must be on a party which alleged abuse of power and there must be prima facie evidence in support of the allegation, it is only then that the onus may shift. In the decision ***Dai-Lchi Karia Ltd vrs. Union of India and others***, AIR 2000 (SC) 1741, the Apex Court held that the Court can examine whether relevant factors were taken into account while issuing notification under the Act. The mere fact that the notification issued under an Act is required to be laid before the Parliament, does not make any substantial difference as regard the jurisdiction of the Court to pronounce its validity. Further, if it is challenged in Court that a particular notification has been made contrary to public interest, there can be no presumption that the action of the Government is in public interest.

14. Here, in the case at hand, the petitioners who are power intensive industries and consume energy from their Captive Power Plants have been

singled out from all other consumers including power intensive industries, which consume electrical energy from outside. The object of Act was to augment revenue to expand the development activities of the State. Admittedly, there was no change of duty from 1992 to 2001 in respect of the petitioners. The increase of duty from 0.12 paise to 20 paise after long 9 years is not unreasonable. Because of the view taken by the Apex Court in the cases of **State of Uttar Pradesh and others** (supra), **M/s.Shri Sitaram Sugar Co. Ltd.** (supra), **Shri Ram Krishna Dalmia** (supra), **P.J. Erani** (supra) and **Dai-Lchi Karia Ltd.** (supra), the view taken by Delhi High Court in the case of **Delhi Cloths and G.Mills Company Ltd.** (supra) and the view taken by Chhatisgarh high Court in the case of **Associate Cement Co. Ltd**. (supra) cannot be accepted.

15. Learned counsel appearing for the IMFA further submitted that in the initial recommendation made on 25th April, 2001 by the Chief Electoral Inspector to the Government of Orissa represented through Secretary to Government in their Department of Energy for increase of electricity duty, the proposed increase for captive consumers was only 0.3 paise whereas for power intensive, it was 0.5 paise per unit, so also for domestic and public institution. However, when the matter was placed before the Government, the rate of electricity duty on domestic consumers and others was not increased, out of fear of adverse public reaction, but it was increased from 12 paise to 20 paise in respect of the persons not being licensee or Board, who generate energy for his own use or consumption on the ground that, it would not affect the domestic consumers of the State,

and, as such, would not invite adverse public reaction. So, the grounds of increase of the electricity duty on captive power units are based on extraneous and irrelevant considerations. As against this, Mr. Panigrahi, learned counsel appearing for the opp. parties contended that recommendation or suggestion of the Chief Electoral Inspector is not binding of the State. So, even if there was such a suggestion, it would have no effect. We are in agreement with the view of Mr. Panigrahi, learned senior counsel. So, it cannot be said that the classification was discriminatory, arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

16. Learned counsel appearing for ICCL/IMFA further submitted that Section 14 of Orissa Electricity Reforms Act, 1995 lays down that no person, other than those authorized to do so by licence or by virtue of exemption under the said Act or otherwise or exempted by any other authority under Electricity (supply) Act 1948 can be engaged in the State in the business of transmitting or supplying electricity. As per section 2(e) of Orissa Electricity Reforms Act, 1995 licence means a licence granted under Chapter-VI. Section 2(f) defines licence or licence holder as a person

licensed under Chapter-VI to transmit or supply energy including GRIDCO. The aforesaid provisions came for interpretation in the case of **GRID Corporation of Orissa Ltd. vs. Indian Charge Chrome Ltd**, AIR 1998 SC 1761, where the apex court held that IMFA is a licensee. Per contra, Mr. Panigrahi, learned Senior Counsel appearing for the opposite parties contended that ICCL/IMFA started commercial production on 5.2.1989 and was granted 50% exemption of electricity due for a period of 10 years in accordance with policy of the State Government. In the year 1986, the electricity due for C.G.P had been fixed at 12 paise per unit and hence ICCL/IMFA paid the duty @ 6 paise per unit for 10 years. After 5.2.1999 ICCL/IMFA continued to pay electricity duty @ 12 paisa being covered under Entry No.18 as CPP under the 1992 notification and continued to pay at that rate. After issue of notification on 10.10.2001 for the first time they claimed as licensee as per the order of the Apex Court in the case of **Grid Corporation of India Ltd.** (supra). Even though the Apex Court order was passed on 3.9.1998 ICCL/IMFA did not claim to be covered under the category of licensee until the impugned notification was issued on 10.10.2001. He further submitted that the apex court order was not a final, but an interim order. This Court in the case of **GRID Corporation of Orissa Ltd. vrs. Indian Charge Chrome Ltd.,** AIR 1998 Orissa 101 recorded that ICCL/IMFA is a licensee under the Indian Electricity Act, 1910, which was set aside by the apex court and in paragraph 15 of their judgment the apex court recorded the finding that though no formal license was issued to ICCL under section 2 (h) of Indian Electricity Act, yet relying on the provisions

contained under section 14(1) of the Electricity Reforms Act 1995, the Apex Court held that since ICCL was authorized to supply electricity to OSEB and thereafter to GRIDCO, ICCL would be arbtrable under section 37 (1) read with Section 33 of the Reforms Act. Mr. Panigrahi drew our attention to the relevant portion of the said judgment which reads as follows:-

> "From the facts noted herein above and in view of section 14 (1) of the Reforms Act it is quite clear that ICCL was/is authorized and engaged in supplying the electricity to OSEB and thereafter to GRIDCO and ICCL would be arbitrarible under section 37(1) read with section 33 of the Reforms Act,1995."

So, according to Mr. Panigrahi, learned senior counsel, the aforesaid decision would not be applicable to the present case.

Section 2(e) of Orissa Electricity Duty Act, 1961 defines licensee as follows:-

> "Licensee means any person licensed under part-II of the Indian Electricity Act,1910 to supply energy and includes any person, who

> has obtained the sanction in that behalf of the State Government under section 28 of the said Act."

The aforesaid definition of licensee was thereafter amended by Act 15 of 1998 and after amendment, it reads as follows:-

> "Licensee means any person licensed under part-I of the Indian Electricity Act, 1910 to supply energy."

Since ICCL/IMFA has not been licensed to supply energy in terms of 1998 Amendment Act, it cannot claim as a licensee. As regards the judgment delivered in **Grid Corporation of Orissa Ltd**. (supra), the Apex Court did not hold that ICCL/IMFA was a licencee, but since it was authorized to supply electricity to OSEB and thereafter to GRIDCO, the dispute between the GRIDCO and ICCL could be arbitrable under Section 37 (1) read with Section 33 of the Reforms Act, 1956. As it appears, the definition of licencee as amended by Act 15 of 1998 was not brought to the notice of the Apex Court. The Apex Court has not specifically held that ICCL/IMFA is a licencee. Section 41 of the Reforms Act, 1995 lays down that a licencee or any person exempted under the Act or authorized or exempted by any other authority under the Electricity (supply) Act, 1948 shall engage in the State in the business of transmitting or supplying electricity. So, even if it is held that ICCL/IMFA was authorized to do so still then it cannot be said to be a licencee for payment of electricity duty at lesser rate in terms of notification dated 10.10.2001.

17. Mr. R.K. Rath, learned senior counsel appearing for the petitioner (NALCO) in O.J.C. No.966 of 2001 submitted that electricity duty can not be imposed on the electrical energy lost during transmission to the point of

consumption as duty on consumption, since, in fact, the petitioner-company did not consume the same. In support of his submission, he relied on the decision in the case of ***State of Mysore v. West Coast Papers Mills Ltd. and another***, AIR 1975 SC page 5, which reads as follows:

> "The one question with which we are concerned in this appeal is whether electricity tax is payable in respect of the electrical energy which is lost in transmission as a result of transmission loss or transformer loss.So far as this question is concerned, we are of the view that no tax is payable on the electricity so lost. The entire scheme of the Act is to tax the consumption of electrical energy. Where some energy is not consumed but lost before it reaches the point of consumption, the question of levy of tax on consumption of such energy would not in the very nature of things arise. The place of consumption of electrical energy is normally at some distance from the place where electrical energy is generated. Electrical energy has consequently to be transmitted through metal conductors to the place where it is consumed. Such transmission admittedly

> entails loss of some electrical energy and what is lost can plainly be not available for consumption and as such would not be consumed. If a person, for example, generates 100 units of electrical energy and loses 10 units in the process of transmission from the point of generation to the point of consumption, he would in the very nature of things be able to supply only 90 units of electrical energy to the consumers. The tax which would be payable on the electrical energy consumed in such a case would be only for 90 units and not 100 units. To hold otherwise and to realize tax on 100 units of electrical energy would be tantamount to levying tax on the generation or production of electrical energy and not on its consumption."

Mr. N.C.Panigrahi, learned senior counsel appearing for the opp. parties contended that since the Captive Power Plant and the Smelter Plant of NALCO situate in the same premises at Angul, there being no loss for transmission, the question of deducting transmission charge does not arise. Mr. Rath, learned senior counsel further contended that the distance between the Angul Captive Power Plant and the Smelter plant is about 5.959 K.Ms. This has not been countered by learned counsel for the opp. party during argument. So, certainly some energy is being lost during the process of transmission on which the NALCO is not liable to pay duty.Duty if any paid by NALCO, on transmission loss shall be calculated and refunded to it by opposite parties or the same shall be adjusted with its dues within three months hence.

INDIAN METALS & FERRO ALLOYS -V- STATE [*R,N, BISWAL,J*]

Mr. Rath, learned senior counsel further contended that the words "so however, that such modifications shall be without prejudice to the validity of any electricity duty levied or collected under the notifications" shall be strike out from Section 3 (ii) of Orissa Electricity Duty Act, 1961. Section 3 (ii) reads as follows:-

> "All notifications that may be issued by the State Government from time to time under sub-section (1) shall, as soon as may be after they are issued, be laid before the State Legislature for a total period of fourteen days which may be comprised in one or more sessions and if during the said period the State Legislature makes notifications if any, therein, the notifications shall thereafter have effect only in such modified form, so however, that such modifications shall be without prejudice to the validity of any electricity duty levied or collected under the notifications." (emphasis supplied).

According to Mr. Rath, if the notification is laid before the State Legislature after four years of its issuance, as in the present case and the Legislature reduces the rate of electricity duty, then, the consumer cannot claim the excess amount he paid for four years which is arbitrary, discretionary and against the principle of natural justice. So, the same deserves to be strike out. We are in agreement with the view of learned counsel for NALCO in this regard. So, the words "so, however, that such modifications shall be without prejudice to the validity of any electricity duty levied or collected under the notifications" deserve to be strike out from Section 3 (ii) of the Orissa Electricity Duty Act, 1961, and, accordingly, they are struck out.

The writ petitions are disposed of.

Accordingly, all the interim orders of stay of realization of the amount are vacated. In view of vacation of the stay orders, the petitioners, namely, M/s.Indian Metals and Ferro Alloys Ltd., Ballarpur Industries Ltd. and M/s.National Aluminium Company Ltd., who had been directed earlier by this Court to keep the differential amount in separate accounts are directed to deposit the same (differential amount) in the State Exchequer within a period of four weeks from today.

Writ petitions disposed of.

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

W.P.(C) NO.10649 OF 2009(30.04.2010)

LOCHAN MAJHI ……Petitioner

.Vrs.

STATE OF ORISSA & ORS ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.342.

Petitioner secured employment on the basis of fraudulent Caste Certificate depriving a genuine and deserving Schedule Tribe Candidate for whom the post was reserved – His Service was terminated on the direction of the State Level Scrutiny Committee – Hence the Writ Petition.

Petitioner was noticed and opportunity of hearing was given to him by the Scrutiny Committee – Alternative submission made by the petitioner that he has put more than 25 years of service and as such his service be protected was turned down by this Court – Held, the writ petition deserves to be dismissed. (Para 26)

Case laws Referred to:-

1.AIR 1995 SC 94 : (Kumari Madhuri Patil & Anr.-V-Addl. Commissioner,Tribal Development & Ors.)
2.AIR 2001 SC 393 : (State of Maharashtra-V- Milind & Ors.).
3.(2008)13 SCC 170 : (Regional Manager, Central Bank of India -V-Madhulika Guruprasad Dahir & Ors.).
4.AIR 1971 SC 2533 : (Bhaiya Ram Munda -V-Anirudh Patara)
5.(1968) 38 ELR 212 : (Dina -V- Narayan Singh).
6.(2007) 1 SCC 80 : (State of Maharashtra -V-Ravi Prakash Babulalsing Parmar)
7.(2008) 4 SCC 612 : (Union of India-V- Dattatray S/o.Namdeo Mendhekar & Ors.).
8.(2007) 5 SCC 336 : (Addl.General Manager, Human Resource, Bharat Heavy Electricals Ltd.-V- Suresh Ramkrishna Burde).

For Petitioner – M/s. Gautam Mukharji, P.Mukharji, A.C.Panda, B.Panigrahi & S.Mukharji.
For Opp.Parties – Government Advocate.

B.K.NAYAK, J. In this writ application, the petitioner-Lochan Majhi has challenged the final order dated 30.06.2009 (Annexure-8) passed by the

State Level Scrutiny Committee directing for cancellation of the caste certificate issued in favour of the petitioner describing him as Scheduled Tribe and for his removal from Government service and the consequential order dated 28.07.2009 (Annexure-9) passed by the Executive Engineer, Lower Suktel Dam Division, Bolangir terminating the service of the petitioner.

2. In pursuance of direction of the Hon'ble Supreme Court in the case of ***Kumari Madhuri Patil and another v. Addl. Commissioner, Tribal Development and others*****;** AIR 1995 SC 94, the State Government has constituted the State Level Scrutiny Committee for making enquiry into allegations of fraudulent social status certificate and to pass appropriate orders thereon, so also the District Level Vigilance Cell to investigate into social status claim of persons. The Zilla Adivasi Sangha in the district of Bolangir alleged against a number of persons, who have obtained false and fraudulent Scheduled Tribe Certificates and are thereby gaining advantage by way of reservation in the matter of public employment and admission in the educational institutions to the detriment of the real tribal persons. The

petitioner-Lochan Majhi and his three daughters, namely, Renuka, Sasmita and Rasmita and his son, Sujit are some of the persons alleged to have acquired fake and fraudulent Scheduled Tribe caste certificates. Admittedly, the petitioner-Lochan Majhi has been able to obtain two caste certificates describing him as a Scheduled Tribe of 'Gond' community. At two different points of time from two different authorities he obtained the caste certificates, i.e., from the S.D.O., Titilagarh in the year 1979 in Revenue Misc. Case No.27/175/1979 and the second one from the Tahasildar, Kantabanji in the year 2005 in Revenue Misc. Case No.2295 of 2005. On the basis of the Scheduled Tribe certificate obtained by him, he got employment as a Peon in the reserved quota meant for Scheduled Tribe in the Irrigation Department in the year 1982. His eldest daughter-Renuka Majhi, by virtue of the Scheduled Tribe certificate obtained by her, got appointment as a Junior Clerk in the office of the District Judge, Bolangir. On the complaint received against the petitioner and his children, the State Level Scrutiny Committee initiated Case Nos.5 of 2009 to 9 of 2009 against them and referred the matter to the District Vigilance Cell, Bolangir for the purpose of investigation.

3. The matter was enquired into by the Inspector of Police, Sonepur, who had been deputed to the Vigilance Cell, Bolangir. During enquiry, the Inspector of Police contacted the petitioner, who stated that he is the son of late Dhansai Majhi of village-Rengali, P.S.Kantabanji, Dist-Bolangir and that he read upto matriculation without passing the same and has married one Padmabati Majhi and has got three daughters and one son and he is posted as Peon in the office of the Executive Engineer, Lower Suktel Dam Division, Bolangir since 1982. He claimed that he belongs to Gond caste, which is a

Scheduled Tribe community in the State of Orissa. He started his schooling in Chaulsukha Sevashram (Primary School) and then in Deshil Ashram School of Tureikela Block. He denied the allegation that he was the natural born son of Markand Meher of village-Chaulsukha. In course of his local enquiry, the Inspector of Police of the Vigilance Cell in village-Rengali examined Lalita Majhi (65), wife of late Dhansai Majhi of village-Rengali, who stated that her husband had first married to one Chanchala Majhi, who died living behind a seven month old girl child, namely, Parbati Majhi. Thereafter, she (Lalita) married Dhansai Majhi about 50 years back, stayed in her husband's house, brought up Parbati and arranged her marriage. Lalita herself gave birth to a female child, namely, Ainla Majhi. Except these two daughters born through two wives, Dhansai Majhi has no other son or daughter nor has he taken any son on adoption. Lalita is still staying in the house of her husband, late Dhansai Majhi and possessing his landed properties. Of late, she came to know that Lochan Meher of village-Chaulsukha has claimed to be the son of her husband-Dhansai, even though

she has not seen any Lochan Majhi during the funeral ceremony of her late husband or during the marriage ceremony of her daughter. Lalita further stated that a few months back the petitioner came to her house and identified himself as the son of Dhansai Majhi and offered Rs.200/- and one saree and induced her to recognise him as the son of Dhansai Majhi but she denied. During local enquiry, it was further found that Lochan Majhi and Lochan Meher are one and the same person who is the natural born son of Markand Meher and Smt. Sukrubari Meher of village-Chaulsukha under Kantabanji Police Station having sub-caste 'Bhulia' which is of O.B.C. category.

The I.O. also verified the Admission Register of Chaulsukha Sevashram (Primary School) for the year 1958-1974 in presence of the School Headmaster and Sri Abhimanyu Behera, O.A.S., D.W.O., Bolangir. The admission register revealed that Lochan Majhi was admitted in Class-I in Chaulsukha Sevashram on 20.01.1966 and the original entries in the register were tampered with and re-written by inserting words with different flows and shade of writings as to the name of the student which was initially written as Lochan Meher and subsequently the word 'Meher' had been scored through and over it 'Majhi' had been written with deep shades. Against the column, 'native place', over the mark 'ditto' for Chaulsukha, the word 'Rengali' has been written. Similarly, the original caste 'Bhulia' has been changed to 'Gond'. Under the column, 'guardian's name' the entry 'Markand Meher' has been cut and there over 'Dhansai Majhi' has been written. The original signature of the parent/guardian was 'Markand Meher' which had been scored through and there over one thumb impression had been affixed with writing "Sri Dhansai Majhinka Tipa" in oriya language. It

was also found that in the dress distribution register for class-II students of the said primary school, the name of the student was 'Lochan Meher' vide Sl.No.14 with regard to supply of dresses on 07.04.1967. The distribution register of books revealed that Welfare Extension Officer (WEO) of Tureikela Block had endorsed on 21.8.1969 that a complaint arises that Lochan Majhi is not a S.T. student and he is 'Meher' by caste.

During local enquiry by the I.O. in village-Chaulsukha one Purna Ch. Bhoi of the same village stated that he knew Lochan Meher, who is the son of Markand Meher of the same village and the said Lochan Meher married Padmabati Meher of village-Belpada, Dist-Bolangir as per the custom of Bhulia caste and that he himself performed the Puja before the village deity on the eve of Baranugamana (Barat) of Lochan Meher. He pleaded ignorance if Dhansai Majhi of village-Rengali adopted Lochan Majhi as his son. One Makunda Meher of village-Chaulsukha also stated that Lochan Meher, who is son of Markand Meher of his village, belonged to Bhulia caste and that Lochan also married in Bhulia society.

In the caste certificate issued in favour of Lochan Majhi by the Tahasildar, Kantabanji in the year 2005, his fathers name is shown as Dhansai Majhi of village-Rengali belonging to 'Gond' caste of S.T. community. But in the caste certificate issued in favour of the petitioner in the year 1979 by the Sub-Collector, Titilagarh, his father's name has been described as 'Dhansingh Majhi, but not 'Dhansai Majhi. The enquiry further revealed that the petitioner was physically staying with his natural father-Markand Meher in his house in village-Chaulsukha and never stayed in the house of Dhansai Majhi nor followed the caste customs, traditions and rituals of Gond community in any manner. It was also learnt that 'Dhanasai Majhi' and 'Dhansingh Majhi' were two biological brothers.

10. The I.O. of the District Vigilance Committee, therefore, concluded that the petitioner is the natural born son of Markand Meher of village-Chaulsukha and by manipulating and tampering the school admission register of Chaulsukha Sevashram his identity is sought to be changed describing him as the son of Dhansai Majhi of village-Rengali, who belonged to Gond Tribe, which is a scheduled tribe, and on that basis he obtained fake and fraudulent caste certificate and secured public employment against reserved vacancy meant for scheduled tribe. The children of the petitioner have also accordingly obtained false and fraudulent caste certificates.

11. The report of the Inspector of Police of Vigilance Cell was sent to the State Level Scrutiny Committee, which on its turn sent copies of the report to the petitioner and the other candidates (children) along with show cause notice dated 4.3.2009 asking them to file their show cause reply in support of their claim within 15 days from the date of receipt indicating further if the petitioner would desire to be heard in person.

12. On receipt of notice, the petitioner Lochan Majhi submitted his show cause reply dated 23.3.2009 (Annexure-5) stating that his father's name is Dhansai Majhi and he is the permanent resident of Rengali and he belonged to Gond community which is a Scheduled Tribe. It is stated by him that he had no connection with Markand Meher of village- Chaulsukha. He admitted that he was admitted in the Chaulsukha Sevashram School on 20.01.1966 when he was about five years old. In the school register, he has been described as Lochan Majhi, S/o. Dhansai Majhi of village-Rengali. He left the said school in the year 1969 and was admitted in Deshil Ashram School where also his name has been mentioned as Lochan Majhi, S/o. Dhansai Majhi. It is also stated that in the transfer certificate granted by the Government High School, Malpada, Bolangir in the year 1979, he has been described as Lochan Majhi, S/o. Dhansai Majhi. It is also stated that after the death of Dhansai Majhi, the petitioner has been paying the rental in respect of Holding No.21 of Mouja-Rangali which was the property of Dhansai. In the voters identity card, he has also been described as the son of Dhansai

Majhi. In his service records, he is also so described. He has also stated that there was no tampering in the school admission register and that he could not have tampered the same at the age of five years. Imputing that the enquiry report submitted by the District Vigilance Cell was false, the petitioner lastly desired to be heard in person and to be permitted to engage a lawyer.

13. The final order dated 30.06.2009 (Annexure-8) passed by the State Level Scrutiny Committee reveals that after receipt of the show cause reply of the petitioner and those of his children, notices were sent to them directing to appear on 14.5.2009 for personal hearing. The petitioner did not appear on the date fixed and has, however, disputed the fact of issuance of notice for personal hearing and contended that he has not received any such notice. In pursuance of the direction given in ***Kumari Madhuri Patil'***s case (supra), a copy of the claim of the petitioner (show cause reply) was sent to the D.W.O., Bolangir to be published in the locality by beat of drums, inviting objections from any person or association against the claim. The notice was published by the DWO, Bolangir on 03.06.2009 by beat of drums inviting objections to the claim. Two numbers of objections were received within the stipulated period. The State Level Scrutiny Committee after going through the report of the I.O. of the Vigilance Cell, the show cause reply of the candidates, the objections received within the due date and the other relevant records unanimously came to the conclusion that the petitioner does not belong to Scheduled Tribe of Gond community and that he obtained fake and fraudulent social status certificate (Scheduled Tribe certificate) and took unfair advantage of the same in securing his employment in public service. The State Level Scrutiny Committee, therefore, directed for cancellation of

the caste certificate of the petitioner and those of his children and for termination of the service of the petitioner which was secured as a Scheduled Tribe reserve candidate by utilising fake and fraudulent caste certificate.

14. In assailing the impugned order (Annexure-8) passed by the State Level Scrutiny Committee, the learned counsel for the petitioner vehemently urges that procedure prescribed by the Hon'ble Apex Court in ***Kumari Madhuri Patil's*** case (supra) for the purpose of issuance of social status certificate and the inquiry into the genuineness of such certificate, as laid down in paragraph-12 of the said judgment, have not been followed in the present case as a result of which the order passed by the Scrutiny Committee is totally vitiated, particularly when the investigation into the allegation of fake caste certificate of the petitioner was conducted by an Officer of the District Vigilance Cell, who was on deputation from another District and had no expertise in investigating social status claim. It is his further contention that the impugned order has been passed in violation of

the principle of natural justice inasmuch as though the petitioner in his show cause submitted to the State Level Scrutiny Committee requested for personal hearing, no further notice was sent to him fixing any date of hearing, as a result of which the petitioner was deprived of opportunity to substantiate his claim with regard to his status as a Scheduled Tribe. It is also stated that assuming that any notice of personal hearing was sent to the petitioner, the same was not received by the petitioner and that the notice was also bad as public objection was invited after the purported date fixed for hearing the petitioner. It is the further contention of the learned counsel for the petitioner that two objections were received by the Scrutiny Committee pursuant to publication of notice in the locality, but those objectors were not given any opportunity to lead evidence. Lastly, the learned counsel alternatively urges that in the event this court finds no fault in the findings of the Scrutiny Committee as contained in the impugned order, following the principles laid down by the Hon'ble Apex Court in the case of ***State of Maharashtra v. Milind and others*****;** AIR 2001 SC 393 no adverse order should be passed against the petitioner, as he had obtained the caste certificate a long time back and has already been in Government service for more than twenty five years.

15. A counter affidavit has been filed on behalf of the State refuting the contentions raised on behalf of the petitioner. It is stated in the counter affidavit that the procedure as laid down by the Hon'ble Apex Court in ***Kumari Madhuri Patil's*** case (supra) has been scrupulously followed in the inquiry into the social status of the petitioner and, therefore, the impugned order passed by the State Level Scrutiny Committee cannot be faulted. It is specifically stated that as per the direction of the Hon'ble Apex Court in

Kumari Madhuri Patil's case, the State Government have constituted District Level Vigilance Cell in each district as per the Government Resolution under Annexure-B/1 and all the officers of Vigilance Cell have been imparted training by experts for the purpose of investigating into the social status of Scheduled Castes and Scheduled Tribes including their customs, rituals etc. It is also stated that after receipt of the show cause reply of the petitioner in support of his claim, a further notice was issued to him vide Annexure-E/1 by speed post requesting him to appear before the Scrutiny Committee on 14.05.2009 at 11.00 A.M. and adduce evidence in support of his social status claim but the petitioner did not appear on the date fixed and, therefore, it cannot be said that the petitioner was not given opportunity of hearing. It appears from the counter affidavit that after publication of notice in the locality along with the copy of the enquiry report of the Vigilance Cell and the show cause reply of the petitioner inviting objections, two objections were received within the stipulated period which

were considered by the Scrutiny Committee along with the report of the I.O. of the Vigilance Cell and the show cause reply of the petitioner. It is contended on behalf of the State during argument that since the petitioner did not appear for his personal hearing, though he was given opportunity by issuance of notice to him, it was not necessary to issue him a further notice after receipt of two objections from the locality. In reply to the last alternative submission made on behalf of the petitioner, it is contended by the learned Advocate General that ***Milind's*** case (supra), which has been relied upon by the learned counsel for the petitioner, does not lay down any law that as a matter of principle a person, who has obtained false and fraudulent caste certificate and thereby gained advantage by securing public employment against reserved vacancy depriving reserved candidates of their constitutional right, shall be protected merely because he has rendered service in a post for long years. On the contrary, placing reliance on the judgment of the Apex Court in the case of ***Regional Manager, Central Bank of India v. Madhulika Guruprasad Dahir and others*****;** (2008) 13 SCC 170 it is contended that equity, sympathy and generosity have no place where the original appointment rests on false caste certificate even though the person concerned has rendered service for a long period inasmuch as the selection of the employee having been made on falsity and deception cannot be saved by equitable consideration.

16. Having regard to the contention raised by the parties, it is apposite to note the procedure prescribed by the Hon'ble Apex Court in ***Kumari Madhuri Patil's*** case (supra) for the purpose of scrutiny and enquiry into doubtful social status claims or complaints regarding genuineness of caste certificates.

The relevant subparagraphs of Paragraph no.12 of the said judgment are quoted below :

> " xxx xxx xxx xxx
>
> 4) All the State Governments shall constitute a Committee of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the concerned department, (II) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case of the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.
>
> (5) Each Directorate should constitute a vigilance cell consisting a Senior Deputy Superintendent of police in overall charge and such

number of Police Inspectors to investigate into the social status claims. The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He also should examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the proforma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the concerned castes or tribes or tribal communities etc.

(5) The Director concerned, on receipt of the report from the Vigilance Officer if he found the claim for social status to be "not genuine" or "doubtful" or spurious or falsely or wrongly claimed, the Director concerned should issue show cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgment due or through the head of the concerned educational institution in which the candidate is studying or employed. The notice should indicate that the representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30

days from the date of the receipt of the notice. In case, the candidate seeks for an opportunity of hearing and claims an inquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the Committee and the Joint/Addl. Secretary as Chairperson who shall give reasonable opportunity to the candidate/ parent/guardian to adduce all evidence in support of their claim. A public notice by beat of drum or any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-à-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

(9) The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the cast Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate, the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

(11) The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.

(15) As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the concerned educational institution or the appointing authority by registered post with acknowledgment due with a request to cancel the admission or the appointment. The Principal etc. of the educational institution responsible for making the admission or the appointing authority should cancel the admission/appointment without any further notice to the candidate and debar the candidate for further study or continue in office in a post. xxx xxx xxx "

17. While holding in sub-para (11) of Paragraph-12 of the judgment in ***Kumari Madhuri Patil's*** case (supra) that the order passed by the Scrutiny Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution, the Apex Court in paragraph-14 of the said judgment stated the nature of and the extent to which the High Court can exercise its power of judicial review as under :

" xxx xxx xxx xxx

High Court is not a Court of appeal to appreciate the evidence. The Committee which is empowered to evaluate the evidence placed before it when records a finding of fact, it ought to prevail unless found vitiated by judicial review of any High Court subject to limitations of interference with findings of fact. The Committee when considers all the material facts and record a finding, though another view, as a Court of appeal may be possible, it is not a ground to reverse the findings. The Court has to see whether the Committee considered all the relevant material placed before it or has not applied its mind to relevant facts which have led

the Committee ultimately recorded the finding. Each case must be considered in the backdrop of its own facts."

18. With regard to the contention raised on behalf of the petitioner that in passing the impugned order the State Level Scrutiny Committee violated the principles of natural justice, it is to be seen in the light of the procedure prescribed by the Apex Court in ***Kumari Madhuri Patil's*** case (supra) whether after submission of his show cause reply the petitioner- Lochan Majhi was given notice and adequate opportunity of hearing, and whether calling the objectors, who submitted objections pursuant to publication of notice in the locality to lead evidence was required in the facts and circumstances of the case. Although, the petitioner claimed that no notice was issued to him after he submitted his show cause reply to the Scrutiny Committee for leading evidence with regard to his claim of Scheduled Tribe status, the opposite parties have taken a stand that notice was issued to the petitioner by speed post requesting him to appear before the Scrutiny Committee on 14.05.2009 at 11.00 A.M. and adduce evidence in support of his social status claim, but the petitioner did not appear on the date fixed. Copy of such notice has been annexed as Annexure-E/1. In order to verify the truth of such assertion, we had called for the records. In course of hearing, the learned Advocate General produced the records on 02.03.2010 and on verification it was found that in fact notice had been sent to the petitioner by speed post on 05.05.2009 asking him to appear before the Scrutiny Committee on 14.05.2009 at 11.00 A.M. and adduce evidence in support of his claim. There is no reason as to why the presumption of 'due service' in respect of registered post shall not apply to a notice properly addressed and issued by speed post. We are, therefore, unable to accept the contention of the petitioner that no notice was issued and no opportunity of hearing was given to him by the Scrutiny Committee.

Regarding the contention that the objectors of the two objections submitted in pursuance of publication of notice in the locality were not given

opportunity to adduce evidence, it is necessary to see the nature of the two objections, copies where of have been annexed by the petitioner as Annexure-7 and 7/A. Objection under Annexure-7 has been signed by five persons claiming to be residents of village-Rengali and it is stated therein that Sri Lochan Majhi (petitioner) had been staying in the house of Dhansai Majhi since his childhood and was studying in Chaulsukha Sevashram and thereafter in the Desil Ashram School and Malpada High School and that in view of his service he is staying at Bolangir with his family and that he comes to the village during village festivals. Similarly, the objection under Annexure-7/A was sent by one Bramahananda Tripathy of village-Kasamal, P.S.Kantabanji in which the objector has stated that village-Rengali is a neighbouring village and that Sri Lochan Majhi (petitioner) used to stay in the

house of Dhansai Majhi of Rengali from his childhood and was studying in Chaulsukha Sevashram and that he has been staying at Bolangir with his family ever since he got Government service. It is seen that the tenor and contents of both the objections are similar. They do not contain anything adverse to the petitioner's claim, though there is no mention at all whether the petitioner is the natural born son of Dhansai Majhi or he is in any other manner treated to be his son. It is not known under what circumstances the copies of these two objections came to the possession of the petitioner. Be that as it may, since the two objections were not adverse in any manner to the claim of the petitioner, in our view, it was not necessary to call the objectors to lead any further evidence and to provide the petitioner an opportunity to cross-examine them. We are, therefore, constrained to hold that there was no violation of principles of natural justice in passing of the impugned order by the Scrutiny Committee.

19. Admittedly enquiry by Bolangir District Vigilance Cell was conducted by an Officer, who was deputed from Sonepur District. It is the contention of the petitioner that a Deputationist Officer was not competent to make the enquiry and further that he had no expertise to enquire into the anthropological and ethnological traits including the customs traditions etc. of different communities. The State on the other hand has taken a specific plea that all the Officers of Vigilance cells have been imparted orientation training by experts of Scheduled Caste and Scheduled Tribes with regard to the status of such communities, their deity, rituals, customs and different ceremonies etc. There is no legal bar for an officer of one District to be deputed to another neighbouring District Vigilance Cell and the learned counsel for the petitioner has not brought to our notice any such law. In view of the stand taken by the State, it is not open to the petitioner to challenge the competency of the deputed officer to make an enquiry when the enquiry in the present case involved more of local enquiry than enquiry into the anthropological and ethnological traits of the petitioner and in the given case

this is so because at no stage the petitioner has claimed to be the natural born son of Dhansai Majhi nor there is any claim that he was the adopted son of Dhansai Majhi. His only claim as revealed from his show cause reply is that he is son of Dhansai Majhi and has been so described in the school admission register. The petitioner gives more emphasis on the school admission register as to his identity. When the very paternity of the petitioner in this case was in dispute, it was incumbent upon him to specify whether he was the natural born son or adopted son of Dhansai Majhi. It was also incumbent upon him to state specifically the name of his biological mother, which he has not done. This was more so particularly when the school admission register of Chaulsukha Sevashram (Primary School), where initially the petitioner was admitted, has been found to have been tampered

with respect to every entry relating to the petitioner such as his surname, father's name, village, caste, etc. The fact that initially the petitioner was admitted as Lochan Meher, son of Markand Meher of village- Chaulsukha belonging to caste 'Bhulia', which was subsequently changed as Lochan Majhi, S/o. Dhansai Majhi of village-Rengali belonging to caste 'Gond', necessitated proper explanation from the petitioner as to such changes. The subsequent transfer certificate issued by Chaulsukha Sevashram is based on the fraudulently tampered entries in the admission register. The subsequent admission of the petitioner in another school on the basis of such transfer certificate is therefore of no consequence. In view of such tampering of the primary school admission register coupled with the statement of villagers including that of Lalita Majhi, whose status as the widow of Dhansai Majhi has not been challenged or disputed by any body, the inescapable conclusion is that the petitioner is not the son of Dhansai Majhi and on the other hand is the natural born son of Markand Meher as has been found by the Scrutiny Committee. The caste certificate obtained by the petitioner having been issued mainly on the basis of school transfer certificate was definitely fake and fraudulent one as found by the State Level Scrutiny Committee.

20. In view of the aforesaid analysis, we find no infraction of the procedure prescribed by the Apex Court in ***Kumari Madhuri Patil's*** case (supra) by the State Level Scrutiny Committee in the matter of enquiry into the social status of the petitioner and, therefore, the impugned order under Annexure-8 does not suffer from any infirmity.

21. As to the alternative submission that the petitioner having been in service for more than 25 years on the basis of the Scheduled Tribe certificate his service be protected the learned counsel has placed reliance on the judgment of the Apex Court in ***State of Maharashtra v. Milind and others***; AIR 2001 SC 393 and that of the Bombay High Court in ***Prashant S/o. Haribhau Khawas v. State of Maharashtra and others*** in Writ

Petition No.3980 of 2006 and other connected writ petitions, decided on 25.01.2008.

In ***Milind's*** case (supra) the Constitution Bench of the Apex Court was considering the admission of the respondent to the medical course for the year 1985-86 as a Scheduled Tribe on the basis of caste certificate obtained by him describing him as belonging to the 'Halba/Halbi' Tribe under Entry-19 of the Constitution (Scheduled Tribes) order, 1950, though the respondent in fact belonged to 'Halba Koshti' caste. The respondent therein had obtained the Scheduled Tribe certificate on the basis that Halbi Koshti caste was a sub-tribe within the meaning of Entry-19 of the Scheduled Tribe of the State of Maharashtra, even though it was not specifically mentioned as such. Subsequently, the Director of Social Welfare and the Additional Tribal

Commissioner having invalidated the caste certificate of respondent-Milind, he had filed Writ Petition No.2994 of 1984 before the High Court which was allowed holding that it was permissible to enquire whether any sub-division of a tribe was part and parcel of the Tribe mentioned in the Constitution (Scheduled Tribe) Order and that 'Halba/Koshti' is a sub-division of the main Tribe 'Halba/Halbi' as per the Scheduled Tribe Order. During the time the respondent obtained the caste certificate, the view of the Apex Court in the cases of ***Bhaiya Ram Munda v. Anirudh Patara*****,** AIR 1971 SC 2533 and ***Dina v. Narayan Singh*****,** (1968) 38 ELR 212 to the effect that evidence is admissible for the purpose of showing what an entry for the Presidential Order was intended to be was holding the field and, therefore, Bombay High Court relied upon the said view and allowed the respondent's writ petition. The State of Maharashtra challenged the judgment of the Bombay High Court and the Constitution Bench of the Apex Court allowed the appeal of the State of Maharashtra and set aside the High Court judgment. But, having regard to the fact that 15 years had passed and the respondent had completed the medical course for which huge amount was spent and that it would be to the benefit of the no body if the admission of the respondent to the medical course was annulled but on the contrary it may lead to depriving the service of a doctor to the society, the Apex Court observed that their judgment would not affect the medical degree obtained by the respondent. However, it made clear that the respondent could not take advantage of the Scheduled Tribes Order any further. The Apex Court further observed that having regard to the passage of time, in the given circumstances, including interim order passed in SLP (C) No.16372 of 1985 and other related matters, the admission and appointment that have become final shall remain unaffected by the judgment.

The Constitution Bench, while dealing with ***Milind****'s* case (supra) made the aforesaid observation being aware of the fact that a larger number of candidates, who had obtained caste certificates on the basis of evidence

being led that a particular sub-caste or sub-Tribe belonged to the particular caste or Tribe in the Entries made in the Presidential Orders and that they might be affected by the judgment.

In ***Prashant's*** case (supra) the Bombay High Court protected the appointments of persons belonging to 'Koshti' sub caste who had obtained the caste certificates as Scheduled Tribe 'Halba/Halbi', keeping in view the observation of the Apex Court in Milind's case.

The aforesaid two decisions, however, do not lay down any general principle that rendering long period of service, appointment to which was obtained by means of fake and fraudulent caste certificate, should be protected.

22. On the contrary, in the case of ***State of Maharashtra v. Ravi Prakash Babulalsing Parmar*****,** (2007) 1 SCC 80 dealing with a similar situation, the Apex Court observed in paragraph-23 of the judgment thus:

> "23. The makers of the Constitution laid emphasis on equality amongst citizens. The Constitution of India provides for protective discrimination and reservation so as to enable the disadvantaged group to come on the same platform as that of the forward community. If and when a person takes an undue advantage of the said beneficent provision of the Constitution by obtaining the benefits of reservation and other benefits provided under the Presidential Order although he is not entitled thereto, he not only plays a fraud on the society but in effect and substance plays a fraud on the Constitution. When, therefore, a certificate is granted to a person who is not otherwise entitled thereto, it is entirely incorrect to contend that the State shall be helpless spectator in the matter."

23. In the case of ***Regional Manager, Central Bank of India v. Madhulika Guruprasad Dahir and others*****,** (2008) 13 SCC 170, the Apex Court held as follows :

> "14. Similarly, the plea regarding rendering of services for a long period has been considered and rejected in a series of decisions of this Court and we deem it unnecessary to launch an exhaustive dissertation on principles in this context. It would suffice to state that except in a few decisions, where the admission/ appointment was not cancelled because of peculiar factual matrix obtaining therein, the consensus of judicial opinion is that equity, sympathy or generosity has no place where the original appointment rests on a false caste certificate. A person who enters the service by producing a false caste certificate and obtains appointment to the post meant for a Scheduled Caste or Scheduled Tribe or OBC, as the case may be, deprives a genuine candidate falling in either of the said categories, of appointment to that post, and does not deserve any

> sympathy or indulgence of this Court. He who comes to the Court with a claim based on falsity and deception cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour."

24. In the case of ***Union of India v. Dattatray S/o.Namdeo Mendhekar and others;*** (2008) 4 SCC 612, the Hon'ble Apex Court set aside the judgment of the Bombay High Court whereby the High Court had granted protection to the services of the respondent, which had been procured on the basis of false caste certificate. Following the observation of

the Supreme Court in ***Milind's*** case (supra) in paragraph-5 of the judgment, the Apex Court held as under :

" xxx xxx xxx xxx

> But the said decision has no application to a case which does not relate to an admission to an educational institution, but relates to securing employment by wrongly claiming the benefit of reservation meant for Scheduled Tribes. When a person secures employment by making a false claim regarding caste/tribe, he deprives a legitimate candidate belonging to Scheduled Caste/Tribe, of employment. In such a situation, the proper course is to cancel the employment obtained on the basis of the false certificate so that the post may be filled up by a candidate who is entitled to the benefit of reservation.
>
> xxx xxx xxx xxx"

25. In another similar case where the High Court relying on the observation in ***Milind'***s case, had protected the services of the respondent, who had already rendered twenty two years of service, the Hon'ble Supreme Court in the case of ***Addl. General Manager, Human Resource, Bharat Heavy Electricals Ltd. v. Suresh Ramkrishna Burde*****,** (2007) 5 SCC 336 while setting aside the judgment of the High Court observed in paragraph-7 as follows :

" xxx xxx xxx xxx

> The High Court has granted relief to the respondent and has directed his reinstatement only on the basis of the Constitution Bench decision of this Court in ***State of Maharashtra v. Milind*****.** In our opinion the said judgment does not lay down any such principle of law that where a person secures an appointment by producing a false caste certificate, his services can be protected and an order of reinstatement can be passed if he gives an undertaking that in future he and his family members shall not take any advantage of being member of a caste which is in reserved category.

xxx xxx xxx xxx"

26. In the light of the judicial pronouncements as seen above, the alternative submission of the learned counsel for the petitioner carries no force, in as much as the petitioner secured employment on the basis of a false and fraudulent caste certificate by depriving a genuine and deserving Scheduled Tribe candidate for whom the post was reserved. Accordingly, we find no merit in this writ application and we dismiss the same without any order as to costs.

Writ petition dismissed.

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2010 (II) ILR – CUT-74

B.P.DAS, J & C.R.DASH, J.

REVIEW PETITION NOS.230,231,232,233,234,235, 236 & 237,(Decided on22.03.2010)

M/S.GULF OIL CORPORATION LTD. & ANR. …….Petitioner

.Vrs.

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

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

This court dismissed the writ petition on 10.4.2008 as withdrawn with a liberty to approach other forum – Without approaching other forum petitioners approached the Hon'ble Supreme Court – Before the Apex Court, they also seek permission to withdraw the petition in order to file appropriate petition before the High Court – Petitioners again filed fresh writ petitions on the same cause of action – This Court dismissed the writ petitions – Hence the review petitions before this Court.

Allowing withdrawal of the writ petitions liberty was granted to the petitioners to approach any other forum which is obviously not another Bench of this Court – Before the Supreme Court petitioners prayed to withdraw their petitions with permission to file appropriate petition before this Court is not a direction from the Apex Court – Moreover the order impugned does not come within the ambit of review as the same does not suffer from any error apparent on the face of the record – Held, Review petitions are dismissed in limine. (Para 13)

Case laws Referred to:-

1.AIR 1987 SC 88 : (Sarguja Transport Service -V- State Transport Appellate Tribunal, Gwalior & Ors.).
2.AIR 1986 SC 1009 : (M/s.Konkan trading Company -V- Suresh Govind Kamat Tarkar & Ors.).
3.AIR 1943 All 67 : (Muktanath Tweari & Anr.-V-Vidyashanker Dube & Ors.).
4.AIR 1940 Bom. 121 (F.B.) : (Ramrao Bhagwantrao Inamdar & Arn.-V- Babu Appanna Samage & Ors.).
5.AIR 1994 SC 754 : (State of U.P. & Anr. -V- Labh Chand).

For Petitioners - M/s.Jagabandhu Sahoo, N.K.Rout & P.Mohapatra,Advs.
For Opp.Parties – Addl.Standing Counsel (Revenue).

M/S. GULF OIL CORPORATION -V- STATE [*C.R.DASH,J.*]

C.R. DASH, J. These review petitions arise out of common order dated 07.10.2009 passed in writ petitions bearing W.P.(C) Nos. 11866 of 2009 to 11873 of 2009,(covering eight assessment years from 1976-77 to 1983-84).

2. As all the aforesaid matters are between the same parties involving similar facts and questions of law, they are taken up for disposal by this common order.

3. Admittedly, on the self-same cause of action and similar grounds the petitioners had filed writ petitions bearing W.P. (C) Nos. 2503 of 2008 to 2510 of 2008 covering the self-same assessment years from 1976-77 to 1983-84. Those writ petitions were dismissed as withdrawn by common order dated 10.04.2008 passed by this Court, which reads as follows:-

> "On the prayer of the leaned counsel for petitioner this writ petition is allowed to be withdrawn without any determination on the merits of the case and all the questions are left open. The Writ Petition is dismissed as withdrawn. This will not in any way prevent the petitioner from approaching other forum in accordance with law.
>
> Misc. Case Nos. 2211 and 2212 of 2008 are also disposed of.
>
> Urgent certified copy of this Order be granted on proper application.
>
> Sd/-
> A.K. Ganguly, CJ.
> Sd/-
> B.N. Mohapatra,J."

A cursory reading of the aforesaid order makes it explicitly clear that the writ petitions have been allowed to be withdrawn with liberty to the petitioners to approach other forum in accordance with law. No sort of interpretation of the aforesaid order makes the same agree with the contention of the learned counsel for the petitioners that permission has been granted to withdraw the writ petitions with liberty to file afresh on the same cause of action as the same (the writ petitions) suffered from non-joinder of parties.

4. However, without approaching the other forums as represented before this Court in the aforesaid writ petitions i.e. W.P.(C) Nos. 2503-2510 of 2008, the petitioners approached the Hon'ble Supreme Court under Article 32 of the Constitution of India and Hon'ble Supreme Court vide order dated 17.11.2008 disposed of the writ petitions with the following order:-

> "Mr. Salve, learned Senior Counsel seeks permission to withdraw the petition stating that an appropriate petition will be filed before the High Court. Permission granted".

The writ petition is accordingly disposed of as withdrawn".

5. On disposal of the writ petitions by Hon'ble Supreme Court as aforesaid, the petitioners field fresh writ petitions bearing W.P.(C) Nos. 11866 of 2009 to 11873 of 2009 before this Court admittedly on the same cause of action.

6. This Court taking stock of order dated 10.04.2008 dismissed all the aforesaid writ petitions bearing W.P.(C) Nos. 11866 to 11873 of 2009 by the impugned order dated 07.10.2009 which reads thus:-

> "07.10.2009:
>
> Heard learned counsel for the petitioner.
>
> In view of the order dated 10.04.2008 passed by this Court in W.P.(C) No. 2503 of 2008 (M/s Gulf Oil Corporation Ltd. Vrs. State of Orissa & Others), nothing remains to be decided in the present writ petition.
>
> The Writ Petition is accordingly dismissed.
>
> Sd/-
> B.P. Das, J.
> Sd/-
> C.R. Dash, J".

7. Before delving into the merit of the review petitions, it is profitable to give the background of the case. Initially, S.J.C. No. 229 of 1995 and STREV No. 14 of 2006 were filed by M/s. IDL Chemical (P) Ltd., Rourkela (now it is known as M/s. Gulf Oil Corporation, as stated by the learned counsel for the Revenue), in which the assessments under the Central Sales Tax Act for the years 1976-77, 1977-78 to 1983-84, 1989-90 and 1990-91 were the subject matter of dispute. W.P.(C) Nos. 11866 of 2009 to 11873 of 2009 also pertain to the assessment from 1976-77 to 1983-84, which were the subject matter of the aforesaid S.J.Cs. and STREF. Ultimately, while disposing of the aforesaid S.J.Cs. and STREV, the following questions were referred.

> "(1) That in view of the quotation offered by the assessee company and supply order issued by M/s. CIL indicating the firm order of rate of payment, quality to be purchased, period of contract etc. on acceptance of the offer, whether the Sales Tax Tribunal was correct in law to hold that it was not the contract of sale but the actual purchase and sale was triggered only when a colliery placed indent with M/s. IDL Chemicals ?
>
> (2) That in view of the fact that M/s. IDL Chemicals moved goods in pursuance to the supply order placed by M/s. CIL, whether the Sales Tax Tribunal was correct in law to hold that the transactions do not constitute sale falling u/S. 3(a) of the C.S.T. Act ?

> (3) That in view of the fact that the indents placed by the constituents of M/s. CIL was mere indents to take delivery of the goods, whether the Sales Tax Tribunal was correct to hold that the actual sales were triggered by such indents and taken place inside

the respective State and were intra-State sale subject to levy of tax under the law of that State ?"

Thereafter, examining all the aspects, the questions referred to above were answered as follows :-

"(i) In view of the quotation of the assessee-company, supply order of M/s. CIL and the surrounding factors noted supra, the Sales Tax Tribunal was not correct to hold that the order issued by M/s. CIL was not a contract of sale and that the actual purchase and sale were triggered only when the collieries placed indent with M/s. IDL Chemicals.

(ii) The movement of goods from M/s. IDL Chemicals, Rourkela to different States constitutes sales under Section 3(a) of the CST Act.

(iii) The sales having taken place at the exit points of M/s. IDL, Rourkela, the State of Orissa was entitled to levy Sales Tax on those goods under the Central Sales Tax Act."

Now for the self-same assessment years, concerning which orders passed by this court has been indicated in the foregoing paragraphs the petitioner has filed in W.P.(C) Nos. 2503 of 2008 to 2510 of 2008 and W.P. (C) Nos. 11866 of 2009 to 11873 of 2009.

8. As the contentions raised by learned counsel for the review petitioners, touch the law on withdrawal of a suit petition and its effect, we feel inclined to address that aspect at the outset.

The issue of withdrawal of writ petition is no more res integra. In ***Sarguja Transport Service Vrs. State Transport Appellate Tribunal. Gwalior and Others,*** *AIR 1987 SC 88*, Hon'ble Supreme Court held as under :-

".....The principle underlying Rule 1 of Order XXIII of the Code, is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. **In**

order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule(3) of Rule 1,

Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code... .

… … It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition……"

(Emphasis added)

9. Law is further settled on the scope on the part of a court and the ambit thereof in permitting withdrawal of a suit/case with liberty to file afresh. Order XXIII, Rule 1 CPC does not confer an unbridled power upon the Court to grant permission to withdraw the petition, with liberty to file afresh, on the same cause of action; it can do so only on the limited grounds mentioned in the provision of Order XXIII, Rule 1 CPC, and they are, when the Court is satisfied that the suit must fail by reason of some **formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit** for the same subject matter, and that too, on such term as the Court thinks fit. The grounds for granting a party permission to file a fresh suit, include a formal defect, i.e., in the form or procedure not affecting the merit of the case, such as also of statutory notice, under Section 80 of the Code, mis-joinder of the parties or cause of action, non-payment of proper Court-fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject matter of the suit, absence of territorial jurisdiction of the Court or defect in prayer clause etc. Non-joinder of a necessary party, omission to substitute heirs etc. may also be considered a ground in this respect, or where the suit was found to be premature, or it had become in fructuous, or where relief could not be, and where the relief even if granted, could not be executed, may fall within the ambit of sufficient ground mentioned in that provision. (vide, **M/s. Konkan**

Trading Company *Vrs.* Suresh Govind Kamat Tarkar & Ors, AIR 1986 SC 1009; **Muktanath Tewari & Anr. *Vrs.* Vidyashanker Dube & Ors.,** AIR 1943 All 67; and **Ramrao Bhagwantrao Inamdar & Anr. *Vrs.* Babu Appanna Samage & Ors.,** AIR 1940 Bom. 121 (F.B.)).

10. Learned counsel for the review petitioners in course of hearing contended that order dated 10.04.2008 in W.P.(C) Nos.2503 to 2510 of 2008 came to be passed by this Court as it was submitted by learned counsel for the petitioners therein that this Court may not be in a position to give appropriate and effective directions in those writ petitions (W.P. (C) Nos. 2503 to 2510 of 2008) against the other States to annul or to quash the respective completed assessments or order refund or adjustment of taxes against the demand of the opposite parties 3 and 4. It is further contended that the order dated 10.4.2008 clearly records the stand of the petitioners and there was no dismissal of those writ petitions by this Hon'ble Court upon any adjudication of the matters on merits.

11. In course of hearing order dated 10.04.2008 passed by this Court was confronted to learned counsel for the review petitioners to show that said order has not recorded the stand of the petitioners to the effect that withdrawal has been permitted for non-joinder of necessary parties rather the writ petitions were permitted to be withdrawn with liberty to approach other forum in accordance with law. At this, learned counsel for the review petitioners submitted that "Other Forum" mentioned in the order is other Bench of this Court because no other forum can give effective relief/reliefs to the review petitioners against other states except the High Court. Further it is submitted by learned counsel for the review petitioners that in view of order dated 17.11.2008 passed by Hon'ble Supreme Court (as quoted supra), it was not proper on the part of this Court to dismiss the writ petitions (W.P. (C) Nos. 11866 to 11873 of 2009) in limine and such dismissal, was no misconception of law and also facts as this Court proceeded on the premises that the earlier writ petitions were adjudicated on merit.

12. If the contentions raised by learned counsel for the petitioners is considered vis-à-vis the law of withdrawal of the writ petitions discussed supra, there is no hesitation in our mind to hold that the writ petitions were not permitted to be withdrawn for non-joinder of parties as asserted by learned counsel for the review petitioners, but while allowing withdrawal of the writ petition liberty was granted to the petitioners to approach any other forum which is obviously not another Bench of this Court. Further, this Court while passing the order dated 07.10.2009 impugned in the review petitions did not at all proceed on the premise that the order dated 10.04.2008 was

passed in W.P.(C) Nos. 2503 to 2510 of 2008 on merit. We only took into consideration the salutary public policy of discouraging successive writ petitions as the petitioners having availed the remedy had abandoned the same by withdrawing the earlier writ petitions with liberty to move other

forum. The principles of law which shaped our mind to pass the impugned order has been well explained by Hon'ble Supreme Court in ***State of U.P. and Another Vrs. Labh Chand,*** *AIR 1994 SC 754,* and we feel inclined to make a reference to the following passage :-

> "This reason is not concerned with the discretionary power of the Judge or Judges of the High Court under Article 226 of the Constitution to entertain a second writ petition whose earlier writ petition was dismissed on the ground of non-exhaustion of alternative remedy but of such a Judge or Judges having not followed the well established salutary rule of judicial practice and procedure that an order of a Single Judge Bench or a Larger Bench of the same High Court dismissing the writ petition either on the ground of latches or non-exhaustion of alternative remedy as well shall not be bye-passed by a Single Judge Bench or Judges of a Larger Bench except in exercise of review or appellate powers possessed by it….. But as the learned Single Judge constituting a Single Judge Bench of the same Court, who has in the purported exercise of jurisdiction under Article 226 of the Constitution bye-passed the order of dismissal of the writ petition made by a Division Bench by entertaining a second writ petition filed by the respondent in respect of the subject matter which was the subject matter of the earlier writ petition, the question is, whether the well established salutary rule of judicial practice and procedure governing such matters permit the learned Single Judge to bye-pass the order of the Division Bench on the excuse that High Court has jurisdiction under Article 226 of the Constitution to entertain a second writ petition since the earlier writ petition of the same person had been dismissed on the ground of non-availing of alternative remedy and not on merits…Second writ petition cannot be so entertained, not because the learned Single Judge had no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same Court dismissing the earlier writ petition, redundant and nugatory although not reviewed by it in exercise of its recognized power. Besides, if a learned Single Judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in *limine* by another Single Judge or a Division Bench of the same Court, it would encourage an

> unsuccessful writ petitioner to go on filing writ petitions after writ petition in the same matter, in the same High Court and for it brought up for consideration before one Judge after another. Such a thing, if

is allowed to happen, it would result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any Bench of such Court refusing to entertain a writ petition could be ignored by him with impunity and the relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by Judges of the High Court, for there could be no finality for an order of the Court refusing to entertain a writ petition. It is why the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting that the writ petition of the same person was dismissed by the same Court even if the order of such dismissal was in *limine*, be it on the ground of latches or on the ground of non-exhaustion of alternative remedy, has come to be accepted and followed as salutary rule in exercise of writ jurisdiction of the Court".

13. What is the effect of the order dated 17.11.2008 passed by Hon'ble Supreme Court in relation to order dated 10.042008 passed by this Court in W.P.(C) Nos. 2503 to 2510 of 2008 is the question that arise for consideration in view of vehement emphasis of learned counsel for the review petitioners on the same to get salvaged from the situation.

Before Hon'ble Supreme Court learned counsel appearing for the petitioners sought for permission to withdraw the writ petitions stating that an appropriate petition will filed before the High Court. On the basis of such a statement permission was granted and the writ petition was disposed of as withdrawn. Etymologically, the word 'Permission' is a word of wide import. Said word is to be understood in the present case in the context in which it has been used keeping in mind the law settled by Hon'ble Supreme Court on the subject of withdrawal of a suit/case as discussed supra. Permission by Hon'ble Supreme Court to file an appropriate petition before this Court, in the facts and circumstances of the case does not at all relegate the petitioners to a status/ position ante in relation to the order dated 10.04.2008 passed by this Court in W.P.(C) Nos. 2503 to 2510 of 2008. The aforesaid order dated 10.04.2008 passed by this Court without being set aside or quashed stands as it is and it cannot be held to have been avoided. In view of such fact the

petitioners by virtue of aforesaid order of Hon'ble Supreme Court dated 17.11.2008 has been relegated to a position to post-order dated 10.04.2008. The permission granted in the order means only leave to do some acts

which but for the leave will be illegal. The permission so granted by Hon'ble Supreme Court if understood in the context as aforesaid does not bind this Court to act in the manner as wished by the petitioners without being alive to settled position of law, when order dated 10.04.2008 passed by this Court stares at the face of the petitioner as well as this Bench of this Court.

14. Even otherwise, the order impugned does not come within the ambit of review inasmuch as the same does not suffer from any error apparent on the face of the record and permitting the order to stand shall not in any way lead to failure of justice. We feel inclined to make it clear that our order impugned in the review petitions does not in any way affect the liberty granted to the petitioners vide order dated 10.04.2008 as it must have been clear by now that we have followed the salutary judicial practice only to up keep the sanctity of the earlier order passed by another Bench of this Court on 10.04.2008 .

In the result, we are not inclined to admit these Review Petitions and the same are dismissed in limine.

Review petition dismissed.

2010 (II) ILR – CUT- 83

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

O.J.C. NO.4023 OF 2001(Decided on 22.04 2010)

M/**S. FERRO ALLOYS CORPORATION LTD & ANR** ……Petitioner

.Vrs.

STATE OF ORISSA & ORS . ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.226.

Execution of lease deed for construction of office & Guest house – Work to be completed within three years – No construction in the meantime excepting the boundary wall and out house – No steps for resumption during 13 years after execution of the lease deed – Construction of office building and Guest house started prior to passing of the order of resumption – Now the entire building has been completed and has been made to use and it would cause great prejudice to the petitioners if the order of resumption is allowed to stand – Held, impugned order directing resumption of land is set aside.

(Para 4 & 5)

For Petitioners – M/s. A.K.Parija, S.P.Sarangi, B.C.Mohanty, & P.P.Mohanty.

For Opp.Parties – Advocate General & Additional Standing Counsel.

L.MOHAPATRA, J. Petitioner No.1 is a Company and petitioner No.2 is the Resident Manager thereof. They have filed this writ application assailing the legality of the order dated 15.3.2001 in Annexure-7 passed by the Government of Orissa in General Administration Department resuming the land allotted in favour of the petitioner No.1 in Mouza Jaydev Vihar, Bhubaneswar and directing the petitioner to remove the structures and materials from the demised premises within a specified time.

2. The petitioner No.1 is a Public Limited Company having its plant at Randia, in the district of Bhadrak. It has also chromite mines granted on lease by the State Government at different places. In order to have a better coordination with different functionaries of the State, the office of the petitioner-Company was established in Bhubaneswar in the year 1972. The said office was running in a rented house. The State Government during mid 80's started granting lease to established industrial houses for construction of their own office buildings in Bhubaneswar and accordingly the petitioner No.1 approached the State Government for allotment of a piece of land for

construction of its Company office and Guest House. The State Government was pleased to allot a piece of land measuring 237 ft./274ft. in Mouza

Jaydev Vihar, Bhubaneswar over Plot No.GD-2/10 on long term lease basis. The lease deed was executed on 19.1.1988 and a premium of Rs.14,90,000/- had been paid by the petitioner No.1 before execution of the lease deed. Possession of the said land was handed over to the petitioner No.1 on 24.5.1988 and in terms of the lease, the petitioner No.1 was required to construct its office and Guest House within a period of three years. During the said period the Ferro Alloys Industry had gone into a severe depression and all Companies producing Ferro Alloys were sustaining huge loss as that of the petitioner. Therefore, it was not possible on the part of the petitioner No.1's Company to invest money for construction of its office and Guest House in Bhubaneswar and consequently there was delay. Though the petitioner had obtained approved plan from the Bhubaneswar Development Authority for construction of the house, the same could not be constructed because of the financial stringency. Applications were filed before the Bhubaneswar Development Authority for extending the validity of the approved plan from time to time. The last extension was granted on 9.3.1998 which was valid up to 29.3.2001. While the matter stood thus, the petitioner received a letter on 20.9.1999 requiring it to show cause as to why the lease should not be determined and the land should not be resumed for non-compliance of the provision contained in the lease deed which requires the petitioner to make the construction within three years from the date of execution of the lease deed. A reply to the said notice was submitted by the petitioner explaining the reasons for delay but without considering the reasons assigned in the reply, the impugned order in Annexure-7 was passed for resumption of the land. In course of hearing, it was submitted by the learned Senior Counsel Shri A.K. Parija that before resumption of the land in Annexure-7, the construction work had already started and without verifying the same, the order in Annexure-7 was passed illegally without any further enquiry.

3. A counter affidavit has been filed by the opposite parties wherein execution of the lease deed in favour of the petitioner No.1 is admitted. It is the stand of the opposite parties in the counter affidavit that the petitioner No.1 was required to complete the building on the allotted plot in every respect within 36 months from the date of execution of the lease deed or within the extended time, if permitted. However, the petitioner No.1 did not start the construction work for 13 years from the date of execution of the lease deed. On the request of the petitioner, when a joint enquiry was made on 30.12.2000 in presence of petitioner No.2, Land Officer, G.A. Department and the concerned Revenue Inspector, it was found that the land was lying

vacant and there was only a boundary wall and an out house. The petitioner No.1, therefore, having violated the conditions of the lease, notice was issued to show cause as to why the land shall not be resumed and on consideration of the reply given by the petitioner No.1, a decision was taken to resume the land on the ground of non-compliance of the conditions of the lease deed. Learned Advocate General appearing for the opposite parties contended that there being clear violation of the conditions of the lease deed, there was nothing wrong in resuming the land after due notice to the petitioner.

4. Annexure-1 is the deed of lease which was executed on 19.1.1988. Clause 2(iii) of the lease is as follows:

> "(iii) That he shall, at his own expense and with the previous permission in writing of the lessor, erect upon the land leased in a substantial and workmanlike manner with new and sound materials and to the satisfaction of lessor or his authorized representative, a building for use as a residential house with all requisite and proper walls, sewers drains and other conveniences as shall be approved by the lessor or his authorized representative, and shall complete the same in all respects fit for occupation within thirty-six months from the date hereof or within such further time, if any as the lessor may allow."

As is evident from the said clause, the petitioner was required to complete the construction of the building within 36 months from the date of execution of the lease deed or within such further time, if any, as the lessor may allow. Admittedly the office building and the Guest House had not been constructed during this period even though approval of the Bhubaneswar Development Authority had been obtained for the purpose. The reason assigned by the petitioner is that the demand of Ferro Alloys manufactured by the petitioner-Company was not there and the Company was passing through severe financial crisis for which it was not possible to invest money for construction of office and Guest House at Bhubaneswar. But there is no dispute that the boundary wall and the out house had already been constructed within the said period. Though the State Government was aware of the fact that the office building and the Guest House had not been constructed within the time stipulated in the lease deed, they could have also initiated proceeding for resumption much earlier instead of 2001 and therefore the conduct of the State Government in not initiating a proceeding for resumption of the land immediately after expiry of the period of 36 M/S.

months otherwise proves that the lessor never intended to terminate the lease and presumption is that time was extended for construction of the building which was within the competency of the lessor. Apart from the above, it is also found that though the order of resumption was passed on 15.3.2001, the construction of the office building and the Guest House had already started in January, 2001 and this fact was within the knowledge of the lessor. Therefore, without considering the fact that the construction of the office building and Guest House had already been started, the order of resumption could not have been passed. The further admitted position is that in the meantime the office building and the Guest House have been completed, occupied and are being used. Will it not be justified on our part to sustain the order of resumption when the building has been completed and the same has been put to use for almost eight years by now. We are of the view that it would cause great prejudice to the petitioner No.1 if the said order of resumption is sustained.

5. The learned Advocate General in support of the order of resumption submitted that this Court should not interfere in a contractual matter in exercise of its jurisdiction under Article 226 of the Constitution of India. It is true that under the agreement, the petitioner was required to complete the construction within 36 months from the date of execution of the lease deed and it had not done so excepting constructing the boundary wall and out house. But the State Government in the appropriate Department also did not take any step for resumption for 13 years thereby giving an impression to the petitioner that it could construct the office building and the Guest House even in the year 2000-2001. Admittedly the construction work had started in January, 2001 and without taking this fact into consideration, the order of resumption was passed in March, 2001. Now that the entire building has been completed and has been made to use, we are of the view as stated earlier that great prejudice would be caused to the petitioner if the order of resumption is allowed to stand which had been passed without considering the fact that by the time the order was passed, the construction of the office building and the Guest House had already started.

6. We, therefore, allow this writ application, set aside the order in Annexure-7 directing resumption of the land.

Writ petition allowed.

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

W.P.(C) NO.13097 OF 2009 (Decided 21.05.2010)

ANIL KUMAR MOHAPATRA ……. Petitioner.

.Vrs.

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

ORISSA ZILLA PARISHAD ACT, 1991 (ACT NO.17 OF 1991) – SEC.36(2).

Even if an elected member of the Zilla Parishad has taken oath as member there of has to take oath again after being elected as president or Vice president.

In this case neither O.P.6 nor O.P.7 has taken oath as president and Vice president of the Zilla Parishad within 90 days from the date they assumed office – Held, O.P.6 & 7 are ceased to hold office and consequently both the seats are declared to be vacant.

(Para 4)

ORISSA ZILLA PARISHAD ACT, 1991 (ACT NO.17 OF 1991) – SEC.9, 36(2).

O.Ps. 6 & 7 were elected as president & Vice-president of Balasore Zilla Parishad – They failed to take oath within 90 days from the date they assumed office – They ceased to hold office – Petitioner prays that he being Sl. No.1 in the panel he be declared elected as president – Held, fresh election is required to be held for the said posts and the petitioner can not be automatically declared as president being number one in the panel prepared in terms of the said section.

(Para 4)

For Petitioner - M/s. G.P.Dutta, A.Ghose. S.K.Mohanty & B.K.Sahu

For Opp.Parties – Addl. Govt. Advocate (for O.P. Nos.1 to 4)
M/s. P.Achqrya, B. Bhadra, P.Pattanaik, S.Rath, B.K.Jena & S.Rout (for O.P.No5)
Mr. Subas Chandra Das (for O.P.No.6)
M/s. G.K.Mohanty, G.P.Samal, B.C.Ghadei, D.Mishra, G.B.Das, N.A.Khan & B.Naik (for O.P.No.7).

L.MOHAPATRA, J. The petitioner, who is an elected member of the Zilla Parishad, Balasore, has filed this writ petition for a declaration that opposite party Nos.6 and 7 who had been elected as President and Vice-President have ceased to hold office in such capacity having not taken oath/affirmation as required under sub-Section (2) of Section 36 of the Orissa Zilla Parishad

Act, 1991 and a further declaration that the petitioner being the number one in the panel of elected members is entitled to assume the office of the President of Zilla Parishad in terms of sub-Sections (3) and (4) of Section 9 of the said Act.

2. The case of the petitioner is that the elected members of the Balasore Zilla Parishad took oath/affirmation as members of the said Zilla Parishad on 13.3.2007. The first meeting was convened for the purpose of election of President and the nomination was scheduled to be filed between 10.30 A.M. to 12.30 A.M. The nomination papers were scrutinized at 12.30 A.M. and the process for withdrawal of candidature started from 1.00 P.M. One Nityananda Sahu, who had filed nomination submitted an application for withdrawal of his candidature and thereafter the voting process for the post of President was done between 2.30 P.M. to 5.00 P.M. At 5.15 P.M. the counting of votes started and opposite party No.6 having secured a maximum number of votes was declared elected as President of the Zilla Parishad. Similarly on 22.3.2007, the second meeting of the Parishad was convened for election to the post of Vice-President and opposite party No.7 having secured the maximum number of votes was also declared elected as the Vice-President of the Parishad. On 19.9.2007 in the fifth meeting of the Parishad under Agenda No.2, a panel of Members for the post of President was prepared in terms of sub-Sections (3) and (4) of Section 9 of the Act and the name of the petitioner was at sl.No.1 in the said panel. Referring to Section 36 of the Act, it is contended by the petitioner in the writ petition that both the opposite party Nos.6 and 7 having not taken oath as President and Vice-President respectively, they ceased to hold office any further and therefore, the petitioner being number one in the panel is required to be declared as President of the Zilla Parishad.

3. Counter affidavit has been filed on behalf of opposite party Nos.3 and 4 wherein it is stated that consequent upon election to the post of members of Zilla Parishad, Balasore in the year 2007, all the 45 elected members were administered oath of allegiance to the Constitution of India by the Collector, Balasore in a special meeting convened on 13.3.2007. Soon thereafter the election for the post of President was undertaken and opposite party No.6 was declared to have been elected as President of the Zilla Parishad on 13.3.2007. Later on 22.3.2007 opposite party No.7 in an election was declared to have been elected as the Vice-President of the Zilla Parishad. In paragraph-6 of the counter affidavit, it is stated that there is no specific provision in the Act specially in Section 36 for taking oath or affirmation twice by the elected members including the President and Vice-President and therefore, there is no necessity of administering oath or affirmation to the

President and Vice President again. Opposite party No.6 has also filed a counter affidavit taking the same stand as opposite party Nos.3 and 4 and learned counsel appearing for opposite party No.7 in course of hearing of the application also took the same stand as taken in the counter affidavit filed by the said opposite party. Therefore, the Court is now called upon to decide as to whether under Section 36 of the Act it is necessary for the members of the Zilla Parishad who have taken oath once as members to take oath again after being elected as President or the Vice President as the case may be. Section 36 of the Act is quoted below:

> "**36. Oath of allegiance** – (1) Every elected member including the President and the Vice-President of the Parishad shall, before taking his seat, make at a meeting of the Parishad an oath or affirmation of his allegiance to the Constitution of India in the following form, namely:
>
> "I……. having become a member/the President/ the Vice-President of the Parishad, swear in the name of God/Solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established that I will faithfully discharge the duty upon which I am about to enter."
>
> (2) Any such member, President or Vice-President who fails to make, within three months of the date with effect from which he holds office or at any one of the first three meetings of the Parishad whichever is later, the oath or affirmation as aforesaid, shall cease to hold office as such and thereupon the seat shall become vacant.
>
> (3) No such member, President or Vice-President shall take his seat at a meeting of the Parishad or do any act as such unless he has made the oath or affirmation as provided in this section."

As is evident from sub-Sections (1) and (2) every elected member including the President and the Vice-President of the Parishad before taking his seat, must take oath or affirmation of his allegiance to the Constitution of India in the form prescribed in sub-Section (1) itself. Sub-section (2) provides that any such member, President or Vice-President who fails to take within three months of the date with effect from which he holds office or at any one of the first three meetings of the Parishad whichever is later, the oath or affirmation as aforesaid, shall cease to hold office as such and thereupon the seat shall become vacant. As is evident prior to 1993 there was no necessity for the President or the Vice-President to take oath and by Orissa Act 17 of 1993, Section 36 has been amended and it provides that

every elected member including the President and the Vice-President has to take oath in the form prescribed in sub-Section (1) of Section 36.

4. The learned counsel for the State referring to the counter affidavit submitted that under Sub-section (2) of Section 36, a member elected to the Parishad can take oath within 90 days from the date he holds office and therefore, before taking oath as a member of the Parishad, one can participate in the election for the post of President and Vice-President and it may so happen that all the members after such election may take oath but within 90 days from the date of holding office. With the above reasons, it is submitted by the learned counsel for the opposite parties that in such event, it is not necessary to take oath twice, once as member and again as President or Vice-President as the case may be. Admittedly, in the present case prior to election to the post of President and Vice-President, oath had been administered to all the members of the Zilla Parishad and therefore, the question of taking oath as President or Vice-President did not arise at that stage. After amendment of the provision in Section 36 by Orissa Act 17 of 1993, it became mandatory for the elected members including the President and Vice-President of the Parishad to take oath of allegiance to the Constitution of India in the form prescribed under sub-Section (1) of Section 36. The oath itself clearly shows that it has to be taken either as a member or as President or as Vice-President as the case may be, and therefore, even if an elected member of the Zilla Parishad has taken oath as member thereof, has to take oath again after being elected as President or Vice-President as the case may be. Admittedly, in this case neither opposite party No.6 nor opposite party No.7 has taken oath as President and Vice-President respectively within 90 days from the date of assumption office as President and Vice-President of the Zilla Parishad and therefore, in terms of sub-Section (2) of Section 36, they ceased to hold office as such and consequently both the seats are declared to be vacant on expiry of 90 days from the date of assumption of office as such. We, therefore, allow this prayer of the petitioner and declare that both opposite party Nos.6 and 7 having not taken oath as President and Vice-President of the Parishad in terms of sub-Section (1) of Section 36 within 90 days from the date of assumption of office, have ceased to hold such office and the posts are declared to be vacant.

So far as the second prayer of the petitioner is concerned, reference was made by the learned counsel for the petitioner to Section 9 of the Act. But on perusal of the said Section, we find that fresh election is required to be held for the said posts and the petitioner cannot be automatically

declared as President being number one in the panel prepared in terms of the said Section. Therefore, the second prayer of the petitioner for declaration that he is deemed to be holding the office of the President cannot be allowed and accordingly the said prayer is turned down.

5. The writ application is disposed of accordingly.

Writ petition disposed of.

L.MOHAPATRA, J & I.MAHANTY, J.

O.J.C. NO.7621 OF 2001.(Decided on 19.05.2010)

BABAJI SAHOO (DEAD) & AFTER HIM PURNAMASI SAHOO & ANR. ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.311.

Departmental proceeding and Criminal case – When the nature of the charge is Criminal in nature, the disciplinary authority would be bound by the findings arrived at in the Criminal Case.

In the present case no evidence was recorded by the Inquiring Officer in course of disciplinary proceeding so the Disciplinary Authority is bound by the report of the police on the F.I.R. lodged against the petitioner indicating that "Facts true, but no clue." – Held, the Disciplinary Authority could not have arrived at any conclusion holding the petitioner guilty of any offence for loss justifying any order of termination against him. (Para 14 & 15)

CONSTITUTION OF INDIA, 1950 – ART.311.

Departmental Proceeding – Inquiring Officer held inquiry without recording evidence either from the side of the prosecution or from the side of the defence – He did not even examine the Accountant who was present before him allegedly on the ground that the said accountant was likely to make statement in favour of the delinquent officer and concluded the inquiry by dismissing the petitioner from service.

Abject conduct on the part of the Inquiring Officer, by throwing to the winds all cannons of justice / law and the inquiry held was at best an eye wash. (para 9 &10)

Case law Referred to:-

AIR 1999 SC 1416 : (Cap. M.Paul Anthony -V- Bharat Gold Mines Ltd. & Anr.).

For Petitioner – M/s. S.R.Das, K.Jena, A.K.Mohapatra, S.K.Das & P.Rath.

For Opp.Parties – Addl. Standing Counsel (School & Mass Education Department).

I.MAHANTY, J. The petitioner-Babaji Sahoo filed this application challenging the order dated 11.10.1991 passed by the Orissa Administrative Tribunal in Transferred Application No.374 of 1988 rejecting his challenge to the order dated 22.1.1983 passed by the disciplinary authority dismissing the petitioner from Government service on the ground of misappropriation of

Government money to the tune of Rs.15,041.60, as well as, the order of the appellate authority confirming the order of punishment and the order of the Appellate authority rejecting the petitioner's appeal. During the pendency of the writ petition, the petitioner Babaji Sahoo having died on 10.10.2006, in his place, his wife and son have been substituted.

2. The State Administrative Tribunal, came to hold that the petitioner had encashed a Government cheque for more than Rs. 15,000/- and loss of the said money is admitted by the petitioner-Babaji Sahoo, the Tribunal fixed such responsibility for such loss on the petitioner and therefore, dismissed the same.

3. The petitioner had claimed before the tribunal that after en-cashing the cheque and collecting money from the bank, he had left his bag at a nearby betel shop owned by his cousin brother from where the said bag was picked up by a child, who ran away with the same and could not be apprehended despite of the best efforts of the petitioner and by others.

The tribunal also came to a finding that the Enquiry Officer disbelieved the stand taken by the petitioner and came to hold that the petitioner had left the cash with an unauthorized person, which itself amounts to gross negligence of duty, thereby leading to misappropriation of Government money. Accordingly, it was held that the petitioner could not justify the stand taken by him.

The petitioner's other contention was that his stand was substantiated by the police submitting a "Final Report" in the case indicating "fact true, but no clue". Therefore, the stand of the petitioner that there was no justification to hold the petitioner guilty of misappropriation was rejected by the tribunal, inter alia, on the ground that filing of such Final Report does not decide the delinquency or otherwise of the petitioner. Further, there was no bar for the Government to proceed with the disciplinary proceedings for loss of Government money or its misappropriation. It appears that the police had submitted a Final Report for the offence under Section 380 of the I.P.C. and therefore, the disciplinary authority was correct in initiating a disciplinary proceeding against the petitioner, causing huge loss in a day light robbery involving Government money of Rs.15.041.60.

4. Learned counsel for the petitioner, inter alia, raised the following contentions:

(i) That the disciplinary proceeding itself proceeded ex-parte and from the nature of report of the Enquiry Officer it would be clear that the petitioner was denied any opportunity to effectively defend himself in such inquiry proceeding and the Inquiring Officer concluded the inquiry abruptly, only on the first date on which he held a sitting.

(ii) That the tribunal as well as appellate authority failed to apply their judicial mind to the contention of the petitioner, that he had filed an immediately after loss of the bag containing cash and although the police submitted a Final Report, yet such Final Report also recorded a finding that "fact true, but no clue". According to the learned counsel for the petitioner once the police submitted the Final Report with the above endorsement, there is no justification whatsoever to hold the petitioner guilty of misappropriation.

(iii) That the disciplinary authority as well as the tribunal lost sight of the fact that, while admittedly there had been loss of Government money amounting to Rs.15,041.60, every "loss of Government money" could not be equated with "misappropriation". In other words, it is contended that while the petitioner had admitted the loss of the Government money, such admission on the part of the petitioner can never be construed to be an admission of "misappropriation".

5. Learned Additional Standing Counsel appearing for the School and Mass Education Department on the other hand, supported the impugned order and claimed that since the petitioner admitted the loss of Government money and the fact that he had left the bag in the betel shop of his cousin brother from where the bag containing the cash was stolen away, the stand of the petitioner, itself, justifies the finding of "gross negligence" on the part of the petitioner and therefore, the writ application ought to be dismissed.

6. On consideration of the submissions made and on perusal of the records of the case, it clearly appears there from that, the petitioner who was working as a 'Peon' in the Government Girls High School, Attabira for more than fifteen years prior to the date of the alleged occurrence had been terminated from his service for the loss of Government money amounting to Rs. 15,041.60. Admittedly the petitioner, who was serving as a 'Peon' in terms of his official duty was not required to act as a courier for encashing the Government cheques and bring it to the school and that too without any escort. It is admitted that the petitioner for more than fifteen years on the instruction of the Headmistress of the School had been taking the Government cheques for encashment and after collecting money used to deposit the cash with the accountant of the School. Such performance of duty by the petitioner was without any authority of law. A peon in the establishment of a school is the lowest grade staff of the institution. The school gets payment from the Government and on instruction of the Headmistress and the Accountant, the petitioner had been discharging his job for fifteen years and in course of such performance of duty he had never been negligent in discharging of such responsibility.

7. The case of the petitioner is that after he encashed the cheque from the bank, when he was boarding a bus, he felt that something had fallen on his back side of the shirt and dhoti and found it to be a semi liquid substance like vomits. Yet, he wanted to enter into the bus and return back to the School. But due to the "foul smell", the passengers of the bus as well as cleaner and conductor of the bus did not allow him to enter, for which reason, he goy off the bus and went to nearby Pan-shop, owned by a cousin brother. After hanging the said bag in the said shop, he went behind the shop, to a water tap to wash his hands and remove the said vomit from his shirt and dhoti. It is stated by the petitioner that while he returned to the Pan-shop within two to three minutes, he found that his bag had been taken by a small boy, who went running to the other side of the road and despite the best edeavour by the petitioner and others, they could not catch hold of the boy, for which the petitioner lost the cash as well as the bag.

The petitioner immediately went to the local police station and reported the said facts and also sent a message to the Headmistress of Attabira Government Girls High School as well as Block Development Officer, Attabira. It appears that, based on the F.I.R. lodged by the petitioner, though the police enquired into the same, they could not arrest the accused and therefore, submitted a Final Report for the offence under Section 380, I.P.C. noting that while the fact of theft was true, but they were unable to obtain any clue in order to arrest the accused.

8. In so far as the disciplinary proceeding is concerned, it appears that the District Inspector of Schools, Sambalpur-I, Sambalpur was appointed to act as the Inquiring Officer. His report dated 17.4.1982, which is to the following effect.

(a) It appears from the report that the Inquiring Officer issued a notice dated 2.12.1981 fixing the date of inquiry to 16.1.1982. The petitioner-delinquent submitted a petition, through post, with a prayer for engagement of a legal practitioner vide his letter dated 13.12.1981. Such petition was allowed by the Inquiring Officer on 8.1.1982 and the petitioner was directed to submit his explanation to the charges as well as list of witnesses by 14.1.1982.

On 13.1.1982 the petitioner delinquent applied for an adjournment of hearing which was allowed and the proceeding was adjourned to 6.2.1982. This fact clearly indicates that no enquiry by the Enquiry Officer was held on 16.1.1982.

(b) It further appears that, the petitioner once again by his petition dated 25.1.1982 prayed to hold inquiry at Sambalpur, instead of Attabira on the ground that he could not get any legal assistance at Attabira, but at the same time, submitted his explanation to the charges, as well as list of witnesses.

Such prayer of the petitioner was rejected by the Inquiring Officer, with a direction to him to remain present on 6.2.1982 along with his legal practitioner for hearing of the proceeding.

On 6.2.1982 the Inquiring Officer held inquiry at Attabira Government Girls High School (effectively first date of sitting of inquiry). There is no evidence on record to indicate the communication of the rejection of the petitioner's application for adjournment. On 6.2.1982, i.e., the first date on which date the Inquiring Officer actually conducted the inquiry, the petitioner having been found to be absent, the Inquiring Officer proceeded with the inquiry ex-parte.

(c) On 6.2.1982 the Inquiring Officer took note of the fact that the petitioner had submitted a list of witnesses, but since the petitioner had not appeared and even though the Accountant-cum-clerk, Sri Jibardhan Biswal of Attabira Government Girls High School was present, he recorded that, he did not like to record the statement of the Accountant due to the absence of the delinquent Government servant and further recorded that the said accountant being an employee of the institution was likely to give statement in support of the delinquent.

(d) The inquiry report itself clearly indicates that no witnesses examined by the Marshalling Officer in support of the charges framed against the petitioner and obviously none were also examined on behalf of the petitioner. Instead on the very first date of effective inquiry, i.e., 6.2.1982, the inquiry proceeded ex-parte on the basis of charges framed against the petitioner. The Inquiring Officer concluded his inquiry and submitted the enquiry report, finding the petitioner guilty of act of misconduct including misappropriation.

9. We have gone through the inquiry report of the Inquiring Officer in detail only to highlight the fact that the Inquiring Officer not only held inquiry only on one day, i.e., 6.2.1982, but, on the same day, without recording any evidence whatsoever either from the side of the prosecution or from the side of the defence, did not even examine the Accountant who was present before him (allegedly on the ground that the said accountant was likely to make statement in favour of the, delinquent petitioner) and concluded the inquiry and reached his conclusion/finding based on the charges against the petitioner which resulted ultimately the dismissal of the petitioner from service.

10. The facts of the case as noted herein above clearly indicate plight of a very poor person i.e., a 'Peon' in the establishment of a girls High School, who, in such circumstances, has been terminated after having served the institution with a blemish-less record for more than fifteen years. What is even more surprising is, that the Inquiring Officer though was required to enquire into the charges levelled a gainst the petitioner also came to

conclude that the report of the Headmistress dated 3.7.1989 was false since the Headmistress's report, clearly supported the delinquent petitioner and since the Headmistress had given such a report, though such report was not within the scope of inquiry, the Inquiring Officer, went ahead and declared such report of the Headmistress to be false and unwarranted. Our judicial conscience compells us to record herein, the abject conduct on the part of the Inquiring Officer, by throwing to the winds all cannons of justice/law and the inquiry held was at best merely an eye-wash.

11. We are further of the considered view that both the appellate authority as well as the tribunal have not applied their judicial mind to the contentions raised by the petitioner and in fact the finding of the tribunal in the instant case that, the Inquiring Officer was justified in rejecting the prayer of the petitioner to engage a legal practitioner, is a clear error of fact. The prayer of the delinquent petitioner had been allowed by the Inquiring Officer vide order No.204 dated 8.1.1982.

12. The tribunal's further finding is that though the petitioner had been given opportunity to summon his witnesses, yet he did not furnish any name is also an error of record. In the inquiry report itself the Inquiring Officer has noted that the delinquent Government servant-Babaji Sahoo had submitted a "list of witnesses", namely, Ghasiram Sahoo, Officer-in-Charge of Bargarh Police Station, Investigating Officer and Accountant of Atabira Government Girls High School and therefore, the finding of the tribunal that the petitioner had not furnished any list of witnesses is, once again a clear error of record.

13. Apart from the above, the facts as narrated hereinabove clearly indicate, how a lowly paid Government servant working as 'Peon' at the lowest rank of the Government service had been asked to go and encash a Government cheque much beyond what the rules provide. It appears that the petitioner had sincerely performed his duty for more than fifteen years and was terminated on the allegation of 'misappropriation' by effectively equating 'loss' of Government money to the term misappropriation.

14. "Misappropriation" is a criminal offence, prescribed under Section 403 of the I.P.C., which mandates that whoever dishonestly misappropriates or converts to his own use any movable property is liable to be prosecuted for 'Misappropriation'. Although, the present case arises from a disciplinary proceeding, although the petitioner has admitted, loss to the Government exchequer, but the F.I.R. filed by him and the investigation thereto, having been completed by the police, with the conclusion that the "facts true", but Final Report having been submitted, that there was "no clue" available to apprehend the accused, the said benefit has to enure to the benefit of the petitioner. No doubt a disciplinary proceeding may continue independent of the criminal proceeding, yet when the nature of the charge is criminal in nature, the disciplinary authority would be bound by the findings arrived at in

the criminal case. It is well settled by the Hon'ble Supreme Court in the case of **Cap. M.Paul Anthony v. Bharat Gold Mines Ltd & another** reported in AIR 1999 SC 1416:

> "Departmental proceedings and criminal case-Based on identical set of facts-Evidence in both proceedings common-Employee acquitted in criminal case-Said order of acquittal can conclude departmental proceedings-Order of dismissal already passed before decision of criminal case liable to be set aside."

15. The facts in the present case clearly indicate that no evidence whatsoever was recorded by the Inquiring Officer in course of disciplinary proceeding and therefore, in terms of the judgment of the Hon'ble Supreme Court as noted hereinabove, the Disciplinary Authority is bound by the report of the police on the F.I.R. lodged against the petitioner indicating that "Facts true, but no clue". Therefore, the Disciplinary Authorities could not have arrived at any conclusion holding the petitioner guilty of any offence for loss justifying any order of termination against him.

16. Unfortunately in the course of litigation since 1981 the petitioner expired in the year 2006 and has been substituted by his legal heirs. Therefore, in view of the aforesaid findings, we direct that the order of termination dated 22.1.1983 under Annexure-1 as well as rejection of the petitioner's appeal therefrom as well as the order dated 11.10.1991 of the Orissa Administrative Tribunal in Transferred Application No.374 of 1988 are hereby quashed.

The legal heirs of the petitioner-Babaji Sahoo will be consequently entitled to get the benefits of continuous service of the petitioner, as well as, all service benefits till the date of his death or retirement which ever is earlier as well as post retirement pensionery benefits. The opposite parties are directed to release the dues of the petitioner in favour of the legal heirs of the petitioner within a period three months from the date of communication of this order.

17. With the aforesaid observation and direction the writ petition is allowed.

Writ petition allowed.

L.MOHAPATRA, J & INDRAJIT MAHANTY, J.

W.P.(C) NO.10315 OF 2007. (Decided on 19.05.2010).

GANGADHAR MANGUAL. ……. Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.311.

Disciplinary Proceeding – Punishment directing retrospective superannuation – Allegation of tampering with the Date of Birth in the Original Service Book – Petitioner's date of birth corrected by the R.T.O. Puri - Enquiring officer established that the petitioner was not the author of the said act – Moreover original service Book is always retained with the employer and no employee has any access to handle it – Tribunal found that the punishment passed violating principles of natural justice and should have quashed the proceeding instead of remanding the same.

Held, order of the Tribunal as well as the Departmental Proceeding and order of punishment are quashed and the petitioner is entitled to all service benefits. (Para 11)

Case laws Referred to:-

1.2005(II) OLR (SC) 375 : (Kailash Singh -V- State of Bihar & Ors.).
2.2007(II) OLR 320 : (Smt. Gelli Dei -V- Orissa Lift Irrigation Corporation Ltd. & Ors.).

For Petitioner - M/s. Akshaya Kumar Sahoo & R.Khatun.
For Opp.Parties - Addl.Government Advocate.

I.MAHANTY, J. This writ application has been filed by the petitioner-Gangadhar Mangual with the following prayer:

(i) To quash the order dated 20.7.2007 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. 1460(C) of 1999 directing the disciplinary authority to continue the proceeding which was started against the present petitioner after getting representation of the applicant-petitioner and finalise the same as per law.

(ii) To direct the opposite parties to accept the date of birth of the petitioner (as per the H.S.C., i.e. 12.10.1934).

(iii) To quash the order of punishment under Annexure-3 as well as the departmental proceeding under Annexure-2 and the notice of retrospective superannuation under Annexure-7.

(iv) To direct the opposite parties to pay the outstanding dues of the petitioner with interest from the date of recovery till the date of payment.

(v) To realize the arrears and current pension/gratuity etc.

2. Shorn of unnecessary details, the fact leading to the present challenge are that, the petitioner entered into the government service as a 'helper' in the Transport Department on 17.12.1952. In course of his appointment, the petitioner passed HSC examination in the month of March, 1975. At the time of his appointment his date of birth was indicated as 12.10.1929 in the service book. After the petitioner passed the HSC examination, he submitted his certificate which is certified his date of birth as 12.10.1934 and based on which, the then R.T.O., Puri corrected his date of birth as per the HSC certificate. Thereafter the petitioner was promoted to Class-II post of Orissa Transport and Engineering services and posted as Additional Regional Transport Officer (Enforcement), Balasore.

3. It appears that on 1.10.1990, the petitioner submitted an application for voluntary retirement from service w.e.f. 1.1.1991 and instead of processing his application for voluntary retirement, by order dated 9.4.1991 under Annexure-7, the petitioner was made to retire with retrospective effect i.e. from 11.10.1987 and on the self-same date, i.e. on 9.4.1991, charges were framed against the petitioner under annexure-2.

4. The Disciplinary Proceeding was taken up by the Enquiring Officer who came to the following conclusions:

> "Therefore, I am of the opinion that the charge against Sri Gangadhar Mangual has been clearly proved beyond all reasonable doubt. Therefore, I hold him guilty of the charge."

Thereafter, the Government by office order dated 5.10.1995 under Annexure-3 have been pleased to pass the following orders:

1. Half of the pension is withheld or withdrawn.
2. Leave salary etc. drawn beyond 31.10.87 will be recovered from his gratuity.
3. Deduction from the pension will be compensated to other excess drawals by him.

5. Sri Sahoo, learned counsel for the petitioner submitted that the aforesaid conclusion of the Enquiring Officer was wholly unsustainable in law as well as incorrect since it was based on surmises and conjectures.

In this respect reliance was placed on the judgment of the Hon'ble Supreme Court in the case of **Kailash Singh v. State of Bihar and others,** 2005 (II) OLR (SC) – 375 as well as the judgment of Orissa High Court in the

case of **Smt. Gelli Dei v. Orissa Lift Irrigation Corporation Ltd. and others,** 2007 (II) OLR – 320

Learned counsel for the petitioner assailed the order passed by the Orissa Administrative Tribunal (Annexure-6), inter alia, on the ground that the Tribunal, having come to a finding/conclusion that after completion of enquiry a copy of the report of enquiry was not supplied to the applicant to make representation amounts to violation of the principles of natural justice or "Audialterm pattern". Quashing the disciplinary enquiry and the order of punishment, directed remand of the matter to the Disciplinary Authority, to continue with the proceeding as after getting the representation of the applicant and to finalize the same as per law.

He further submitted that the petitioner was issued with an order dated 9.4.1991 superannuating him with retrospective effect i.e. from 11.10.1987 and such retrospective superannuation is impermissible in law since the Enquiry Officer had concluded, in clear terms as noted hereinabove, that "the petitioner was not in any manner responsible for having effecting the change in the service book", no purpose whatsoever would be served in remanding the matter and continuing with the enquiry.

6. Learned counsel for the State, on the other hand, submitted that there is no legal infirmity in the order passed by the Orissa Administrative Tribunal, since the Tribunal has quashed the order of punishment and has remanded the matter back to the Disciplinary Authority to consider the representation of the applicant and to proceed, in accordance with law.

7. Sri Sahoo, learned counsel for the petitioner, in response, stated that the petitioner has not only retired from service w.e.f. 9.4.1991 and that too retrospective effect from 11.10.1987, the salary drawn by him, in the interagnum from 11.10.1987 to 9.4.1991 has been directed to be recovered from the petitioner, from the retirement benefits and/or his pension and further, although 18 long years have been passed, since the said date, the petitioner has not yet been granted pension.

He further submitted that it would be grave injustice, if the direction to the petitioner to go back to the stage of disciplinary proceeding, at this advanced age, also in view of the fact that, the petitioner is suffering from cancer and has grave financial needs in order to take care of his illness.

8. We have perused various documents appended to the writ application. The certificate issued by the Board of Secondary Education, Orissa clearly indicates that the date of birth of the petitioner is 12th October, 1934. From the records of the proceeding, it appears that the petitioner's date of birth was originally indicated as, 12th October 1929 in service book, at the time of entry into Government service. But it is claimed by the petitioner that, the change of the date of birth, in the service book was made by the RTO on 10.7.1979. Had this change not been made in the service book, his date of

retirement would have been 31.10.1987 since the original date of birth indicated in the service book is 12.10.1929. But the petitioner continued in service till 9.4.1991 till he applied for voluntary retirement and the impugned order under Annexure-7 was issued. It clearly appears that the entire issue of the petitioner's date of birth come up for consideration only since the petitioner submitted an application for VRS on 1.10.1990.

Apart from the above, although the charge framed against the petitioner under Annexure-2 on the allegation that the petitioner had colluded in interpolating his own service book, yet, the report of enquiry clearly as noted hereinabove earlier absolves the petitioner of any such collusion.

9. In the case of **Smt. Gelli Dei** (supra) this Court had came to hold that as follows:

> "5. The question that needs determination of this Court is whether the employee was entitled to salary for the aforesaid period and whether salary already received by him needs to be recovered from him. Admittedly the employee concerned had discharged his duties to the fullest satisfaction of the authorities concerned till he was made to retire. Thus he was entitled to salary for the work done by him.
>
> 6. As regards tampering with the date of birth in his Service Book is concerned, no material has been produced by the opposite party-Corporation nor is there any averment in its counter affidavit as to how and when such tampering was done and as to whether that was done by the employee concerned. It is well settled that the Service Book is always retained with the employer and no employee has any access to handle the original Service Book. Thus the Corporation being the custodian of the Service Book it cannot blame an employee in case of any alteration of the entries made therein or the same being tampered with. In absence of any cogent material, it cannot conclusively be said that the employee concerned had a hand in it. Even otherwise, the same is a question of fact which cannot be effectually adjudicated under Writ Jurisdiction.

9. Relying upon the ratio of the aforesaid decision of the Supreme Court and considering the entire scenario of facts as discussed above, this Court has no hesitation to quash the order Annexure-7 and direct that no recovery of salary received for the alleged excess period of service rendered by the employee concerned shall be made by the Corporation, and orders accordingly. Payment of retirement benefits not being a bounty and rather the same being the statutory duty of the employer, this Court directs the Corporation to calculate the pension and other retirement benefits

of the employee concerned as per the rules and pay the same within a period of four months from the date of communication of this judgment.

The Writ Petition is accordingly allowed."

10. In the case of **Kailash Singh** (supra) the Hon'ble Supreme Court came to hold that since the petitioner therein had actually worked for the said period when there was no dispute his age, there is no justification whatsoever in denying him post retiral benefit as well as the salary for the period that he has worked. Paragraph Nos.5 and 6 are quoted herein below:

> "5. The service book of the appellant was opened in 1993. The Medical Board seems to have constituted and on the basis of the report of the Medical Board he was immediately retired. In these circumstances, the learned counsel for the respondents has very fairly submitted that there would be no recovery of the salary already paid to the appellant for the period from 1.4.1995 to 24.4.2000. The appellant has actually worked during this period without there being any dispute about age.
>
> 6. So far as post-retiral benefits are concerned it is submitted that they may not be admissible to him. We fail to appreciate the submissions made on behalf of the respondents in the background of the facts indicated in the earlier paragraph. The respondents took work from the appellant without any dispute. He would obviously be entitled to his salary and there is no reason as to why he should be denied the post-retiral benefits. His total service comes to 32 years. We have already adverted to the fact that the medical report has not been placed on the record, nor as to what is meant by the term "average age", has been explained to us. In the totality of the facts and the circumstances of this case, we find no good reason to deny those benefits to the appellant."

11. In view of the facts as noted hereinabove and the judgments cited hereinabove, we are of the considered view that the petitioner's date of birth i.e. 12.10.1929 had been duly corrected as 12.10.1934 and that too, as early as on 10.7.1979 by the R.T.O., Puri and since the said date was accepted by the employer as his date of birth, right till 9.4.1991. It is only after 1.10.1990 when the petitioner made an application for VRS, dispute in relating to his date of birth arose. Therefore, in view of the judgments referred hereinabove, there is no justification whatsoever in not accepting the petitioner's date of birth as 12.10.1934 for all purposes. Even, the finding of the Enquiring Officer, clearly establishes that the petitioner was not the author of the said act and the further conclusion that "it was not impossible on the part of the changed officer to get hold of the service book and

commission of the crime," is directly opposed to the law laid down by the Apex Court, in the case of **Smt. Gelli Dei** (supra).

We are therefore, of the considered view that, the order of the Tribunal impugned herein under Annexure-7, directing remand of the matter, at such a belated stage and that too after having come to a conclusion, that the order of punishment had been passed by violating the principles of natural justice, the Tribunal ought to have quashed the proceeding, instead of remanding the same to the Disciplinary Authority. Therefore, we have no hesitation in directing quashing of Annexure-6 (order of the Tribunal) as well as Annexures 2 and 3 i.e., Departmental Proceeding and order of punishment respectively, as well as the order under Annexure-7 directing retrospective superannuation.

12. In view of the aforesaid findings, we direct that the petitioner's date of birth as indicated in the HSC certificate appended as Annexure-1 is to be accepted as 12th October 1934 and consequently, the petitioner is entitled to all service benefits. On such computation if any deduction has been made from the salary or entitlement of the petitioner's the same shall be refunded to the petitioner and all such dues are directed to be released, within a period of three months from the date of communication of this judgment. All retirement benefits also to be recomputed and the same are also directed to be released in favour of the petitioner within a further period of three months thereafter.

We make it clear that, in the event the directions as noted hereinabove are not complied with within the period as directed, the petitioner shall also be entitled to the interest, at the rate of 8% per annum.

13. The writ application is allowed in terms of the directions made hereinabove.

Writ petition allowed.

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

W.P.(C) NO.10381 of 2006 (Decided 04.05.2010)

UNION OF INDIA ……. Petitioner.

.Vrs.

HADIBANDHU BEHERA ……. Opp.Party.

CCS (PENSION) RULES 1972 - RULE 9.

Departmental Proceeding initiated against the Opp.Party after his retirement – Alleged misconduct does not attract the rigor of Rule 9 of the Pension Rules – Punishment imposed by the Disciplinary Authority on the iuntervention of 3rd Party – Held, punishment imposed so also the proceeding initiated is unsustainable. (Para 7)

Case law Referred to:-

AIR 1991 SC 1507 : (Nagaraj Shivarao Karjagi -V- Syndicate Bank Head Office, Manipal & Anr.).

For Petitioner - Mr. P.R.Barik, P.Choudhury & A.Pradhan.
For Opp.Party - Mr. D.P.Dhalsamanta & P.K.Behera.

B.P. RAY, J. The Union of India has filed this writ application assailing the order passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.22 of 2004. This Original Application was disposed of by the learned Tribunal by order dated 16.11.2005 by which the learned Tribunal has quashed the order of punishment dated 31.10.2003 passed by the Under Secretary to the Government of India, Ministry of Communications & Information Technology, Department of Telecommunications and the consequential report of the Inquiring Officer and the charges.

2. The fact giving rise to filing of O.A. No.22 of 2004 before the Tribunal was that the opposite party retired from service as Telecom District Engineer, (in short "T.D.E."), Rourkela in the month of July, 1991. After retirement, a charge sheet dated 31.8.1994 was issued under Rule 9 of CCS (Pension) Rules, 1972. The gist of the allegation in the charge sheet was that while the opposite party was functioning as T.D.E. during the period 1990-91, he had passed orders for sale of unserviceable store materials to one contractor, Shri M.Koteswar Rao without inviting sealed tenders or holding public auction which was in violation of the order of the General Manager and thereby the loss sustained by the Department was estimated at Rs.8.17 lakhs. On conclusion of the enquiry, the Disciplinary Authority by order under Annexure-1 imposed punishment on the opposite party by which

the pension of the petitioner was reduced to minimum level of pension i.e. Rs.1275/- per month and also the gratuity amount of Rs.72,188/- was forfeited. This punishment was imposed by the Disciplinary Authority on the basis of the advice tendered by the Union Public Service Commission and the Central Vigilance Commission. This order under Anneuxre-1 was assailed before the learned Tribunal in the aforesaid O.A.

3. The learned Tribunal after hearing the parties and on consideration of the relevant materials on record and also on perusal of the relevant files has quashed the order of punishment imposed on the opposite party. The Tribunal while quashing the order of punishment has also quashed the report of the Inquiring Officer as well as the charge. Thus the Tribunal by order dated 16.11.2005 has allowed the O.A. filed by the opposite party. The present writ petition has been filed by the Union of India challenging the said order.

4. On being noticed, the opposite party has filed a return. In the said return of the opposite party, it has been stated that the punishment under Annexure-1 was imposed on the intervention of a 3rd party without supplying copy thereof and it was also stated that on the advice of the U.P.S.C. and the Central Vigilance Commission, the impugned punishment under Annexure-1 was imposed.

5. We have heard learned Central Government Counsel appearing for the Union of India and also the learned counsel appearing for the opposite party and we have also carefully perused the impugned order passed by the learned Central Administrative Tribunal.

6. On perusal of the impugned order passed by the learned Tribunal, it appears that the departmental proceeding was initiated against the opposite party after his retirement from service under Rule 9 of CCS (Pension) Rules, 1972. The allegation contained in the charge has been noticed by us in the preceding paragraph referring to the findings of the enquiry report. Learned Tribunal has held that no specific finding has been arrived at by the Inquiring Officer as to whether the Department had sustained financial loss of Rs.8.17 lakhs and the Disciplinary Authority agreed with the said findings of the Inquiring Officer. It appears from the impugned order of Tribunal that the Central Vigilance Commission to which the file was submitted found that the charges were fully proved and it has further held that the lapses committed were serious in nature attaching doubtful integrity of the opposite party and that the Central Vigilance Commission had advised to impose penalty of suitable reduction in pension of the opposite party. This advice of the Central Vigilance Commission having accepted by the Disciplinary Authority, the learned Tribunal in the impugned order has held that the opposite party had no dishonest motive, the decision to initiate action under Rule 9 of the Pension Rules was violative of the own policy of the Department. It also

further appears from the impugned order that the action of the opposite party regarding disposal of unserviceable store materials was referred to the C.B.I. in R.C. No.45(A)92-BBS and the C.B.I. after holding a detailed inquiry remitted back the matter with the findings that the charges of criminal conspiracy, cheating etc. could not be substantiated against the opposite party. But, however, the C.B.I. was of the view that the opposite party has committed grave mis-conduct in the alleged disposal of the unserviceable store materials. Therefore, the Tribunal has held that the Disciplinary Authority was more influenced by the findings of the C.B.I. to initiate the disciplinary proceeding though no reason was available in the report of the C.B.I. in support of such recommendations. Accordingly, the learned Tribunal has held that the Disciplinary Authority has failed to apply its mind. The learned Tribunal having analyzed all the materials available in the relevant files came to the conclusion that the C.B.I. had influenced the decision for initiating a major action against the opposite party though such recommendation of the C.B.I. The Tribunal has also found that similar such transactions were undertaken in other districts, but no action was taken in respect of such transaction by the responsible officers. But so far as the opposite party is concerned, he was singled out for the action under Rule 9 of the Pension Rules.

7. Learned Tribunal having made a detailed analysis of the materials available on record came to the conclusion that the alleged mis-conduct does not attract the rigor of Rule 9 of the Pension Rules. Therefore, keeping in view, the law enunciated by the Apex Court in the case of **Nagaraj Shivarao Karjagi v. Syndicate Bank Head Office, Manipal and Anr.** (AIR 1991 SC 1507), learned Tribunal has reached the conclusion that as the punishment has been imposed on the intervention of 3rd party, the same is unsustainable and so also the proceeding initiated.

8. We are in respectful agreement with the conclusion reached in the impugned order of the Tribunal and we concur with the same, inasmuch as we also do not find any infirmity therein.

Accordingly, the writ petition fails and is dismissed.

Writ petition dismissed.

2010 (II) ILR – CUT-108

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

Criminal Appeal No. 57 of 2001 (Decided 04.05.2010)

GOPAL CHOUDHURY …….. Appellant.

.Vrs.

STATE OF ORISSA …….. Respondent.

INDIAN PENAL CODE, 1860 (ACT NO.45 OF1860) – SEC. 302.

Conviction U/s. 302 I.P.C. – No eye witness – Only circumstantial evidence – Deceased found dead and was hanging in the house of the accused – Doctor says cause of death was asphyxia due to throttling – Deceased was left in the company of the accused in his house and on the next day she was found to have died a homicidal death – Time of death as mentioned in the Post mortem report correlates to the time when the deceased was left in the company of the accused – Onus shifts to the accused to explain under what circumstances the deceased died – No explanation by the accused – A complete chain is established in the absence of any contrary evidence – Held, it was the accused and none else who was the author of the death of the deceased. (Para 4,5 & 7)

Case law Referred to:-

AIR 1997 SC 3255 : (Ajit Savant Majagavi -V- State of Karnataka).

For Appellant - M/s. B.Panda & Associates.

For Respondent - Mr. D.K.Mishra (A.G.A)

B.P.RAY, J. The appellant has filed this appeal challenging the judgment and order of conviction dated 28.2.2001 passed in Sessions Trial Case No. 28/19 of 1999 on the file of Addl. District & Sessions Judge, Rourkela. The learned Additional Sessions Judge in the impugned judgment held the appellant guilty of the charge U/s. 302 I.P.C. and sentenced him to undergo punishment of imprisonment for life.

2. The prosecution case in brief is that on 18.6.1998 the deceased Namita Padhi married to the accused-appellant in the Laxminarayan temple of Sector-14, Rourkela. It was an arranged marriage. In the marriage the appellant and his family members demanded scooter, gold ring and gold chain or instead of scooter Rs.20,000/- as cash for purchase of the scooter and the informant, the father of the deceased paid Rs.15,000/- and promised to pay the rest amount later. On 18.6.1998 being Thursday, the informant did not allow his daughter to go her husband's house. On the next day i.e. on 19.6.1998 deceased Namita was sent to her husband's house being

accompanied by her brother and other relations. After leaving Namita (deceased) his brother and other relations returned from the house of the accused in that night. On the next date i.e. 20.6.1998 at about 6 A.M., Abhimanyu Choudhury, father of the present appellant came and informed the son of the informant that some one has committed suicide. On being questioned, Abhimanyu did not disclose the name of the deceased. However, the son of the informant, Susanta Padhi found that her sister was hanging from the beam of the kitchen of Abhimanyu Choudhury, the father of the appellant. Her legs were touching the ground. When Susanta Padhi asked the accused as to the reason for the unfortunate incident, the accused remained silent. Thereafter, the informant reported the matter to the Police Station at 9.30 A.M., vide the F.I.R. Ext.1. On receipt of the F.I.R., Police registered a case under Sections 498-A, 304-B, 302/34 I.P.C. read with Section 4 of the D.P. Act and on the requisition of the Police, inquest was done in presence of the Executive Magistrate. After completion of investigation, charge sheet was filed against the present appellant and Abhimanyu Choudury the father of the appellant. By order dated 25.8.1999, Abhimanyu Choudhury was discharged by the learned trial court and the present appellant was charged only U/s. 302 I.P.C.

3. The prosecution in order to bring home the charge examined as many as 11 witnesses in this case and defence has examined none. P.W.1 is the brother of the deceased, P.W.2 is the father of the deceased, P.W.3 is the sister of the deceased, P.W.4 is the witness to the seizure, P.W.5 is a Doctor, who conducted autopsy, P.W.6 is the Executive Magistrate in whose presence the inquest was made, P.W.7 is the mother of the deceased, P.W.8 is the brother of the deceased in whose presence broken golden necklace, silver chain and broken bangles and other materials were seized from the bedroom of the accused-appellant by the Investigating Officer, P.W.8(a) is the Police Officer, who registered the case and took up preliminary investigation. P.W.9 is the I.O., who filed charge sheet and P.W.10 is the Doctor, who examined the appellant-accused. P.W.11 is the Doctor, who clarified the query made by the I.O.

4. Admittedly, there is no eye-witness to the occurrence and so there is no direct evidence in this case. This case is based on circumstantial evidence. In the case of **Ajit Savant Majagavi v. State of Karnataka**, A.I.R. 1997 S.C. 3255, the apex Court has propounded that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:-

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) these circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

5. Keeping the aforesaid law in mind, let us examine the materials on record. From the evidence of P.Ws.1,2,3,7 & 8, it is amply clear that Namita was found dead and was hanging from the beam of the kitchen in the house of the accused in Quarter No.KN No.32 of Kalyananagar, Chhend, Rourkela. P.W.8(a), the I.O., who registered the case also corroborated the said fact. He also brought down the dead body of the deceased and prepared the inquest report in presence of the Executive Magistrate, P.W.6. The next question arises as to how Namita died and who caused the death and the reasons of her death. The Doctor, who conducted post mortem examination found the following injuries:-

Abrasion ½" x ½" just below right lower eye lid, abrasion 1/2" x ½" just below left eye brow, bruise 2" x ½" on the chin, abrasion ½" x ½" on the dorsom of right middle finger, abrasion ½" x ½" on the dorsom of left hand just below left index finger. According to the Doctor, the above said injuries were ante-mortem in nature. In the neck, he also found one finger tip bruise looking like pressure mark of thumb of size – 1" x ¼" on the right side of the lower part of neck below the thyroid cartilege anterioly and four finger tip bruises clustered together of the size 2" x 2" on the left side of wound in the lower part of the neck. These injuries were also ante-mortem in nature.

On dissection, the Doctor also found bruise mark and extra-vessession of blood was found in sub-cutaneous tissues. Tinny blood clots were found on their margins. The sub-coetaneous tissues of the neck found to be ecchymosed. The hyoid bone was found to be fractured. The trachea and larynx were congested. Blood clots were present near the fracture side of hyoid bone. Both the lungs were intact and deeply congested and there was exudation of bloody fluid from cross section of both lungs. The tongue bruised. Blood clot was found on the tip of tongue.

Regarding cause of death, the Doctor opined that it was asphyxia due to throttling and violence. He has also mentioned the time of death as 12 to 18 hours since the time of his examination, which is found to be 4.30 P.M. of 20-06-1998 (vide entry in the post-mortem examination report).

6. The Doctors' evidence has remained untrammeled in the cross examination. This Court as such sees no apparent reasons to disbelieve the

same. Therefore, the irresistible conclusion is that the death of the deceased was homicidal one. Hence, the finding of the trial court that the hanging was done after the deceased died appears to be based on evidence on record, as such needs no disturbance.

7. It has emerged from the evidence of the P.W.1 that Gopal Choudhury had love affairs with his sister and after marriage they sent the bride along with the bride-groom to the house of the accused on 19.6.1998. He also accompanied the bride to the house of the accused and after marriage rituals were over, he along with others returned to his house in the night. On the next day morning they found the deceased to have died in the kitchen of the house of the accused. From the aforesaid evidence on record it has categorically emerged that the deceased was left in the company of the accused in the previous night in his house. Thereafter in the next day morning the deceased was found dead in the house of the accused and such death of the deceased was homicidal one. When the deceased was left in the company of the accused in his house and on the next day the deceased was found to have died a homicidal death in the house of the accused, onus shifts to the accused to explain under what circumstances the deceased died a homicidal death. As the appellant-accused in this case has not come out with any explanation under what circumstances he left the company of the deceased and deceased died a homicidal death, it goes without saying that the accused authored such death of the deceased. It is further verified from the post mortem report that the particular time of death of the deceased was from 12 to 16 hours since the time of examination which necessarily correlates to the time when the deceased was left in the company of the accused. The aforesaid circumstance establishes a complete a chain in the absence of any contrary evidence and gives rise to only hypothesis that it was the accused and none else who was the author of death of the deceased. When the accused is the author of such death of the deceased in the absence of any other materials on record, looking into the nature of injury contributing to the death of the deceased, it can very well be said that the accused intentionally caused a culpable homicidal which squarely attracts a charge U/s. 302 I.P.C.

8. Hence, the impugned judgment of conviction as returned by the trial court in this regard can not be found fault with. So far as the sentence imposed is concerned, the sentence imposed being the minimum sentence for the charge U/s. 302 I.P.C.; the same also needs no interference.

For the foregoing reasons, this appeal filed by the appellant is devoid of merit and as such the same stands dismissed.

Appeal dismissed.

2010 (II) ILR – CUT-112

A.S.NAIDU, J.

W.P.(C) NO.10965 OF 2003 (Decided on 24.6.2010).

SUKANTI SAHOO …… Petitioner.

.Vrs.

VICE CHANCELLOR, UTKAL UNIVERSITY & ORS. ……. Opp.Parties.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.115.

Action of the Utkal University not according permission to the petitioner to appear in the B.Ed. Examination for the second time is challenged in this writ petition – According to University the petitioner surreptitiously managed to appear in the examination in the year 1992 by suppressing vital facts for which her results were not published and she was declared to have failed – Publication of such result will not confer upon her a right to appear in the examination for the second time as her appearance in the examination on the very first instance was illegal.

Held, the principles of estoppel can not be extended to protect an illegality or an action not sanctioned by law – No infirmity in the decision taken by the University.

(Para 7)

For Petitioner - M/s. Budhadev Routray & C.R.Patnaik.
For Opp.Party Nos.1 to 2 – M/s. Dr.A.K.Rath, S.Mohanty & A.Panda.

A.S.NAIDU,J. The petitioner seeks to assail the inaction of the Utkal University in the matter of not according permission to her to appear in the B.Ed Examination for the second time.

2. The scenario of facts reveal that the petitioner completed her B.Ed Course from Biju Pattnaik College of Science and Education, Bhubaneswar in the academic session of 1991-92. She appeared in the Annual Examination conducted by the Utkal University as a regular candidate in the year 1992 but then her results were not published. Being aggrieved by the said fact she had approached this Court earlier in W.P.(C) No.6816 of 2003. The said Writ Petition was disposed of on 11.9.2003 with an observation that if the petitioner has appeared in the examination, her results may be declared. It is submitted, her results were published in the year 1996 by the

University and the petitioner was declared to have failed. The petitioner then sought permission from the Utkal University authorities to allow her to appear in the examination conducted in the year 1996-97 for the second time. It is alleged that she purchased the forms and submitted the same but then the University authorities did not accept the same. She made a representation before the University authorities and prayed to allow her to appear in the examination, unfortunately no action was taken on the representation filed by the petitioner vide Annexure-4 for quite a long time. On 12.11.2003 the Controller of Examinations informed the petitioner that neither the Private Colleges imparting B.Ed Courses are in existence nor there is any system for permitting candidates who have completed their courses from the private unrecognized colleges to appear in the examination conducted by Utkal University. The said order dated 12.11.2003 (Annexure-5) is assailed in this Writ Petition.

3. After receiving the Rule a detailed counter affidavit has been filed by the Utkal University. It is averred that after 1987 none of the Private Colleges of Orissa imparting B.Ed Courses were granted affiliation or concurrence. However, Colleges which had admitted students without having Government concurrence and University affiliation during the year 1988-89 and 1989-90 were permitted to present their students to appear in the examination so as to avoid prejudice to the students who had prosecuted their studies. Thus according to the University the examination held in the year 1990 was by way of one time privilege granted to all Private Colleges imparting B.Ed Courses, to avoid prejudice to the students who had completed the course. It is further averred that the University framed a special regulation wherein it was provided that the candidates who had prosecuted their studies having been admitted in the Private Colleges for the session 1986-87, 1987-88, 1988-89 and 1989-90 with or without Government concurrence, only would be eligible to appear in the B.Ed Examination held in the years 1987, 1988 and 1990 as one time dispensation. According to the said resolution students who prosecuted their studies in Private B.Ed Colleges having no affiliation from the University or concurrence from the Government were allowed to fill up the forms and appear in the B.Ed Examination, 1990.

The petitioner, it is submitted did not fill up the forms for B.Ed Examination, 1990 but some how other could manage to appear in the B.Ed Examination, 1992 through surreptitious means. The Syndicate of the University on 15.1.1993 took a decision that the results of the candidates who had appeared in the B.Ed Examination, 1992 without recommendation of the Committee/Syndicate shall not be published without prior approval of

the Syndicate. After scrutinizing the records the Syndicate came to the conclusion that the petitioner has appeared in the Examination through surreptitious means and did not publish the results.

In the counter affidavit the University has specifically taken a stand that the petitioner was not eligible to appear in the B.Ed Examination and as such the University authorities have rightly declined to grant permission to her to appear in the examination for the second time.

4. After receiving the counter affidavit a rejoinder affidavit has been filed. Mr. Routray, learned counsel appearing for the petitioner took pains to refer several documents and submitted that the University authorities having been permitted the petitioner to appear in the examination and as her results have been published and she was declared to have failed in all prudence she should be permitted to appear in the examination for the second time.

5. This submission is repudiated by Dr. Rath, learned counsel for the University. Relying upon several paragraphs of the counter affidavit he submitted that the petitioner was not eligible to appear in the B.Ed Examination, 1992 but then some how or the other surreptitiously she could manage to appear in the said examination. Coming to know about the said fact and in consonance with the direction issued by this Court, the matter was scrutinized by the Syndicate and it was found that the petitioner was not otherwise eligible and she was declared to have failed. Holding special examination in the year 1991 was by way of one time privilege, to all those candidates who had prosecuted their studies in private B.Ed Colleges which were neither approved by the Government nor recommended by the University, however, taking into consideration the plight of the students who have prosecuted their studies a further decision was taken to grant one time privilege to all the students to appear in the B.Ed Examination, 1991. The petitioner surprisingly did not avail the said privilege. In short according to Dr. Rath, as the petitioner having failed to make use of the benefit granted by the University, which was in the shape of one time benefit, she cannot claim to permit her to appear in the examination for the second time.

6. Mr. Routray on the other hand submitted that the University authorities having permitted the petitioner to appear in the examination and published her results is obliged to grant her another opportunity to appear in the examination and is estopped from taking any contrary stand.

7. Heard learned counsel for the parties at length. Perused the materials available on record. This Court is satisfied that the petitioner has not come

to this Court with clean hands. She has prosecuted her B.Ed Courses in a Private College. She has not availed the opportunity of one time privilege provided by the University. According to the University surreptitiously she managed to appear in the examination in the year 1992 by suppressing vital facts. In course of scrutiny the illegality having come to the knowledge of the authorities, her results were not published and subsequently she was declared to have failed. Publication of such result will not confer upon her a right to appear in the examination for the second time, more so, because her appearance in the examination on the very first instance was illegal. The principles of estoppel cannot be extended to protect an illegality or an action not sanctioned by law. In view of the aforesaid facts and circumstances, this Court finds no infirmity in the decision taken by the Utkal University and declines to interfere with the same.

The Writ Petition is accordingly dismissed.

Writ petition dismissed.

2010 (II) ILR – CUT-116

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

O.J.C. No. 11774 of 1999 (Decided 18.05.2010)

SIDHESWAR KANUNGO …….. Petitioner.

.*Vrs.*

FOOD CORPORATION OF INDIA & ORS. …… Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311.

Adverse remarks in Annual Confidential Report, 1993 – Petitioner was informed on 11.10.96 – He made representation on 25.10.96 for expunction of such remarks – His representation was rejected without disclosing any reason and he was denied promotion – New reasonings given subsequently in the year 1999 is not legally sustainable – Representation of the petitioner explaining each and every adverse remark entered in the ACR 1993 has not been dealt by the Opp.parties – Held, Opp.Parties are not justified to deny promotion to the petitioner in the selection Grade from the date his juniors were promoted.

(Para 7 & 8)

Case laws Referred to:-

1.AIR 1979 SC 1622 : (Gurdial Singh Fijji -V-State of Punjab).
2.AIR 1990 SC 1984 : (S.N.Mukherjee -V-Union of India).
3.(1971) 1 ALL ER 1148 : (Breen -V- Amalgamated Engg.Union).
4.(1974) ICR 120 (NIRC) : (Alexander Machinery (Dudley) Ltd. -V- Crabtree).
5.(1999) 1 SCC 45 : (Vasant D. Bhavsar -V- Bar Council of India).
6. AIR 1991 SC 1216 : (Union of India & Ors.-V-E.G.Nambudiri).
7.AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V-The Chief Election Commissioner, New Delhi & Ors.)

For Petitioner - M/s. B.Routray, A.K.Baral, B.N.Satpathy, D.K.Mohapatra & P.K.Dash.
For Opp.Parties – M/s. S.P.Choudhury, S.Das, A.K.mohanty, U.C.Mohanty & A.K.Tandi.

B.N.MAHAPATRA, J In this writ petition, the petitioner prays for quashing of Annexures-2 & 3, whereby he was informed about the adverse remarks recorded in his Annual Confidential Report (for short 'the ACR') for the year 1993 and Annexures-5 and 6 by which he was intimated about rejection of his representation made for expunction of the said adverse

remarks. The further prayer of the petitioner is for a direction to the opp. parties to place him in the Selection Grade with effect from 01.12.1994 the date on which his juniors were placed in such grade and to grant him all consequential service benefits including the arrears of differential salary.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner joined the services of Food Corporation of India on 27.06.1973 as Assistant Grade-3 (General) in the District Office, Balasore. During the year 1994, some of the juniors of the petitioner got promotion superseding him and were placed in Selection Grade with effect from 01.12.1994. The petitioner made a representation to the higher authorities for consideration of his case for promotion and placement in the selection grade with effect from 01.12.1994, i.e., the date on which his juniors were placed in the Selection Grade. In the year 1996, vide Annexures 2 & 3 the petitioner was informed about the adverse entries made in his ACR. The petitioner made a representation (Annexure-4) with detailed explanation to the Zonal Manager for expunction of the said adverse remarks in his ACR, 1993. The said representation was rejected and communicated to the petitioner vide letters dated 14.07.1999 and 24.07.1999 (Annexures- 5 and 6). Hence, this writ petition.

3. Mr. D.K.Mohapatra, learned counsel appearing on behalf of the petitioner vehemently argued that un-communicated adverse ACR cannot be utilized against the petitioner to deny him promotion/placement in the Selection Grade. The petitioner was denied placement in the Selection Grade before communication of the adverse entries made in the ACR for the year 1993. Rule 8 of Chapter 14 of Swamy's Manual of Disciplinary Proceeding for Central Government servants clearly speaks that adverse remarks should immediately be communicated to the person concerned. A combined reading of Rules 3, 4, 5, 6 and 7 reveals that the adverse remarks must be communicated immediately and the ACR must be written by the Reporting Officer on the basis of materials available and due care and caution should be taken while writing adverse ACR. But in petitioner's case, neither the adverse ACR was communicated immediately nor there was any adverse remarks by the Reporting Officer. The petitioner worked as Grade-3 Assistant from 1988 to 1995 and the ACR of the petitioner was excellent all through except for the year 1993. The representation of the petitioner for expunction of the adverse remarks from the ACR for the year 1993 has been rejected by the Deputy Manager, PBRS without assigning any reason therefor. As per rule, the confidential report must be countersigned by the counter signing officer to give effect to the adverse remarks, which has not been followed in the present case. An adverse remark in ACR report cannot be utilized against an employee unless it is duly countersigned by the competent authority.

4. Mr.S.Das, learned counsel appearing on behalf of the opp. parties vehemently argued that the promotion to the Selection Grade was being given by the Zonal Office, FCI, Calcutta after considering the seniority and confidential report. The performance of the petitioner for the year 1993 having not found to be satisfactory certain adverse remarks were made in the ACR for the said year. The same was communicated to the petitioner. Against the said adverse remarks, the petitioner represented to the higher authorities for expunction of the same vide representation dated 25.10.1996. After careful consideration of the same, the competent authority decided that the remarks recorded in the ACR for the year 1993 cannot be expunged and such fact was communicated to the petitioner vide memorandum dated 14.07.1999. The petitioner was imposed with the penalty of stoppage of two consecutive increments without cumulative effect. When the petitioner was posted at the District Office of FCI, Patna, he committed an act of gross irregularity and omission in handing over a cheque for Rs.99,852.90 in favour of M/s Shyam Sundar and Co. on 21.07.1987 towards the cost of certain electrical goods without receiving the materials. The said cheque was debited from FCI account on 22.07.1987. ACR in question was duly countersigned by the countersigning officer to give effect to the adverse remarks. Proper procedure has been followed in doing so. Food Corporation of India is guided by its own Rules and Regulations and Circulars are issued by the FCI Headquarters from time to time. According to the Corporation, Circular No.22 of 1992 dated 30.12.1992, which relates to introduction of Selection Grade in respect of Grade-III and IV employees of the Corporation with effect from 01.12.1987, 30% of the sanctioned posts in each cadre of the Grade is to be considered as Selection Grade Posts and placement is made on the basis of seniority subject to rejection of unfit employees by the Zonal Promotion Committee in the case of Grade-III employees and the Regional Promotion Committee in the case of Grade-IV employees. As per the clarification vide FCI HQ Letter No.EP-17-5/93 dated 17.12.1993, the same procedure was adopted in deciding cases for placement in the Selection Grade which is being followed in the case of promotion. The petitioner was considered for placement in the Selection Grade along with others with effect from 01.12.1994. For this purpose, according to the Rules, the ACRs for the last three preceding years were considered by the Zonal Promotion Committee held on 20.06.1996. Due to the adverse remarks in the ACR for the year 1993, the petitioner was declared 'unfit' for placement in the Selection Grade with effect from 01.12.1994. Similarly, case of the petitioner was rejected with effect from 01.12.1995 and 01.12.1996 because of the adverse entries in the ACR for the year 1993. Therefore, no illegality has been committed by the authorities by granting Selection Grade Scale of Pay to the employees junior to the petitioner. The general assessment of the

Reporting Officer and views of the Reviewing Officer were recorded taking into consideration the performance/activities/behaviour of the delinquent towards his superiors during the relevant years. Promotion to the higher post and placement in Selection Grade are always made strictly on the basis of ACRs with due regard to seniority. Therefore, the writ petition is liable to be dismissed.

5. It is not in dispute that there were some adverse remarks in the ACR of the petitioner for the year 1993 for which he was found unfit by the competent authority while considering his case on 20.06.1996 for placement in the Selection Grade. It is also not in dispute that by the time the case of the petitioner along with others was taken into consideration for placement in the Selection Grade, the said adverse remarks were not communicated to the petitioner.

Law is well settled that an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned. The apex Court in ***Gurdial Singh Fijji Vs. State of Punjab, AIR 1979 SC 1622***, held as under:-

> "The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified…."

Admittedly, in the instant case, the Zonal Promotion Committee on 20.06.1996 declared the petitioner 'unfit' for placement in the Selection Grade with effect from 01.12.1994 because of the adverse remarks made in his ACR for the year 1993. But, unfortunately, by that time the petitioner was not communicated with the adverse remarks given in his ACR for the year 1993 and thus on this ground alone the decision of the Zonal Promotion Committee cannot be held to be legal.

6. The other aspect of the case is that the petitioner having been informed about the said adverse remarks for the year 1993 vide letter dated 11.10.1996 (Annexure-2) made a representation to the Zonal Manager, East FCI, Zonal Officer, Calcutta on 25.10.1996 (Annexure-4) for expunction of the same. The said representation was rejected by the Deputy Manager (PBRS) for Zonal Manager and communicated to the petitioner vide Memo dated 14.07.1999. The adverse remarks recorded in the ACR for the year 1993 are as under:-

"Overall assessment: The official is a leather in A/cs work. Mind & spirit to learn the same. Unable to finish an A/cs work single handedly. The Official is responsible but shrewed in nature.

In addition, he minds for self interest without caring the loss of F.C.I. Already punished departmentally and other cases are still pending. He is liability to F.C.I."

In response to the above said communication, petitioner filed his representation in detail on 25.10.1996 for expunction of the adverse entries, but the Deputy Manager (PBRS) for Zonal Manager in a non-speaking memorandum rejected the said petition observing as follows:-

"Shri S.Kanungo, AG.II(N) submitted his representation dated 25.10.1996 for expunge of Adverse remarks. On careful examination of the representation of Shri S.Kanungo, it has been decided by the competent authority that the adverse remarks recorded in his ACR for the year 1993 can not be expunged."

The above memorandum does not contain any reason as to why the submission/explanation made by the petitioner against each of the adverse remarks for expunction has not been accepted. By merely saying that the representation of the petitioner to expunge the adverse remarks was considered and the same cannot be expunged is not enough. No doubt, this is a material irregularity committed by the employer.

Law is well settled that every administrative decision must be hedged by reasons. (See *Life Insurance Corporation of India & Anr. Vs. Consumer Education and Research Centre & Ors [1995] 5 SCC 482*

The apex Court in ***S.N.Mukherjee-v-Union of India, AIR 1990 SC 1984,*** held that the recording of reasons by an administrative authority serves a salutary purpose namely; it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. The need for recording of reasons is greater in a case where the order is passed at the original stage.

Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. [S*ee Raj Kishore Jha V. State of Bihar (2003) 11 SCC 519]*.

Even in respect of administrative orders Lord Denning, M.R. in ***Breen V. Amalgamated Engg. Union (1971) 1 All ER 1148***, observed: "The giving of reasons is one of the fundamentals of good administration."

In ***Alexander Machinery (Dudley) Ltd. V. Crabtree (1974) ICR 120 (NIRC)*** it was observed: "Failure to give reasons amounts to denial of justice".

In ***Vasant D. Bhavsar V. Bar Council of India (1999) 1 SCC 45***, the apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based.

The apex Court in ***Union of India & Ors. v. E.G. Nambudiri, AIR 1991 SC 1216***, held that there is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a Government servant against the adverse entries the competent authority is not under any obligation to record reasons. But the competent authority has no licence to act arbitrarily, he must act in a fair and just manner. He is required to consider the questions raised by the Government servant and examine the same, in the light of the comments made by the officer awarding the adverse entries and the officer countersigning the same. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. In the absence of any statutory or administrative provision requiring the competent authority to record reasons or to communicate reasons, no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. No order of an administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex facie and it is not open to the court to interfere with such orders merely on the ground of absence of any reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reasons for the same. In governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation does not contain any reasons, the order cannot be held to be bad in law. If such an order is challenged in a court of law it is always open to the competent authority to place the reasons before the court which may have led to the rejection of the representation. It is always open to an administrative authority to produce evidence aliunde before the court to justify its action.

7. Admittedly, in the instant case, no material was produced before this Court on behalf of the OP-Corporation to show that any reason has been recorded by the competent authority before rejecting the representation of the petitioner filed pursuant to the communication made to the petitioner regarding adverse remarks in the ACR for the year 1993. Since Annexures-5 and 6 by which the representation of the petitioner to expunge the adverse remarks was rejected do not disclose any reason and the OP-

Corporation has failed to place any evidence showing reason for rejecting representation of the petitioner, we asked learned counsel for the opposite parties to produce the original record. The same was produced on 14.05.2010. Perusal of record reveals that the Senior Regional Manager vide his letter dated 17.06.1999 intimated Sri C.R. Biswal, Secretary to Government that Sri K.G. Das, AM (A/c), the then Reporting Officer recommended expunction of adverse remarks given in the ACR of the petitioner. However, Sri C.P. Gond, Deputy Manager (General) has maintained the stand justifying the adverse comments. Sri C.P. Gond, vide his letter dated 31.05.1999 addressed to the Senior General Manager, Food Corporation of India, Vani Vihar intimated that the remarks of the Reporting Officer and the Reviewing Officer should be treated as such in the ACR of 1993. In the said letter, he further observed that during the period of report, the petitioner was very arrogant in behaviour and his performance was also not in desired manner and he was always avoiding to attend the work allotted to him in spite of personal instruction given to him from time to time. He was also found to be in the habit of criticizing superior officers during the period of report when the allotted work did not suit him.

Adverse remarks given in ACR 1993 does not contain all the above allegations. Law is well settled that validity of an order is to be judged by reasons so mentioned therein and it cannot be supplemented by fresh reasons. (See ***Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851)***

Therefore, the new reasonings given by Sri C.P. Gond, Deputy Manager (General) to justify the adverse remarks made in the year 1993 is not legally sustainable. Sri C.R. Biswal vide his letter dated 25.06.1999 intimated the Zonal Manager (East) that as a countersigning officer he had signed the report. It was very difficult to know the functioning of AG-II (M) level officers in the district offices. The comments of the Reporting Officer and the Reviewing Officer have been endorsed by him. Since he had no material in hands to rebut the stands taken by the Reporting Officer and the Reviewing Officer, he endorsed their views.

Thus, the representation of the petitioner under Annexure-4 explaining each and every adverse remark entered in the ACR 1993 has not at all been dealt with by the opp.parties while rejecting the petitioner's representation. Merely by saying that the remarks of the Reporting Officer and Reviewing Officer should be treated as such in the ACR 1993 with some new reasoning and without considering the petitioner's representation cannot justify the action of the opposite parties in rejecting the representation of the petitioner.

8. In the facts situation, we are of the considered view that the opposite parties are not justified to deny promotion to the petitioner in the

Selection Grade from the date his juniors were promoted. We, therefore, direct the opposite parties to place the petitioner in the Selection Grade w.e.f. 01.12.1994 when his juniors were placed in such grade and to grant him all consequential service benefits including arrears of differential salary.

9. With above direction, the writ petition is disposed of.

Writ petition disposed of.

2010(II)ILR – CUT-124

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

JAIL CRIMINAL APPEAL No.149 OF 1999.(Decided on 20.04.2010)

GANESWAR PATRA ……Appellant

.Vrs.

STATE OF ORISSA ……Respondent

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.3.

Appreciation of evidence – P.W.4 is the mother of the deceased, an immediate post-occurrence witness – P.W.5 a neighbour of P.W.4 – No material to disbelief their evidence – Contradictions/discrepancies appearing in their evidence is minor in nature – Such contradictions / discrepancies are bound to occur due to efflux of time and in case of rustic and illiterate witnesses like P.Ws.4 & 5.

Held, the oral testimony of P.Ws.4&5 coupled with the medical evidence unequivocally points at the guilt of the appellant.

(Para 8)

For Appellant – Mr.Deepak Kumar.
For Respondent – Mr.Jyoti Prakash Pattnaik
Addl.Government Advocate

PRADIP MOHANTY,J. This Jail Criminal Appeal is directed against the judgment and order dated 07.05.1999 passed by the learned Sessions Judge, Keonjhar in S.T. Case No.81 of 1995 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that the deceased Sarojini is the only daughter of her widow mother Marua (P.W.4). She had married the accused-appellant on 06.03.1994 and the accused was residing in the house of Marua as illatom son-in-law. Due to dispute with deceased Sarojini, the accused left the house of Marua during Bahuda Jatra of 1994 and went to his own village. After a month or so, he came back to the house of Marua. On that day, when he was served with food during lunch he quarrelled with his wife and went away with the lunch plate declaring before the villagers that he was served with poisonous food. A few days later, on receipt of a letter from the Ward Member (P.W.5), the accused came to the house of Marua, returned the plate, stayed for one night and went back to his house. On 21.02.1995 at about 3.00 PM, the accused again arrived at the house of Marua. In the night, after taking dinner Marua slept in a separate room and the accused slept along with the deceased in an adjacent room. Coming to know that the accused and the deceased were

discussing with each other, Marua came out of her room and heard the accused insisting to record all the properties in his name. The deceased was saying that the same would only be possible after her mother's death. At this, the accused got enraged and asked the deceased to go with him to his house, but the deceased refused. By then it was 12 mid-night. Hearing their discussion, Marua went to her room but till 2:00 AM she had no sleep. Some time after 2.00 AM, she felt asleep and suddenly woke up from sleep hearing the shout of her daughter who gave out that "O' mother, I am dying. The person whom you sheltered murdered me and escaped." Suddenly, Marua (P.W.4) came out of her room and by that time the deceased had also come out of her room to the verandah by pressing her palms on her abdomen. P.W.4 shouted by taking the names of Mukunda and Niranjan, who are her neighbours. They all reached the spot and in their presence the deceased gave out that the accused had stabbed her with a knife and escaped. There was profuse bleeding from the wound and the deceased succumbed to the injury on the spot. On the same day, i.e., 22.02.1995, P.W.4 lodged FIR at Bamebari Outpost. The police registered case, investigated into the matter and ultimately filed charge-sheet against the accused-appellant under Section 302, IPC.

3. The plea of the accused is one of complete denial of the allegations. His specific plea is that the deceased sustained injury by fall either on the knife or axe kept in the bedroom while she wanted to come out to attend call of nature. In the alternative, he took a plea that the deceased might have committed suicide.

4. In order to prove its case, the prosecution has examined as many as eight witnesses including the doctor and the I.O and exhibited sixteen documents. The defence has examined one witness, i.e., the accused himself. On completion of trial, the learned Sessions Judge convicted the appellant under Section 302 I.P.C and sentenced him to undergo imprisonment for life basing on the evidence of P.W.4 and leading to discovery of the knife (M.O.I).

5. Mr. Deepak Kumar, learned counsel appearing for the accused-appellant assails the impugned judgment and order of conviction mainly on the following grounds:

1. P.W.4 being the mother of the deceased is an interested witness and she has tried to develop the prosecution story from stage to stage;

2. P.W.5 deposed that hearing the voice of P.W.4 he came to the spot and he had not seen the occurrence. So, his evidence cannot be relied upon for any purpose;

3. There is no material to prove that in the relevant night the accused was present in the room of deceased.

4. Leading to discovery has not been proved by the prosecution as per Section 27 of the Evidence Act; and

5. Some material witnesses have been withheld by the prosecution.

6. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that the appellant has been named as the accused in the FIR lodged by P.W.4. While deposing in court P.W.4 has corroborated the facts stated in the FIR. P.W.5 corroborates the evidence of P.W.4 and specifically states that he has seen in the moon light the accused running away towards the back yard. The evidence of P.Ws.4 and 5 gets support from the evidence of P.W.2, the doctor, who conducted autopsy over the dead body of the deceased. The prosecution through P.Ws.6 and 8 has proved that after arrest the appellant led the police and gave recovery of the weapon of offence (M.O.I). Therefore, no illegality has been committed by the trial court in convicting the appellant under Section 302, IPC.

7. Perused the LCR. Admittedly, there is no eye witness to the assault. P.W.4 is the mother of the deceased and mother-in-law of the accused. She specifically deposed that on 21.02.1995, i.e., before the night of occurrence, the accused came to her house and after taking dinner slept in a room along with the deceased. In the midst of the night when she (P.W.4) woke up to attend call of nature, she heard the discussion between the accused and the deceased. The accused was asking the deceased to get all the properties recorded in his name. She further stated that by the time she heard the discussion between the accused and the deceased, the accused had not removed his pant and shirt. Therefore, she became suspicious and kept waiting in her room without sleep. After some time, she again came out of her room for urination and while urinating, she heard her daughter shouting “MAA GO DAUDI AAA, TO JOIAN CHAKU MOTE MARIDELA”. At that time, P.W.4 saw the accused running away with the knife in his hand. She immediately rushed to her daughter and saw that she was pressing her abdomen with both the palms and when she released her palms, the intestine protruded out of the injury. P.W.4 raised alarm hearing which her neighbours, namely, Raghu, Mukunda and Niranjan arrived.

Immediately, a person was sent to arrange an ambulance and a doctor. By the time the ambulance arrived with doctor, it was early dawn. The doctor examined and declared her daughter dead. In the said ambulance, P.W.4 along with her neighbours went to Bamebari Outpost and lodged oral report. During investigation, the D.S.P. came to her house, seized the list of dowry articles and the letter written by the accused to the deceased. In her cross-examination, she stated that she had seen the stabbing and escaping of the accused. She has also admitted that there was no light in the bed-room and the kerosene lamp had gone out. Nothing has been elicited in the cross-examination to demolish the prosecution case.

P.W.5 is a co-villager and an agnatic nephew of P.W.4. He supported the evidence of P.W.4 to the extent that after hearing the shout of P.W.4 calling him by name to come to her rescue as the accused had escaped after stabbing the deceased, he came to the spot and found the deceased pressing her palms on her abdomen. The deceased disclosed that she had been stabbed by her husband. P.W.5 specifically deposed that he had seen the accused running away towards the back yard in the moon light and that the intestine came out of the wound after removal of the palm. He stated to have attended the inquest and put his signature in the inquest report. In cross-examination, he deposed that the house of Marua is at a distance of 30 feet from his house and the houses of Niranjan and Mukunda are at a distance of 15 and 30 feet respectively. He further deposed that he was examined by the I.O. during investigation and it is not a fact that he had not stated before the police that he saw the accused escaping with a knife towards the back side of the house of Marua and that he saw the accused in the moon light.

P.W.6 is a witness to the leading to discovery and seizure of the knife. This witness has deposed in his examination-in-chief that the knife was recovered from Brirampur tank. He along with the accused and police officials went to that tank in a Jeep and police brought out the knife and showed him. The seizure list (Ext.5) was prepared in his presence and he put his signature (Ext.5/1) thereon. But in the cross-examination, he specifically stated that he was moving on the road and the police officer called him to accompany in the vehicle. He remained on the ridge of the tank during recovery of the knife from the tank and the knife was recovered within a distance of five meters from the place where he was sitting.

P.W.7 is the A.S.I. of police then attached to Bamberi Outpost. He deposed to have reduced the oral report of Marua (P.W.4) to writing, drew

up plain paper F.I.R., read over the contents thereof to the informant and obtained her LTI thereon. He proved the said FIR marked Ext.6 and his signature thereon marked Ext.6/1. He further stated that immediately after recording of the FIR he proceeded to the spot, made inquest over the dead body of the deceased, examined some of the witnesses and seized the blood stained earth vide Ext.9 and blood stained Kantha vide Ext.10 from the spot. On 23.02.1995, P.W.7 stated to have re-examined P.W.4 and seized the dowry articles vide Ext.11 and prepared the spot map.

P.W.8 is the O.I.C., Joda P.S., who took charge of the investigation from P.W.7 and arrested the accused. He specifically deposed that while in custody the accused disclosed to have concealed the weapon of offence in a tank near Jhumpura, led the police and the witnesses to that place and gave recovery of the knife (M.O.I). He seized the knife vide Ext.5 in presence of the witness P.W.6. He also seized the wearing apparel (lungi, M.O.III) of the accused vide Ext.14. Finally, S.I. of Police S.K. Behera submitted charge-sheet on 23.05.1995 since he (P.W.8) was under orders of transfer. In cross-examination P.W.8 has also admitted that the tank in question from where the knife was recovered at the instance of the accused is a public tank.

P.W.1 is the doctor who at the relevant point of time was working as C.M.O., Central Hospital, Joda. He stated that on 25.02.1995 on police requisition he collected the blood sample of the accused and on examination found the same to be O+. He proved his report marked Ext.1. P.W.2 is the doctor who conducted post-mortem examination over the dead-body of the deceased and found the following injuries:

"External Injuries

(i) A portion of the intestine coil seen protruding through the gaping wound situated on interior abdominal wall 2" right to the umbilicus placed transversely directing latterlly oblique; and

(ii) Another wound at a higher level then the left. After reposition of the intestinal coil to the abdominal cavity, external wound found to be punctured wound of size 1" X 1/3" peritonial cavity. It was spindle shaped. Both the margins are clean cut right angle of the wound was acute and sharply cut. Left angle shows ruggedness.

Internal Injuries

On dissection deep into the wound, it was found the abdominal anterior muscles, fascia and peritoneum underlying the wound were

> cut. Blood clots seen along the track. The abdominal cavity specifically the pelvic cavity was filled with blood clots and haemorrhagic fluid and dark blood. On detail examination of the abdominal viscera, the small intestine was found to be punctured at three sides with discharge of faecal matters. The puncture are through and through. The mesentry was also pireced at three sides at which the mesentry vessels were cut. The blood clots were found surrounding the mesenteric wound. The other abdominal viscera were found to be in tact."

He specifically opined that all the above injuries were ante mortem in nature and the probable cause of death was due to haemorrhage and shock following the injuries of the mesentry vessel. The time of death was within 24 to 48 hours of the time of post mortem examination. He further opined that the injuries found in the body of the deceased as mentioned in the post mortem report could be possible by a knife.

8. From the above analysis of the evidence, it is crystal clear that none of the prosecution witnesses has seen the actual assault by the appellant on the deceased. However, it is evident from the evidence of P.W.4, who is the mother of the deceased and an immediate post-occurrence witness, that the appellant came to her house on 21.02.1995 at 3.00 pm, i.e., on the day preceding the night of occurrence and after taking dinner he slept in a room along with the deceased. At mid night when P.W.4 woke up to attend the call of nature, she heard hot discussion going on between the appellant and the deceased with regard to transfer of properties and by then the appellant had not removed his pant and shirt. Suspecting demeanor of the appellant she kept waiting in her room without sleep. Some time after, hearing shouts of her daughter "MAA GO DAUDI AAA, TO JOIAN CHAKU MOTE MARIDELA" she came out of her room and saw the appellant running away with a knife in his hand. At that time, P.W.4 saw her daughter pressing her both the palms on her abdomen and when P.W.4 released her palms, the intestine protruded out of the injury. The F.I.R. story gets corroboration from the evidence of P.W.4. P.W.5, an immediate neighbour of P.W.4, who is also a post-occurrence witness, corroborates the evidence of P.W.4 about the disclosure by the deceased that the accused had stabbed her. He specifically stated to have seen the accused running away towards the backside of the house of P.W.4. There is no material to disbelieve the evidence of P.Ws.4 and 5. No evidence has been adduced by the defence to prove the relationship of P.W.5 with the deceased or P.W.4. That apart, law is now fairly settled that merely because a witness is related to the

deceased, his/her evidence cannot be rejected if it is found to be credible, trustworthy and if it inspires confidence. The contradictions/discrepancies appearing in the evidence of P.Ws.4 and 5 are minor in nature. Such contradictions/discrepancies are bound to occur due to efflux of time and in case of rustic and illiterate witnesses like P.Ws.4 and 5. So far as leading to recovery of the weapon of offence by the appellant is concerned, the same is well proved by the prosecution through the evidence of P.W.6, the independent witness, and P.W.8, the then O.I.C. of Joda P.S. The oral testimony of P.Ws.4 and 5 coupled with the medical evidence and the fact of recovery of the weapon of offence at the instance of the appellant unequivocally points at the guilt of the appellant.

9. For the reasons indicated above, there is hardly any scope for this Court to interfere with the impugned judgment of conviction and sentence passed by the trial court. The Jail Criminal Appeal is accordingly dismissed.

Appeal dismissed.

2010 (II)ILR – CUT-131

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

JAIL CRIMINAL APPEAL No.16 (Decided on 21.05.2010)

N.SATYANARAYAN RAO …….Appellant

.Vrs.

STATE OF ORISSA ……Respondent

(A) **EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.9.**

Delay in conducting T.I.Parade – I.O. explained that due to engagement in law and order duty he could not arrange T.I. Parade earlier – No reason to disbelieve his evidence – Nothing has been shown about any illegal or improper manner of conducting T.I. Parade – Held, it can not be said that the T.I. Parade not conducted properly.

(Para 7)

(B) **EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.9.**

T.I. Parade conducted two months after the arrest of the accused – Allegation that the witnesses might have seen the accused before he was put to T.I. Parade and identification by P.Ws 3 & 4 has no relevancy – Evidence of P.W.S. 3&4 that they have seen the accused stabbing with knife and when he escaped they also chased him but failed to catch hold of him – So P.Ws 3 & 4 apart from seeing the accused at the time of occurrence had further opportunity of seeing him while they chased him – No suggestion put to them that they had seen the accused or the police had shown the accused to them after the arrest of the accused and before conduct of T.I. Parade – No such suggestion was also given to the I.O.

Held, accused was properly identified by the witnesses.

(Para 7)

Case laws Referred to:-

1.AIR 1983 SC 753 : (Bharwada Bhoiginbhai Hirjibhai -V- State of Gujarat)
2.AIR 1988 SC p.696 : (Appabhai & Anr.-V- State of Gujarat).

For Petitioner – M/s. S.K.Nanda.
For Opp.Party – Mr.J.P.Patnaik
Addl. Government Advocate.

B.K.NAYAK, J. This Criminal appeal has been filed by the appellant N.Satyanarayan Rao from Jail challenging the judgment dated 04.12.1999 passed by the learned Additional Sessions Judge, Sonepur in Sessions Case No.4/13 of 1999 convicting the appellant under section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life.

2. The prosecution case, shortly stated, is that the deceased Govinda Badmali of village Sakama had come to Sonepur with his father Balabhadra Badmali (P.W.1) and some co-villagers to perform dance and seba puja in the *Bali jatra* in different temples at Sonepur in the month of Aswina in the year 1998. On 29.09.1998 at about 5.30 P.M., after offering *'Sandhyabati'* to deity Samaleswari Devi in the temple while the deceased was standing in front of the *Singhadwara* of the temple, the appellant suddenly stabbed on his chest with a knife and thereafter went away from the spot. On being stabbed, the deceased shouted "A*E BUA MARIGALI*" and having walked a few steps, fell down on the ground. The father of the deceased (P.W.1), Purna Ch. Badmali (P.W.2), Jibardhan Badmali (P.W.3) and Santosh Negi (P.W.4) took the deceased to the hospital for treatment. But, on arrival at the hospital, the Doctor (P.W.10) declared him brought dead. Thereafter P.W.1 orally reported the matter to the O.I.C., Sonepur P.S., who reduced the report to writing (Ext.1) and registered the case. The O.I.C. took up investigation, during the course of which he visited the place of occurrence, conducted inquest over the body of the deceased at the hospital and sent the same for P.M. examination and examined some witnesses. On the next day, he arrested the accused and seized the knife (M.O.IV) and full pant and shirt of the appellant. He also seized sample earth and blood stained earth from the place of occurrence and wearing apparels of the deceased. He got the T.I. parade of the appellant conducted and on completion of investigation filed charge sheet against him, where upon the appellant stood his trial under Section 302 of the Indian Penal Code.

3. The plea of the accused was denial simplicitor.

4. During trial the prosecution examined 13 witnesses whereas the defence examined three witnesses.

Believing the ocular evidence of P.Ws.1,2,3,4 and 5, the medical evidence of P.W.10 along with the evidence with regard to identification of the accused, the learned trial Court found the accused-appellant guilty and accordingly convicted and sentenced him by the impugned judgment as aforesaid.

5. The learned counsel for the appellant has raised the following contentions.

i) The T.I. parade was not conducted properly and the identification of the accused was not conclusive.

ii) The evidence on record does not clearly prove the seizure of the weapon of offence (knife).

iii) The ocular evidence of the witnesses is full of contradictions and inconsistencies for which the same cannot be believed in proof of the guilt of the accused.

6. The learned Additional Government Advocate, on the other hand contends that the learned Trial Court has properly and rightly evaluated the evidence on record and there is no illegality or infirmity in the impugned judgment.

7. The first contention raised by the learned counsel for the appellant is that the T.I. parade was not conducted properly and the identification of the accused was not conclusive. This contention has been raised because the accused was not named in the F.I.R. (Ext.1) as neither the informant (P.W.1) nor the other eye witnesses knew the name of the accused at the time of occurrence or till the filing of the F.I.R.. Therefore, the I.O. felt it necessary to get the T.I. parade of the accused conducted. In the F.I.R. however detail descriptions of the accused along with the description of the full pant and shirt which he had put on at the time of occurrence have been given. P.Ws.1 to 4 who are eye witnesses to the occurrence have stated categorically that they were present at the *Samalai Temple* when the occurrence took place at about 5.30 P.M. near the gate of the temple. P.Ws.1,3 and 4 had attended the T.I. parade and while P.Ws.3 and 4 correctly identified the accused in the T.I. parade, P.W.1 failed to identify the accused. These P.Ws identified the accused correctly in Court. P.W.2, the other eye witness who was not present in the T.I. parade also correctly identified the accused in Court. The grievance of the learned counsel for the appellant is that the T.I. parade was conducted nearly two months after the arrest of the accused and therefore, the witnesses might have seen the accused before he was put to T.I. parade and therefore, identification by P.Ws.3 and 4 of the accused in the T.I. parade has no relevancy. The submission that there is a possibility of the witnesses seeing the accused before the T.I. parade was conducted inside the jail does not hold good for the reasons that while in the T.I. parade P.Ws.3 and 4 could be able to identify the accused, p.w.1 failed to identify. In case the witnesses had opportunity to see the accused before the T.I. parade was conducted, P.W.1 could not have failed to identify the accused in the T.I. parade. The evidence of P.Ws.3 and 4 reveal that having seen the accused stabbing the deceased with knife and thereafter escaping from the place of occurrence, P.Ws.3 and 4 chased him, but failed to catch hold of him. This clearly suggests that P.Ws.3 and 4 apart from seeing the accused at the time of occurrence had also further opportunity of seeing him while they were in chase of the accused. Although in cross-examination P.Ws.3 and 4 were put several questions with regard to the conduct of T.I. parade, they were not even suggested that they had seen the accused or the Police had shown the accused to them after the arrest of the accused and before conduct of T.I. parade. No such suggestion was also given to the I.O. (P.W.13).

With regard to delay in conduct of T.I. parade the I.O. has explained in his evidence that due to engagement in law and order duty he could not arrange T.I. parade earlier. There is no reason, nor anything is borne out from the record for disbelieving this evidence of the I.O. Nothing has been shown about any illegal or improper manner of conduct of T.I. parade. In the circumstances, it cannot be said that the T.I. parade was not conducted properly. All the eye witnesses to the occurrence clearly identified the accused in court, which is substantive evidence. P.W.1 is an old man and even if his identification of the accused in Court may not be relied upon for his failure to identify the accused in the T.I. parade, the identification of accused by P.Ws.2,3 and 4 cannot be impeached. The occurrence having taken place at about 5.30 P.M. in the month of September by which time darkness had not set in, it cannot be said that witnesses had failed to recognize the accused at the time of occurrence, so that they could not have been able to identify the accused later.

For all the above reasons there is nothing to differ from the view of the trial Court that the accused was properly identified by the witnesses.

8. We have gone through the evidence on record carefully. P.Ws.1,2,3 and 4 have stated in no uncertain terms that after offering Sandhyabati to the deity inside the temple while the deceased was near the gate of the temple, the accused who was then loitering in front of the temple, suddenly stabbed on the chest of the deceased with a knife which he brought out from his pocket. It is also in their evidence that on being stabbed the deceased walked few steps ahead crying 'Marigali Marigali' and then fell on the ground. It is also in their evidence that after stabbing the deceased, the accused escaped from the place of occurrence. P.Ws.3 and 4 chased the accused, but failed to catch hold of him. It is also the consistent evidence of these witnesses that soon thereafter the deceased was taken to the hospital where he was declared dead. Except some minor contradictions and discrepancies in the evidence of the ocular witnesses nothing has been brought out to discredit their testimony with regard to the substratum of the prosecution case. It is pointed out that while in the F.I.R. it has been written that the deceased on being stabbed raised a cry *"AE BUA MARIGALI*", in the evidence it is stated that he raised a cry "MARIGALI MARIGALI". This contradiction is too insignificant to raise any doubt with regard to the veracity of the witnesses. P.W.1 is the father and P.Ws.2 to 4 are other co-villagers who were present at the Samalai Temple in connection with rendering of seba to the deity in question during the festival time. Their presence was quite natural at the temple and was also not challenged by the defence. They were neither inimical to the accused nor had any other reason to falsely implicate him. Some other minor contradictions with regard to which

witness was standing at what place near the temple have been pointed out, which in no way affect the credibility of the eye witnesses.

9. Law is well settled as has been held by the Apex Court in the case of ***Bharwada Bhoiginbhai Hirjibhai –v.-State of Gujarat*** AIR 1983 SC 753 that discrepancies which do not go to the root of the matter and shake the basicversionofthewitnesses cannot be annexed with undue importance and more so when all the important probabilities factor echoes in favour of the version narrated by the witnesses. It is also well settled as has been held by the Apex Court in the case reported in AIR 1988 SC page 696 : ***Appabhai and another –vrs.State of Gujarat*** that discrepancies which are due to normal errors of perception or observation should not be given importance whereas errors due to lapse of memory may be given due allowance. It is trite rule that the Court by calling into aid its past experience in men and matters must evaluate the entire materials on record by excluding the exaggerated version given by any witness. Falsus in uno falsus in omnibus is not a sound rule. The evidence of the eye witnesses is found to be clear, cogent and trust worthy and therefore, we have no hesitation to hold that such evidence coupled with the medical evidence of the Doctor (P.W.10) clearly proves the guilt of the accused.

10. It is in the evidence as stated by the I.O. and P.W.7, the Town Havildar that on the next date of occurrence, the accused was arrested. From the evidence of P.W.7 it transpires that in the morning of the following day of the occurrence P.W.6 Upendra Sahu and one Radhamadhab Jugunia (P.W.11) told P.W.7 that the person who killed the deceased was sleeping on the Mandap of Gokarneswar temple of Sonepur with the knife. On receipt of such information, P.W.7 rushed to the Gokarneswar temple along with P.W.6 and Radhamadhab Jugunia (P.W.11) and found the accused sleeping there with the knife in his possession. P.W.7 snatched the knife from the accused and thereafter brought him to the P.S. and produced the accused and the knife before the O.I.C. and the knife was seized by the O.I.C. under the seizure list Ext.5/1 in presence of P.Ws.6,7 and 11. It is in the evidence of P.W.7 that while bringing the accused to the P.S. from the Mandap of Gokarneswar temple, a large number of persons followed them to the P.S. and in their presence the accused admitted to have killed the deceased. However, there is no evidence that he used the knife which was seized for killing of the deceased. The admission of the accused, as per the evidence of P.W.7, though amounts to confession which is not admissible being made to a police officer, it does not contain any additional statement which might be relevant under section 27 of the Evidence Act. P.Ws.6 and 11 though admitted their signatures on the seizure list Ext.5/1, they did not admit in

their evidence that the seizure was effected in their presence. The learned trial Court believed the seizure of the knife on the basis of evidence of P.W.7 and the seizure list. However, there being no evidence that the knife which was seized was used for killing of the deceased, the same cannot be accepted as the weapon of offence. The non-recovery of the weapon of offence, however, does not affect the veracity of the prosecution case in view of the clear, cogent and trustworthy ocular testimony of the eye witness to the occurrence.

11. A further contention was raised by the learned counsel for the appellant that there was no motive on the part of the accused to kill the deceased. Of course the prosecution has not proved any motive. However, proof of motive is not a sine-qua-non for establishment of guilt of the accused, particularly when the evidence on record proves the guilt.

12. Lastly, the learned counsel for the appellant submits that since the accused dealt a single blow by a knife the case would fall under section 304 of the Indian Penal Code as it is covered under Exception-4 to Section 300 of the Indian Penal Code. Exception-4 to Section 300 of the Indian Penal Code runs as under:

> "Exception 4 - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

13. On perusal of the evidence on record, nowhere it is found that the occurrence took place in course of a sudden quarrel, in a sudden fight in the heat of passion and without any premeditation on the part of the accused. Keeping in view the gravity of the injury as found from the medical evidence even though it resulted out of a single blow by a knife, the appellant has been rightly convicted under section 302 of the Indian Penal Code by the learned trial Court.

14. In the light of the discussions made above, we find no infirmity in the impugned order of conviction and sentence. The appeal is therefore, dismissed.

Appeal dismissed.

2010 (II) ILR – CUT-137

M.M.DAS, J.

W.P.(C) No.9979 of 2008 (Decided on 07.05.2010)

SRI PRIYARANJAN JENA ……. Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226.

Education – Petitioner appeared JEE -2008 for admission to MBBS Course under reserved category meant for children/widow of personnel Armed/Para-Military Forces – Plea that the writ petition becomes infructuous after the last date of admission is over, was not accepted – Main allegation is wrong prioritization in service category – Priority IV was allotted to some candidates as they are wards of Ex-servicemen getting disability pension – Eight Candidates were allotted priority IV who were much below the petitioner in the rank list of the JEE – Held, petitioner shall be given admission to MBBS Course in any of the three Govt. Medical Colleges to his choice in the session 2010-2011 as a reserved candidate in the seats reserved for children/widows of persons of Arms/Para Military forces.

(Para 8,10 & 13)

Case law Referred to:-

1.AIR 1999 SC 2824 : (Preeti Srivastava -V- State of Madhya Pradesh).

For Petitioner - M/s. A.C.Mohanty,G.N.Rout, B.Pradhan & S.Bhagat.

For Opp.parties – Mr.P.C.Biswal (C.G.C)
M/s.R.K.Dash, P.K.Tripathy & S.Patnaik (For O.P.6)
Mr.R.C.Mohanty (For O.P.8)
M/s.T.Swain & M.S.Raman (For O.Ps 13 & 14)
M/s.D.Bhuyan, A.Tripathy, P.Kar & P.K.Nayak (For O.Ps 10 & 11)
M/s.R.R.Pattnaik, S.S.Jena, A.N.Samantray, B.C.Parija, & R.R.Rout (For O.Ps 9 & 15)
M/s. S.Mohanty, R.K.Rath, G.Das & N.C.Panda (For O.P.16)
M/s. S.Tripathy, A.K.Panda (For O.P.12).

M. M. DAS, J This writ petition relates to admission of the petitioner to the M.B.B.S. Course pursuant to his appearance in the Joint Entrance Examination, 2008. The petitioner appeared in the said examination under

the reserved category meant for children/widows of personnel of Armed/Para-military Forces, who are native of Orissa. The prayer in the writ petition has been made to quash the order dated 19.6.2008 under Annexure-10 issued by the Industries Department, Government of Orissa to settle the process of admission in respect of Military (M.I.) category for the year 2008-09 on the ground that prioritization is not given in consonance with the provisions in vogue and for any other appropriate relief.

2. An Information Brochure for the Joint Entrance Examination, 2008 was published by the Chairman, J.E.E., 2008 for admission of candidates into Engineering/Medical/Dental/MBA/MCA/Hotel Management Courses. In paragraph-2.1.5 of the said brochure, it was mentioned as follows:-

> "2.1.5. 2% of seats in engineering colleges and 3% seats in Government Medical colleges in MBBS and BDS courses are reserved for children/widows of personnel of Armed/Paramilitary Forces who are native of Orissa. Candidates applying under Military reserved category shall furnish a certificate in the prescribed format provided in this brochure as Appendix-IV at the time of counselling. The priorities will be notified in the Counselling-cum-Admission instructions as per decision of the Government of Orissa".

On the results of the entrance examination being published, the petitioner's rank was 17 in the merit list under military category (M.I), so far as Medical Course is concerned, and 41 so far as Engineering Course is concerned. The petitioner has stated that he received the letter of intimation indicating his rank on 17.7.2008, where it was endorsed "all J.E.E. qualified candidates under military category for Medical/Engineering/Pharmacist streams are required to report at Rajya Sainik Board, Lewis Road, Nageswar Tangi, Bhubaneswar for prioritization on 7/8/9th July, 2008". In keeping with the said intimation and direction of the Chairman, J.E.E., the petitioner reported before the Rajya Sainik Board on 7.7.2008. It is the case of the petitioner that till that time, he was unaware of the order of prioritization in the military category. However, after reporting before the Rajya Sainik Board, the petitioner could come to know that wards of other armed forces personnel as well as Para-military forces have been given with 'priority' at par with the wards of Armed Forces Personnel/Ex-service man. The petitioner could further come to know that "wards of defence personnel disabled in peace time with disability aggravated by military service and wards of Armed/Para-military personnel disabled in peace time with disability aggravated by service" have been given Priority-IV instead of Priority-VI though "wards of defence personnel disabled in peace time with disability attributable to military service and wards of Armed/Para-military personnel disabled in peace time with disability attributable to duty" only

need to be given priority-IV. Though the rank of the petitioner in the Military category was 17 and he was categorized under Priority-VI (Wards of Ex-servicemen/Ex-Armed personnel/Ex-Para-military personnel) for Medical courses, but due to wrong prioritization of some of the candidates, who were much below the petitioner in the rank list under Priority – IV, which is due to serious lapses on the part of the Secretary, Rajya Sainik Board, Orissa, the petitioner was deprived from being admitted to M.B.B.S. Course.

3. Learned counsel for the petitioner submitted that Indian Armed Forces is the primary military organization responsible for the territorial security and defence of India. The President of India is the Supreme Commander of the armed forces as enshrined under Article 53 of the Constitution of India, which is subordinate and responsible to the Government of India headed by the Prime Minister. The armed forces are administered by the Ministry of Defence and are comprised of the Indian Army, the Indian Navy and the Indian Air Force. Auxiliary services include the Indian Coast Guard and the Paramilitary forces of India. Since time immemorial, Defence or Military has been etymologically used as "Armed Forces" on different occasions for different purposes. In view of work culture, i.e., hazardous and inhospitable terrain duties in insurgency and counter-insurgency operations, battlefield activities during war/aggression and varied duties during National Calamities, the personnel of the defence services are made to retire/discharge at an early age, which varies from 35 to 57 years depending on rank, where they get much less pension compare to civilian counter-part. Hence, they require a second career as they are young, active and energetic and their responsibilities and obligations are at the peak. Having given the best part of their life for the safety and security of the motherland, it becomes a national obligation to provide necessary facilities for their resettlement. Keeping these in mind, the Central Government as well as Government of Orissa have notified "Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules, 1979 and the Orissa Ex-Servicemen (Recruitment to State Civil Services and Posts) Rules, 1985 respectively. The Government of Orissa, Industries Department, vide order No.VIII.114/80-20992 dated 19.8.1981, intimated that reservation of seats to the extent of 5% of the total intake capacity of the Engineering College/Engineering Schools/ITIs/ Polytechnics may be made for admission for the sons/wards of the Armed Forces Personnel including Ex-Servicemen/Para-military Forces of Orissa, who are permanently disabled or killed in war and hostilities in keeping with the request of Government of India , Ministry of Defence, Kendriya Sainik Board, New Delhi for reservation of seats for the children/wards of Armed Forces. This has been reiterated vide Government of Orissa, Home Department letter No. Ex-44/83/Poll dated 26.3.1983. The Additional

Secretary to the Ministry of Defence, New Delhi vide letter no. D.O. No. 3547/AS(R)/94 dated 3.6.1994 addressed to the Chief Secretaries of all States/U.Ts has recommended standardized prioritization for admission to medical/professional colleges in respect of defence category including wards of Gallantry Award winners, Ex-servicemen and serving personnel of Armed Forces. For better appreciation, the said prioritization depicted is quoted herein below:

"Priority-I : Widows/wards of Defence personnel killed in action.

Priority-II :Wards of serving personnel and Ex-Servicemen disabled in action.

Priority-III: Widows/Wards of defence personnel disabled in peace time with death attributable to military service.

Priority: IV: Wards of defence personnel disabled in peace time with disability attributable to military service.

Priority-V : Wards of Ex-Servicemen personnel and serving personnel who are in receipt of Gallantry Awards:-

(1) Param Vir Chakra
(2) Ashok Chakra
(3) Sarvottam Yudh Seva Medal
(4) Maha Vir Chakra
(5) Kirti Chakra
(6) Uttam Yudh Seva Medal
(7) Vir Chakra
(8) Shaurya Chakra
(9) Yudh Seva Medal
(10) Sena, Nau Sena, Vayu Sena Medal
(11) Mention-in Despatches

Priority-VI: Wards of Ex-Servicemen.

Priority-VII: Wards of serving personnel".

The Government of Orissa, Health and Family Welfare Department vide resolution No. ME-II-IXM-5/97-18961/H. dated 26.5.1998 intimated that Government after careful consideration have been pleased to decide that 3% of the total intake of all medical colleges and paramedical colleges under the control of Health and Family Welfare Department shall be reserved for the children of Ex-Servicemen and Servicemen of Orissa, which was given effect to from the academic session 1998-1999. The Government of Orissa also in Industries Department letter No. V-TTI-235/2000/2065 dated 19.1.2001 intimated that two seats in each Government Engineering Colleges, two seats in each private Engineering Colleges (free seat) and one set in ITI, Choudwar, 8 seats in all Government Medical Colleges in MBBS (on roster basis) and one seat in Dental Wing of

S.C.B. Medical College have been kept reserved for the wards/children/spouses of armed force personnel/Ex-servicemen/Para-military personnel of Orissa serving/retired/permanently disabled or killed in war and hostilities. Again, the Government in Industries Department letter dated 10.8.2001 intimated that reservation of seats for sons/wards of Armed Force personnel including Ex-Servicemen/Para-military Forces of Orissa permanently disabled or killed in wars and hostilities is fixed by the Government at 2% of the total number of free category seats in Government as well as private technical institutions instead of 1% of the total sanctioned seats in Government and Private Engineering Colleges/Schools of the State. The petitioner relying upon the information brochure of J.E.E. 2007 submitted that in the said brochure in clause 2.1.5, it was stated that 2% of seats in Engineering Colleges and 3% seats in Government Medical Colleges in MBBS and BDS courses are reserved for children/widows of personnel of Armed/Para-military Forces, who are native of Orissa. Candidates applying under Military reserved category shall furnish a certificate in the prescribed format provided in the brochure as Appendix-IV at the time of counselling. Further the said clause provided the prioritization, which would be followed for filling up the seats reserved under military category as per D.O. No. 3547 AS(R) 94 dated 3.6.1994 issued by the Ministry of Defence, Government of India. On the date of counselling, a list will be drawn under each priority category and allotment will be made as per the priority category mentioned above.

4. The Government of Orissa in Industries Department vide order No. I-TTI-10/08-9187 dated 19.6.2008 intimated that in pursuance of the direction of this Court's order dated 26.9.2007passed in W.P. (C) No. 8996 of 2007 and after careful consideration of the recommendation of the Policy Planning Body (PPB) in its meeting held on 21.5.2008, Government has been pleased to decide that following prioritization will be followed during the academic session 2008-09 for admission to 2% of seats in Engineering Colleges and 3% of seats in Government Medical Colleges in MBBS and BDS Courses reserved for children/widows of personnel of Armed/Para-military Forces, who are native of Orissa on the wrong notion that other armed forces/Para-military forces are also included in the armed forces. The petitioner being aggrieved by the order dated 19.6.2008 under Annexure-10 has preferred the present writ petition for appropriate relief.

5. Mr. Mohanty, learned counsel for the petitioner strongly urged that the Chairman, J.E.E. 2008 should have notified the priorities in the counselling-cum-admission instruction. Instead of notifying the priorities, it kept the candidates in dark. Further, the J.E.E. Committee called all the 520 candidates, who appeared under the reserved category meant for the military (MI) candidates for counseling as a result, although the petitioner

was ranked 17, was eliminated since the candidates in rank nos. 105 and 178 were allotted priority-III, rank nos. 66, 128, 136, 186, 204, 269, 473 and 478 were allotted priority-IV and rank no. 13 was allotted Priority-VI . For the aforesaid reason, the petitioner could not face the counselling and was not admitted even though he secured a higher rank. Mr. Mohanty has attempted to make out a case that the petitioner being the son of an ex-serviceman, he should have been considered separately from the wards of ex-Para-military forces.

6. The Chairman, J.E.E. filed a counter affidavit on 5.11.2008, inter alia, stating that the writ petition has become infructuous since all reserved seats ear-marked for children/widows of Armed Forces/Para-military personnel, who are residents of Orissa have been filled up during centralized counselling conducted on 11.7.2008 for MBBS and BDS Courses of the three Government Medical Colleges. It has been further stated in the counter affidavit that since the last date for admission was fixed as 30th September of the said year and the same is over, the writ petition has become infructuous. In that view of the matter, it has been pleaded that the prayer made to quash the order dated 19.6.2008 under Annexure-10 and to stall the admission to the ear-marked reserved seat has also become academic and in-consequential. The Chairman has further stated in the counter affidavit that the information brochure was published as per the decision of the Policy Planning Body under which the J.E.E. Committee functions. As per policy of the Government as on the date of admission, 3% of the seats were reserved in Government Medical Colleges for MBBS and BDS Courses for children/widows of Armed Forces/Para-military personnel of the state of Orissa. It is further asserted that the impugned order dated 19.6.2008 under Annexure-10 issued by the Industries Department of the Government of Orissa was pursuant to the direction of this Court passed in W.P. (C) No. 8996 of 2007 disposed of by judgment dated 26.9.2007. In the said judgment, this Court ruled that from the coming year, the reservation for children/widows of Armed Forces and Para-military personnel will be treated at par following the prioritization and it should not be confined to only defence personnel as the same does not cover the members of other Armed Forces. The Chairman has further stated that when the candidates appeared before the Rajya Sainik Board, Orissa on perusal of the documents produced by such candidates in Appendix-IV, while filling up the other particulars provided in the same, although there was no prescribed column to indicate the priority of a candidate, the priority of the candidates were mentioned by the Rajya Sainik Board and no fault can be found in such action..

7. Mr. Mohanty, learned counsel for the petitioner relying upon the rejoinder affidavit filed in reply to the counter affidavit of the Chairman,

J.E.E., vehemently argued that the writ petition has not become infructuous and the J.E.E. Committee called all the 520 candidates without stating the minimum qualifying marks and without adhering to the principles laid down by the Supreme Court in the case of ***Preeti Srivastava v. State of Madhya Pradesh,*** AIR 1999 SC 2894, which is contrary to law and the views expressed by the Supreme Court which definitely leads to erosion of standard of education in Medical Courses. The petitioner has fairly stated in the rejoinder affidavit that as regards the order dated 19.6.2008 under Annexure-10, the petitioner does not want to press the said prayer for quashing the said order dated 19.6.2008, since the same is an out-come of a judgment delivered by this Court. The petitioner has denied the fact that Rajya Sainik Board – opp. Party no. 7 after perusal of the documents has issued priority certificate as per Appendix-IV since it is apparent that the Secretary, Rajya Sainik Board has lost its sight to the ingredients of Priority-IV as indicated in Annexure-10, which specifically prescribes that Priority-IV is applicable only in case of Wards of defence/Armed/Para-military personnel disabled in peace time with disability attributable to military service/duty. The said Secretary, Rajya Sainik Board, according to the petitioner, basing on the fact that Ex-servicemen or Ex-para-military personnel were receiving disability pension, issued priority certificates to their wards**,** which is irrelevant, since disability pension is granted to retired/invalidated persons, who acquired disability which is attributable to or aggravated by military service. This is in keeping with para-173 of Armed Pension Regulations, 1961 and 153 of Army Pension Regulations, 1961 and para - 101 Navy Pension Regulations, 1964. According to Mr. Mohanty, Pension Payment Orders do not indicate whether the disability is attributable to or aggravated by military service. The petitioner states to have claimed information from the Secretary, Rajya Sainik Board under the Right to Information Act about the personal details, such as, service number, rank, name, Unit etc. in respect of the personnel whose Wards got admission to Medical Course, but the said information was not supplied to the petitioner. It is the case of the petitioner that some of the candidates, who have been admitted to Medical Course, should have been given priority-VI instead of Priority-IV and those candidates being much below than the petitioner in rank in the entrance examination, the petitioner was entitled to be admitted to the Medical Course.

8. If the contentions raised by the petitioner are accepted following the principles as laid down by the Supreme Court in the case of Medical ***Council of India v. Naina Verma and others***, (Civil Appeal No. 451 of 2005 disposed of on 13.1.2005), this Court can direct the opp. parties to give admission to the petitioner to M.B.B.S. Course in the coming session.

Hence, this Court is unable to accept the contention made on behalf of the J.E.E. Committee, 2008 that the writ petition has become infructuous.

9. A counter affidavit has been filed by the Secretary, Rajya Sainik Board – opp. party no. 7, wherein, though not candidly but impliedly, the contentions raised by the petitioner that prioritization was made and Priority-IV was allotted to some of the candidates basing upon the fact that they are the wards of the ex-servicemen, who are getting disability pension, has been admitted. . The Secretary, Rajya Sainik Board has stated in paragraph-5 of the counter affidavit as follows:-

> "That with regard to the averments made in paragraph-5 of the writ petition, it is humbly submitted that Priority-IV covers the Defence persons serving or retired who suffer/have suffered disability in peace time due to professional hazards, i.e. rigors, hardship of military service while carrying out duty. It can happen direct from hostile fire/mine blast or be aggravated from prolonged exposure for hardship, difficulties, pressures of tough duty like service in extreme adverse climatic conditions, stressful situations. Those persons who suffer disability because of above mentioned conditions only get disability pension and those who are low medical category because of own mistake like road accident or illness due to personal negligence are not entitled disability pension. Hence, Priority-IV was given only to those who are in receipt of disability pension and the petitioner was given Priority-VI according to the order of the Priority as contained in the Government Order dated 19.6.2008 of the Industries Department. As has been regularly followed, Priority-IV is allotted to those who draw disability pension. There is no difference in grant of the pension amount in cases where it has been mentioned in the document disability attributable to Military duty or aggravated by Military service. It is only those whose disability is less than 20 percent are not entitled disability pension. There is hardly any difference between the two terms - "attributed to Military duty" or "aggravated by Military service" as they both draw same amount of disability pension as per the given percentage of disability. The term "attributed to Military duty" refers to a particular task whereas "aggravated by Military service" covers different tasks over a longer period of time. Those who do not get disability pension, are not given Priority-IV. Therefore, the contention of the complainant is incorrect. There has been no lapse on the part of OP No.7".

10. Therefore, the moot question, which arises for determination in the present case, is as to whether, as contended by the Rajya Sainik Board, "disability attributable to military service" and "disability aggravated by

military service" can be said to be synonymous. If the disability of the above types cannot be equated with each other, the action of the Rajya Sainik Board in giving Priority-IV to wards of ex-servicemen, who are receiving disability pension for disability aggravated by military service, cannot be sustained. It should be kept in mind, at this juncture, that the policy adopted by the Joint Entrance Examination Committee, in case of candidates belonging to the reserved category (MI) i.e., giving admission to candidates who are given a higher priority even though such candidates are much below in the rank in the J.E.E. requires that the aforesaid two phrases , i.e., "disability attributable to military service" and "disability aggravated by the military service" should be strictly construed, as otherwise, the eligible candidates who have secured higher rank, would be debarred from getting admission to the M.B.B.S. Course under the said reserved category. The Rajya Sainik Board though has stated that various documents were checked by a committee before allotting priorities, but, in effect, it has been admitted by the said Rajya Sainik Board that Priority-IV was given basing on the receipt of the disability pension by the parents of the candidates. The Priority-IV, as defined in Annexure-10, i.e., the letter of the Government of Orissa in its Industries department specifically states that wards of defence personnel disabled in peace time with disability attributable to military service and wards of Arms and Para-military personnel disabled in peace time with disability attributable to duty. By no stretch of imagination, it can be said that "disability attributable to military service" and "disability aggravated by the military service" are one and the same. A serviceman while on duty , if receives such injury so as to make him disable, only such disability can be said to be attributable to military service. Whereas, a person suffering from any type of ailment, while in military service, if posted in such place or kept in such situation, thereby the ailment aggravates and consequently, makes him disable, such disability can be said to have been aggravated by military service and not attributable to military service and such disability also entitles him to receive disability pension. **(Emphasis supplied)**

11. This Court is, therefore, of the clear view that the Rajya Sainik Board has acted contrary to law as well as not in accordance with the instruction of the Government of Orissa in its Industries Department under Annexure-10 while allotting the Priority-IV to candidates solely basing on the facts that the parents of such candidates are receiving disability pension, as the disability pension is payable to ex-servicemen even when they having become disabled on account of their ailments being aggravated by military service.

12. It is an admitted case that due to such prioritization by the Raiya Sainik Board, at least 8 candidates were allotted Priority-IV, who were much

below the petitioner in the rank list of the J.E.E. Had they not been allotted Priority-IV, the petitioner having secured rank 17, would have definitely been admitted to the M.B.B.S. Course.

13. In consequence, therefore, finding as above, this Court by adopting the ratio in the case of Medical Council of India (supra), directs that if the petitioner so chooses, he shall be given admission to M.B.B.S. Course in any of the three Government Medical colleges to his choice in the session 2010-11 as a reserved candidate in the seats reserved for children/widows of persons of Arms/Para-military Forces.

14. In the result, the writ petition is allowed, but in the circumstances, without cost.

Writ petition allowed.

2010 (II) ILR – CUT-147

M.M.DAS, J.

W.P.(C) Nos. 10733,16444,16445,16446,16447,
16448 &16449/2009(Decided on29.03.2010)

PRINCIPAL, KALINGA INSTITUTE OF MEDICAL SCIENCES (KIMS), PATIA, BBSR & ORS. …….. Petitioner

.Vrs.

STATE OF ORISSA & ORS ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Education – Admission to MBBS Course – Petitioner-students were selected and got admission – As per the regulations of M.C.I. Candidates securing 50% minimum marks in the JEE are eligible to take admission – Petitioner-students not found eligible – They were asked to be discharged – Action challenged – Hence this writ.

Information brochure omitted to mention the regulation framed by M.C.I. – Petitioner-students were duly selected to take admission and they have already prosecuted their study for more than one year – Cancellation of their result at this belated stage would blight their future for no fault of them – Held, petitioner-students should not be discharged from their seats and their admission to MBBS Course should not be cancelled. (Para 17,18)

Case laws Referred to:-

1.(1979) SCC 560 : (State of Kerala -V- T.P.Roshna).
2.(2005) 6 SCC 537 : (P.A. Inamdar -V- State of Maharashtra).
3.(1984) 1 SCC 307 : (Krishna Priya Ganguli -V- University Lucknow).
4.(1998) 6 SCC 131 : (Medical Council of India -V- State of Karnataka & Ors.)
5.(1997) 7 SCC 120 : (Dr.Preeti Srivastava -V- State of Madhya Pradesh & Ors.)
6.(1971) 1 SCC 619 : (Lachoo Mal -V- Radhe Shyam).
7.AIR 1979 SC 621 : (M/s. Motilal Padampat Sugar Mills Co.Ltd.-V-The State Of Uttar Pradesh & Ors.)
8.(2004) 1 SCC 139 : (State of Orissa & Ors.-V-Manglam Timber Products Ltd.)
9.AIR 1968 SC 718 : (Union of India -V- Anglo Afghan Agencies).
10.AIR 1991 SC 1055 : (Indira Bai -V- Nand Kishore).
11.AIR 1988 SC 1285 : (Jit Ram Shiv Kumar -V- State of Haryana & Ors.).
12.AIR 1993 SC 2414 : (Bengal Iron Corporation -V- Commercial

For Petitioner - M/s. Jayasankar Mishra,

H.Mishra, U.Satpathy, A.Panigrahi &N.N.Panda

For Opp. Parties - Addl. Government Advocate (For O.P.No.1).M/s. T.N.Patnaik &S.Patnaik (For O.P 2.) M/s. R.C.Mohanty & K.C. Swain.B.Sahu, A.K.Mishra (For OPP1&2) M/s. R.K.Dash, P.K.Tripathy & S.Pattanaik (For O.P.4)

For petitioners- Mr. Ramesh Ch. Rout.(In WPC Nos. 16444 to 16449)

For opp. Parties- Addl. Govt. Advocate (For O.Ps. 1 and 2 M/s. R.K.Dash, P.K. Tripathy & S.Pattanayak. (For O.P.No.3) M/s. R.C.Mohanty & K.C.Swain (For O.P.No.5) Mr. T.N.Pattanaik (For O.P. No.4)

M.M. DAS, J. W.P.(C) No. 10733 of 2009 has been filed by the Principal, Kalinga Institute of Medical Sciences (for short, 'the KIMS') and W.P. (C) Nos. 16444, 16445, 16446, 16447, 16448 and 16449 of 2009 have been filed by six petitioners - students of the said institution, who have been asked to be discharged from the M.B.B.S. Course , 2008-09.

2. The brief facts leading to the case are that the six petitioners-students appeared in the Orissa Joint Entrance Examination, 2008. Being selected to take admission in M.B.B.S. Course and being allotted the Medical College, i.e., the KIMS, they took admission in the said college and continued to study M.B.B.S. Course and were due to appear in the Ist Year M.B.B.S. Examination in the month of July, 2009, but were not permitted by the Utkal University to appear in the said examination in view of the letter dated 23.3.2009 of the Medical Council of India (for short, 'the M.C.I.') addressed to the Principal, KIMS, copy of which was endorsed to the Registrar, Utkal University and the authorities of the State.

Be it mentioned here that by an interim order passed by this Court, the said six petitioners-students were permitted to appear in the Ist Year M.B.B.S. Second Semester Examination, 2009 and thereafter, are continuing to prosecute the said course.

3. Learned counsel for the petitioners contended that the ground on which the M.C.I. has sought for discharge of the said six petitioners-students from the M.B.B.S. Course is that the petitioners – student, under the M.C.I. Regulation 5(5)(ii) of the Graduate Medical Education, 1997, were not eligible to be given admission to M.B.B. S. Course as they did not secure 50% marks in the Orissa Joint Entrance Examination. The six petitioners - students were admitted in the seats reserved for AIPMT. Learned counsel further submitted that in the Information Brochure for the Orissa Joint Entrance Examination, 2008 published by the Chairman, J.E.E. 2008, which

were given to the candidates for their information, under Clause 4.2, prescribed the eligibility of candidates for admission to Ist Year Medical Stream (M.B.B.S. and B.D.S.), that the candidate should have passed in 10+2 or has appeared in 2008 Examination of C.H.S.E., Orissa or any equivalent examination with Physics, Chemistry and Biology having at least 50% marks in the aggregate for the said subjects for general category candidates and 40% marks for Scheduled Caste/Schedule Tribe candidates. It was never prescribed in the said brochure that a candidate in order to be eligible to get admission to Ist Year Medical Stream should obtain a minimum of 50% marks in the Joint entrance Examination. The six petitioners - students being duly selected in the Joint Entrance Examination and offered with the chance of admission, they were admitted in the KIMS and, hence, after completing the Ist year course, they could not have been debarred by the Utkal University from appearing in the Second Semester M.B.B.S. Examination basing on the letter of the M.C.I. The M.C.I., if found fault with the process of admission of the six petitioners - students, should have taken immediate steps before the said six petitioners - students took admission to the said course and since the M.C.I. has failed to take such action and the six– petitioners - students have continued to prosecute the M.B.B.S. Course, as such, the order for their discharge from the position stands irretrievable. It was, therefore, contended that for no fault of the six petitioners - students, they cannot be debarred from prosecuting the M.B.B.S. Course at this belated stage.

4. Counter affidavits have been filed by the M.C.I. and the Orissa J.E.E. The State, however, has chosen not to file any return to the writ petitions. The M.C.I. in its counter affidavit has referred to various decisions of the apex Court and has, inter alia, pleaded that the primary responsibility for giving admission to the students in the medical courses in accordance with the directions issued by the Hon'ble Apex Court from time to time squarely lies with the competent designated admitting authorities of the State/Universities. The M.C.I. is required to ensure that the admissions in all the medical courses by the competent State authorities are made within the annual intake capacity sanctioned to each of the medical colleges by the M.C.I. within the time schedule fixed in accordance with the directions of the Supreme Court. Further, such admission is required to be made strictly in accordance with law. Reference has been made to the decision in the case of ***State of Kerala v. T.P. Roshna*** (1979) SCC 560, wherein, the Supreme Court held that the Medical Council Act, 1956 has constituted the Medical Council of India as an expert body to control the minimum standards of medical education and to regulate their observance. The Medical Council of India has power to prescribe the minimum standards of medical education and it has implicit power to supervise the qualifications or eligibility

standards for admission into medical institutions so as to prevent sub-standard entrance qualifications for medical course.

5. Section 33 of the Medical Council Act, 1956 has empowered the M.C.I. to frame regulations for laying down minimum standards of infrastructure, teaching and other requirements for imparting medicine course with prior approval of the Central Government. Further, reference has been made to the case of ***P.A. Inamdar*** v***. State of Maharashtra***, (2005) 6 SCC 537, wherein the Supreme Court has laid down that Committee for monitoring admission procedure and determining fee structure are permissible as regulatory measures aimed at protecting the interests of student community and such Committee shall continue until a suitable legislation or regulation is framed subject, however, to stipulation that the decisions of the Committee being quasi judicial in nature would always be subject to judicial review. Further, in the counter affidavit, the decision in the case of ***Krishna Priya Ganguli v. University Lucknow,*** (1984) 1 SCC 307 has also been referred, wherein the Supreme Court was examining the judgment of the Allahabad High Court in writ petitions filed by unsuccessful candidates, who could not get admission in the P.G. Medicine Course. In the said case, the Supreme Court has held that the High Court under Article 226 of the Constitution cannot ignore the rules framed by the Admissions Committee nor can it device its own criterion for admission.

6. Regulation 5 (5) of the M.C.I. Graduate Medical Education Regulation, 1997 reads as follows:

> "…… Procedure for selection to MBBS course shall be as follows:-

(i) In case of admission on the basis of qualifying examination under clause (1) based on merit, candidate for admission to MBBS course must have passed in the subjects of Physics, Chemistry, Biology and English individually and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination as mentioned in clause (2) of regulation 4. In respect of candidates belonging to scheduled castes, scheduled tribes or other backward classes, the marks obtained in Physics, Chemistry and Biology taken together in qualifying examination be 40% instead of 50% as above.

(ii) In case of admission on the basis of competitive entrance examination under clause (2) and (4) of this regulation, a candidate must have passed in the subjects of Physics, Chemistry, Biology and English individually and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination as mentioned in clause (2) of regulation 4 and

in addition must have come in the merit list prepared as a result of such competitive entrance examination by securing not less than 50% marks in Physics, Chemistry and Biology taken together in the competitive examination. In respect of candidates belonging to schedule castes, scheduled Tribes or other backward classes the marks obtained in Physics, Chemistry and Biology taken together in qualification examination and competitive entrance examination be 40% instead of 50% as stated above.

Provided that a candidate who has appeared in the qualifying examination the result of which has not been declared he may be provisionally permitted to take up the competitive entrance examination and in case of selection for admission to the MBBS course, he shall not be admitted to that course until he fulfills the eligibility criteria under regulation 4."

7. Reliance has also been placed in the case of ***Medical Council of India v. State of Karnataka and others*** (1998) 6 SCC 131 in support of the contention of the M.C.I. that the regulations framed by the M.C.I. are binding and mandatory and in relation to the conduct of Medicine Course, the Regulation framed by the Universities etc. so far as they are inconsistent with the Acts and the Regulation made by the M.C.I. are repugnant by virtue of Article 254 of the Constitution of India inasmuch as the Act is relatable to List I, Schedule - VII of the Constitution of India. This ratio is also reaffirmed by the Constitution Bench of the Supreme Court in the case of ***Dr. Preeti Srivastava v. State of Madhya Pradesh and others,*** (1997) 7 SCC 120. In substance, the M.C.I. has directed discharge of six students – petitioners, who have not secured 50% marks in the Joint Entrance Examination, 2008.

8. Now referring to the counter affidavit filed on behalf of the J.E.E. Committee, 2008, it is seen that the Chairman in the said affidavit has stated that the J.E.E. Examination was held in the year 2008, which published the result and prepared the merit list of the candidate as per their performance in the examination and conducted the counselling/admission of the candidates commensurating to their merit rank in the merit list where-after, the functions of the said Committee came to an end. It is further stated that the Policy Planning Body (for short, 'the P.P.B.') has been constituted by the State, which is a statutory committee as per section 3 of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (for short, 'the Act 2007') . The aforesaid Act, 2007 was legislated by the Orissa Legislative Assembly basing on the decision of the Supreme Court in the case of P.A. Inamdar (supra).

9. Section 3 of the Act, 2007 provides the method of admission for all professional educational educations. The aforesaid enactment was

challenged before this Court in W.P. (C) No. 2446 of 2007 and other connected writ petitions, wherein this Court declared the said enactment as ultra vires by its judgment dated 18.5.2007. The State has filed a Special Leave Petition against the said judgment which is pending before the Supreme Court. The Supreme Court in its interim order dated 1.6.2007 and 16.5.2008 directed the State Government to keep the Act in force except section 4(1), 4(2), 4(4) and 6(1), 6(2) and 6(3), which were stayed subject to stipulations provided in the said order. The P.P.B. is the statutory body, which is to recommend the modalities for conducting the examination and counselling/admission as approved by the Government of Orissa in its Industries Department. The modalities/procedures were mentioned in the information brochure J.E.E. 2008 which was published by the Chairman, J.E.E. 2008 as per the recommendation of the P.P.B. and approved by the State Government and were provided to the candidates for their information. In clause - 4.2, the eligibility of the candidates for admission to Ist Year Medical Stream (M.B.B.S. and B.D.S.) was prescribed. According to the said clause, a candidate would be eligible to take admission to the said course if he has passed 10+2 examination conducted by the C.H.S.E. or equivalent examination with Physics, Chemistry and Biology and has obtained 50% marks in the said subjects if he belongs to general category and 40% marks if he belongs to Scheduled Caste/Scheduled Tribe community. Since there was no provision in the information brochure informing the candidates that they are to obtain minimum 50% marks in case of general candidates and 40% of marks in case of S.C./S.T. candidates in the entrance examination in order to be placed in the merit list, the same was not implemented by the J.E.E. Committee, 2008 and the six students-petitioners have already been given admission and have been prosecuting their study and, as such, they should not be disturbed.

10. It is not disputed that under the Regulation framed by the M.C.I. which is a statutory regulation and has been held to be mandatory by the apex Court, a candidate to get admission to the medical stream is required to obtain 50% minimum marks in the entrance test if he is a general candidate and 40% of marks in case of S.C./S.T. candidate. But such fact was lost sight of and was omitted to be mentioned in the information brochure, which was recommended by the P.P.B. and approved by the Government. Hence, the J.E.E. Committee, which owes its existence to the P.P.B. cannot be faulted with for omitting to mention such a condition in the information brochure. No reason is also assigned by the M.C.I. as to why the M.C.I. in order to supervise and regulate Medical Courses in the country came out with the letter under Annexure-3 after more than a year from the date when

the six students-petitioners were admitted to the M.B.B.S. Course and not earlier.

11. The State Government, however, has chosen not to file any return in this case and thereby, nothing is brought before this Court as to why the aforesaid condition with regard to minimum percentage of marks to be obtained in the Joint Entrance Examination as per regulation of the M.C.I. was not followed or was omitted in the information brochure and approved by it in the year 2008. It is also strange that as submitted before this Court in the Joint Entrance Examination, 2009 also such a condition was omitted from the information brochure and the candidates, as per the merit list published by the J.E.E. 2009 have also been given admission to the medical stream in different colleges of the State including the Government and private. Many of such candidates might have secured less than the minimum percentage of marks in the J.E.E. as per the regulation of the M.C.I. Hence, it is clear that if the action taken by the M.C.I. with regard to the six petitioner- students in the present writ petitions, is to be repeated in case of all such students in all the medical colleges of the State for the year 2008-09, a chaotic situation would be inevitable. This Court, therefore, is called upon to examine as to whether the principle of estoppel can be made applicable in the facts of the present case, even though it is a well known principle of law that there is no estoppel against a Statute.

12. Estoppel is a rule of evidence and the general rule of estoppel is enacted in section 115 of the Evidence Act, 1872 which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

13. It is also well known that estoppel is a product of an equitable doctrine. In the case of ***Lachoo Mal v. Radhe Shyam*** (1971) 1 SCC 619, the Supreme Court held that everyone has a right to waive and to agree to waive the advantage of law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public policy.

In the case of ***M/s. Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others,*** AIR 1979 SC 621, this issue has been dealt with by the Supreme Court. In the said case, where a representation was made by the State Government that the petitioners' factory would be exempted from payment of sales tax for a period of three years from the date of commencement of production, it was proved that the petitioners had, as a consequence of the representation, set up the factory in the State, but the State Government refused to honour its

representation and claimed sales tax for the period, it had said that it would

not. The Government took the plea that in the absence of notification under section 4-A, the State Government could not be prevented from enforcing the liability to sale tax imposed on the petitioners under the provisions of the Sales Tax Act; that the petitioners had waived their right to claim exemption; and that there could be no promissory estoppel against the State Government so as to prevent it from formulating and implementing its policies in public interest.

14. The Supreme Court rejected all the three pleas of the Government and reiterated the well-known preconditions for the operation of the doctrine of estoppel. It was observed that the Government is equally susceptible to the operation of the doctrine in whatever area or field the promise is made – contractual, administrative or statutory and the Supreme Court held as follows:-

> "The law may, therefore, now be taken to be settled as a result of this decision that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution……..."
>
> The Supreme Court placing reliance upon large number of judgments held that it is not necessary that by altering the position by the promisee, he must have some detriment to his position. Thus, a person raising the plea of promissory estoppel does not have to establish that he suffers from any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise, meaning thereby that the promisee must have led to act differently from what he would otherwise have done. It is not a detriment but a benefit to him which he could have received on acting upon the promise made by the other side.

In the case of ***State of Orissa and others v. Manglam Timber Products Ltd.*** (2004) 1 SCC 139, the Supreme Court has held that the statutory authority making a promise cannot be permitted to take the benefit of its own mistake and back out from the promise made by it if the other side has acted upon it. The Court held as under:

"……..To attract the applicability of the principle of estoppel, it is not necessary that there must be a contract in writing entered into between the parties. We are not satisfied even prima facie that it was a case of an error committed by the State Government of which it was not aware. The State of Orissa should have, while holding out the representation, taken into consideration the fact – who will have to do the replantation and that the permission of the Government of India would be needed for the purpose. The State cannot take advantage of its own omission……."

The aforesaid principle was built upon in the case of ***Union of India v. Anglo Afghan Agencies,*** AIR 1968 SC 718, where it was said:-

"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen….."

15. It is naïve to state that as already discussed, estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. (See ***Indira Bai v. Nand Kishore***, AIR 1991 SC 1055).

16. No doubt, estoppel does not lie against Statute, nor the Court has a power to issue any direction contrary to law, as has been reiterated by the Supreme Court in the case of ***Jit Ram Shiv Kumar v. State of Haryana and others***, AIR 1988 SC 1285, ***Bengal Iron Corporation v. Commercial Taxes Officer and others***, AIR 1993 SC 2414, ***Chandra Prakash Tiwari v. Shakuntala Shukla,*** AIR 2002 SC 2322 and ***I.T.C. Ltd. v. Person Incharge, AMC, Kakinada and others***, AIR 2004 SC 1796.

17. Applying the ratio of the aforesaid decisions and the settled position of law to the facts of the present case, where it is found that admittedly, the Policy Planning Body of the State constituted under the Act, 2007 while framing the information brochure for information of the candidates who were to appear in the Joint Entrance Examination of the year 2008 for taking admission into the medical courses, have omitted to mention the Regulation framed by the M.C.I. that a candidate is required to secure minimum 50% marks in the Joint Entrance Examination for being eligible to take admission to such medical courses. The petitioners having been duly selected in the Joint Entrance Examination were offered admission and they have taken

admission to MBBS Course and prosecuting their study for the last more than one year. Had the above Regulation been adhered to by the Policy Planning Body and the Joint Entrance Examination Committee constituted by the said body for the year 2008, the petitioners would not have been selected and would not have changed their position by taking admission into

MBBS Course. In the event, the cancellation of their admission to such course is upheld, the petitioners-students would be thrown into a lurch for no fault of theirs. It, therefore, appears that even though the doctrine of estoppel does not apply to the facts of the case in a strict sense, but the same is a product of an equitable doctrine and the Joint Entrance Examination Committee which became defunct after completion of Joint Entrance Examination 2008, being non-existent, cannot cancel the admission given to the petitioners. The M.C.I. also cannot direct the Principal, KIMS for discharging the six petitioners – students from MBBS Course at this belated stage. Though it was open for the M.C.I. to take up the matter with the State Government immediately after the information brochure was published/distributed to the students before the Joint Entrance Examination, 2008 was held, which could have prevented the petitioners – students from changing their position to their detriment, but no such steps were taken. In almost similar facts involved in this case, the Supreme Court in the case of ***A.Sudha v. University of Mysore and another***, AIR 1987 SC 2305, finding that the facts were similar to a previous judgment of the said court, in the case of ***Rajendra Prasad Mathur v. Karnataka University and another,*** AIR 1986 1448 held as follows:-

> "We accordingly endorse the view taken by the learned Judge and affirmed by the Division Bench of the High Court. But the question still remains whether we should allow the appellants to continue their studies in the respective Engineering Colleges in which they were admitted. It was strenuously pressed upon us on behalf of the appellants that under the orders initially of the learned Judge and thereafter of this Court they have been pursuing their course of study in the respective Engineering Colleges and their admissions should not now be disturbed because if they are now thrown out after a period of almost four years since their admission their whole future will be blighted. Now it is true that the appellants were not eligible for admission to the Engineering Degree Course and they had no legitimate claim to such admission. But it must be noted that the blame for their wrongful admission must lie more upon the Engineering Colleges which granted admission than upon the appellants. It is quite possible that the appellants did not know that neither the Higher Secondary Examination of the Secondary

Education Board, Rajasthan nor the first year B.Sc. examination of the Rajasthan and Udaipur Universities was recognized as equivalent to the pre-University Examination of the Pre-University Education Board, Bangalore. The appellants being young students from Rajasthan might have presumed that since they had passed the

first year B.Sc. examination of the Rajasthan or Udaipur University or in any event the Higher Secondary Examination of the Secondary Education Board, Rajasthan they were eligible for admission. The fault lies with the Engineering Colleges which admitted the appellants because the Principals of these Engineering Colleges must have known that the appellants were not eligible for admission and yet for the sake of capitation fee in some of the cases they granted admission to the appellants. We do not see why the appellants should suffer for the sins of the managements of these Engineering Colleges. We would, therefore, notwithstanding the view taken by us in this judgment allow the appellants to continue their studies in the respective Engineering Colleges in which they were granted admission. But we do feel that against the erring Engineering Colleges the Karnataka University should take appropriate action because the managements of these Engineering Colleges have not only admitted students ineligible for admission but thereby deprived an equal number of eligible students from getting admission to the Engineering Degree Course. We also endorse the directions given by the learned Judge in the penultimate paragraph of his judgment with a view to preventing admission of ineligible students".

18. Considering all these aspects and applying the law as laid down by the apex Court to the facts of the present case, it is inevitable to conclude that the petitioners – students in W.P.(C) Nos. 16444, 16445, 16446, 16447, 16448 and 16449 of 2009 should not be discharged from their seats and their admission to M.B.B.S. Course should not be treated to have been cancelled. The said orders under Annexures-5 in W.P.(C) Nos. 16444, 16445, 16446, 16447, 16448 and 16449 of 2009 stand quashed. The petitioners - students shall be permitted to continue to prosecute the M.B.B.S. Course and the Utkal University shall also allow them to appear in the University examinations. Since the petitioners – students have already appeared in the second semester examination of Ist M.B.B.S. Course, the Utkal University shall declare their results as early as possible preferably within three weeks hence, if the result of such examination is already declared in respect of other examinees.

19. In the result, the writ petitions are allowed, but in the circumstances, without any cost.

Writ petitions allowed.

2010 (II) ILR – CUT-158

R.N.BISWAL, J.

W.P.(C) NO.5283 OF 2008 (Decided on 05.05.2010)

PRASANT KUMAR BISOI …….. Petitioner.

.Vrs.

TRIPATI BISOI & ORS. ……... Opp.Parties.

ORISSA PANCHAYAT SAMITI ACT, 1959(ACTNO.7 OF 1960) – SEC.45(B)(H).

Petitioner elected as Panchayat Samiti Member – His election challenged as he had committed murder of his father – He was convicted U/s.302 I.P.C. which was altered in appeal to one under Section 304-II I.P.C. and sentence was reduced to 5 years – Plea that by the time he filed nomination he had already under gone the sentence of five years not accepted since the offence involves moral turpitude – Held, learned Courts below rightly declared the return candidate as disqualified for becoming a member of Panchayat Samiti.

(Para 19)

Case laws Referred to:-

1.1994 (I) OLR 386 : (Gopal Krishna Bhanja -V-Sahadeb Bisoi & Anr.)
2.(2009)7 SCC 526 : (Jeewan Kumar Raut & Anr.-V-Central Bureau of Investigation).
3.(2009) 1 SCC : (Mahmadhusen Abdulrahim Kalota Shaikh -V- Union of India & Ors.).
4.(1972) I SCC 214 : (Hardwari Lal -V-Kanwal Singh)
5.(2001) 8 SCC 233 : (Hari Shankar Jain -V- Sonia Gandhi).
6.2007 (Supp.-1) OLR 400 : (Chandrakanti Bhoi -V- Collector, Bolangir).
7.(1997) 4 SCC page-1 : (Allahabad Bank -V- Deepak Kumar Bhola).
8.AIR 1999 SC 3309 : (Thampanoor Ravi -V- Charupara Ravi & Ors.).
9.2008 (suppl.II) OLR 832 : (Paurnamasi Lenka -V- Tahasildar).
10.(1996)4 SCC 17 : (Pawan Kumar -V- State of Hariyana & Anr.)

For Petitioner - M/s. Manoj Kumar Mishra, P.K.Das & A.K.Nayak.
For Opp.Parties – M/s. G.N.Mishra, S.C.Sahoo & P.K.Sahoo (for O.P.No.1)

R.N.BISWAL, J. In this writ petition, the petitioner challenges the judgment dated 25.03.2008 passed by the learned District Judge, Koraput, Jeypore in Election Appeal No.5 of 2007 confirming the judgment dated 6.8.2007 passed by the learned Civil Judge (Senior Division), Jeypore, Koraput in Election Petition No.15 of 2007.

PRASANT KUMAR BISOI -V- TRIPATI BISOI [*R.N.BISWAL,J.*]

2. As per the notification of the State Election Commissioner, election for member of Panchayat Samiti of Kusumi Gram Panchayat was scheduled to be held on 21.02.2007. The petitioner and two others contested for the office of Panchayat Samiti Member on the scheduled date and the writ petitioner own the election. Tripati Bisoi, one of the contestants filed Election Petition No.15 of 2007 before the court of learned Civil Judge (Senior Division), Jeypore, Koraput challenging the election of the returned candidate on several grounds including the ground that the returned candidate was disqualified for becoming a member of Panchayat Samiti and continuing as such since he committed murder and was convicted under Section 302 of I.P.C. by the learned Sessions Judge, Koraput at Jeypore in S.C No.297 of 1991, albeit in Criminal Appeal No.307 of 1992, this Court altered the conviction to Section 304-II IPC vide order dated 17.07.2001, and reduced the sentence to five years only.

3. The writ petitioner was opp. party No.1 and the present opposite party No.1 was the petitioner in the election petition. To establish his case, the election petitioner examined himself alone as P.W.1. The opposite parties examined two witnesses to establish their stand. Besides oral evidence, four documents were exhibited on behalf of the election-petitioner. After assessing the evidence on record, the trial court held that there was no dispute that the returned candidate was convicted for the offence under Section 304-II of I.P.C. on the accusation of killing his father, and was sentenced thereunder to undergo R.I. for 5 years and that killing ones own father is an offence involving moral turpitude and accordingly, allowed the election petition on contest in part and the election of the returned candidate as member of Panchayat Samiti of Kusumi Gram Panchayat was declared void. The returned candidate preferred appeal vide Election Appeal No.5 of 2007 before the District Judge, Koraput and it was dismissed. So, the writ petition, as stated earlier.

4. Learned counsel for the petitioner submits that the petition under Section 44-A of the Orissa Panchayat Samiti Act,1959(hereinafter referred to as Samiti Act) is not maintainable in view of Article 243-F (2) of the Constitution of India read with Section 45-B of the Samiti Act. Article 243-F (2) of the Constitution of India envisages that the question of disqualification in respect of member of a Panchayat has to be decided by the authority as prescribed by the State legislatures. Section 45-B of the Samiti Act

stipulates that whenever it is alleged that any member of a Samiti is or has become disqualified, any other member may apply to the District Judge having jurisdiction over the place where the office of the Samiti is situated for a decision on the allegation. In the case at hand, since the petitioner is alleged to have incurred disqualification on the ground of killing to his father, opposite party No.1 ought to have filed a petition under section 45-B of the

Samiti Act before the District Judge, Koraput for a decision, instead of an election petition. According to learned counsel for the petitioner, it is the settled principle of law that special provision derogates the general provision. Section 44-A is the general provision of the Samiti Act, which stipulates about filing of election petition. But, Section 45-B is the special provision to decide the question of disqualification. So, the election petition is not maintainable. In support of his submission, he relies on the decisions in the case of **Gopal Krishna Bhanja** vs. **Sahadeb Bisoi and another** 1994(I)OLR 386, **Jeewan Kumar Raut and another** vs**. Central Bureau of Investigation,**(2009)7 Supreme Court Cases 526 and **Mahmadhusen Abdulrahim Kalota Shaikh** vs. **Union of India and others** (2009)2 Supreme Court Cases.

5. Learned counsel for the petitioner further submits that this Court in Criminal Appeal No.307 of 1992 has held that the occurrence took place at the spur of the moment and the appellant (petitioner) had no intention to cause death. When he (petitioner) found that his father was digging earth for the purpose of demarcating the house, he might have entertained doubt that by that process he would be deprived of his share in the property and brought out the spear to pierce the same on his father's belly. Accordingly, the order of conviction under section 302 of I.P.C. was altered to one under section 304-II of I.P.C. Under such circumstance conviction for the offence under section 304-II of I.P.C. does not involve moral turpitude.

6. Learned counsel for the petitioner further submits that as envisaged under Article 243-F(1) of the constitution, if a person is disqualified to contest the election to the State Legislature, he would be disqualified to contest the election to the Panchayat Samiti. Sub-Section (3) of section 8 of the Representation of the People Act,1951 lays down that after six years of release of a convict from custody, he would not suffer from any disqualification to contest the election. In the present case, the petitioner was convicted under Section 302 of I.P.C. and was sentenced to undergo imprisonment for life on 7.7.1992 by the trial court in S. C. No.297 of 1991. Being aggrieved with the said judgment and order, he preferred Criminal Appeal no.307 of 1992 before this Court and on 19.9.1996 he was released on bail. The Criminal Appeal was allowed in part on 7.10.2001 and the order of conviction under Section 302 was altered to Section 304-II of I.P.C. and the sentence was reduced to 5 years. Section 16-B(2) of the Samiti Act

provides that in absence of any provision in the said Act, the provision laid down under the Representation of the People Act,1951 shall **mutatis mutandis** apply to it. The cessation of disqualification in respect of an offence having not been provided in the Samiti Act, the provision contained under Section 8 of the Representation of the People Act has full application. The petitioner was in jail from 1991 to 1996 when he was released on bail

So, by the year 2007 i.e. the year of election, the disqualification, if any with the petitioner has already been efaced by operation of law.

7. Learned counsel for the petitioner further submits that the election petition does not contain any averment that the petitioner has been convicted for an offence involving moral turpitude. It is well settled that the election petition has to be filed with specific averment. Mere enumeration of the section is not sufficient. In support of his submission, he relies on the decision **Hardwari Lal** vs. **Kanwal Singh**(1972)I Supreme Court Cases 214 and **Hari Shankar Jain vs. Sonia Gandhi**,(2001)8 SCC 233.

8. At last, learned counsel for the petitioner submits that the petitioner had filed a time petition coupled with a medical certificate on 11.7.2007 in the election petition, but the learned civil Judge rejected the same and closed the hearing without affording any reasonable opportunity to the petitioner to adduce evidence. As he was not allowed to be examined in the election petition, he could not produce any material to substantiate his stand and was highly prejudiced.So, according to the learned counsel for the petitioner, the writ petition should be allowed for complete violation of the principle of natural justice.

9. On the contrary, learned counsel for opp.party no.1 contends that admittedly opp.party no.1 was a candidate in the election fray, as such, he is competent to file an election petition under section 44-C(1)of the Samiti Act and the Civil Judge(Sr.Division) is competent to decide the election petition. Section 45-B of the Samiti Act empowers the District Judge to decide the question of disqualification, but, the District Judge can be moved by a member of the Samiti only. A combined reading of Sections 44-C, 44-L and 45-B of the Act, clearly shows that only a defeated candidate in the election can agitate the question of disqualification of the returned candidate in an election petition and any elected member or Chairman of a Panchayat Samiti can agitate the question of disqualification of a member before the District Judge under Section 45-B of the Act. So, the learned counsel for the opposite party No.1 submits that the election petition is maintainable before the Civil Judge. In support of his submission he relied on the decision in the case of **Chandrakanti Bhoi vs. Collector, Bolangir,** 2007 (suppl.-1) OLR 400.

10. Learned counsel for opp.party no.1 further contends that the phrase ‘moral turpitude’ is an expression which describes a conduct inherently

base, depraved or having any connection showing depravity, as per the decision in the case of **Baleshwar Singh vs. District Magistrate,** which has been approved by the Supreme Court in the case of **Allahabad Bank Vs.Deepak Kumar Bhola (1997)4 SCC page-1.** In the present case, the petitioner pierced a spear on the abdomen of his father, while the latter was digging foundation in the homestead land, resulting his instantaneous death.

The conduct of the writ petitioner in killing his father is inherently vile, connected with depravity. Thus, his conviction under Section 304-II involves 'moral turpitude'**.**

11. Learned counsel for opp.party no.1 next contends that although Section 16-B of the Samiti Act envisages application of Representation of the People Act, to the Samiti Act, but such application is restricted to the cases enumerated under clause (i) to (iv) of sub-section (2) to section 16-B of the Samiti Act that too, in case of absence of any provision in the said Act. The provisions contained under clause (i) to (iv) of sub-section 2 of S14-1ection 16-B of the Samiti Act, do not permit reading of Section 8 of the Representation of the People Act into the Panchayat Samiti Act**.** Otherwise also, the specific disqualifications having been prescribed under Section 45 of the Samiti Act, there is no scope for reading of the provision contained in the Representation of the People Act by application of Section 16-B of the Samiti Act**.** The election being a creation of the statute, all disputes shall be confined to that statute only, and reading of any provision from other statute is not permissible. In support of his submission, learned counsel for the opp.party no.1 relied on the decision **Thampanoor Ravi vs.Charupara Ravi and others,** AIR 1999, Supreme Court 3309.

12. Learned counsel for opp.party no.1 further contends that there is specific averment in the election petition that petitioner was convicted for the offence under section 304-II of I.P.C. involving moral turpitude.

13. Learned counsel for the opp party no.1 lastly contends that the writ petitioner deliberately avoided the witness box. He examined another witness on his behalf, but did not prefer to examine himself, despite several opportunities given to him. Otherwise also, since the petitioner has been convicted under Section 304-II of I.P.C. involving moral turpitude and certified copy of the judgment has been exhibited, he could not have improved his case had he been examined. So, there is no question of violation of natural justice. In support of his submission, learned counsel for opp.party no.1 relied on the decision in the case of **Paurnamasi Lenka vs. Tahasildar,** 2008 (suppl.II) OLR 832.

14. The following points emerge out from the argument advanced by learned counsel for the parties for consideration:

i) whether the election petition is maintainable?

ii) Whether conviction of the petitioner under Section 304-II of I.P.C. involves moral Turpitude and if so, whether the disqualification had already been defaced by the time of filing nomination by the petitioner?

iii) whether there is pleading in the election petition that the petitioner is convicted under any offence involving moral turpitude?

iv) whether there is violation of natural justice by not allowing the petitioner to be examined as a witness before the Civil Judge(Sr.Division), Koraput-Jeypore?

15. As per Section 44-A of the Samiti Act, no election of a person as a member of Samiti shall be called in question except by an election petition. Section 44-C stipulates that an election petition may be presented by any candidate in the election. Section 44-B lays down that election petition shall be presented on one or more of the grounds specified in Section 44-L before the Subordinate Judge having jurisdiction over the place at which the Samiti situates. Section 44-L(1)(c)envisages that the Subordinate Judge shall declare the election of a returned candidate void, if he is of the opinion that such person is disqualified for election. Section 45(1)(h) reads as follow:

"45.**Disqualification for becoming a member and continuing as a member-** (i) A person shall not be eligible to stand for election under Sub-section(1)of Section 16, if he-

Xxx xxx xxx

Xxx xxx xxx

Xxx xxx xxx

(h) is convicted for an offence involving moral turpitude**.**

In the present case, admittedly opp.party no.1 was a contestant in the election. But as stated earlier, as per submission of learned counsel for the petitioner the District Judge alone is competent to decide the question of disqualification under Section 45-B of the Samiti Act and an election petition is not maintainable, in the instant case, before the Civil Jude (Senior Division) Jeypore. At this stage, it would be profitable to quote Section 45-B of the Samiti Act which reads as follows:

"45-B.**District Judge to decide question of disqualification:-**

(1) Whenever it is alleged that any member of a Samiti has become disqualified, or whenever any such member is himself in doubt whether or not he is or has become disqualified such member or any other member may, and the Chairman at the request of the Samiti shall, apply to the District Judge, having jurisdiction over the place

where the office of the Samiti is situated, for a decision on the allegation or doubt.

(2) The District Judge, after holding an enquiry in the prescribed manner, shall determine whether or not such member is or become disqualified and his decision shall be final,

(3)Pending such decision the member shall be entitled to act as if he was not disqualified".

As per this provision, a Samiti member including the Chairman can only initiate a proceeding alleging disqualification of another member. In other words, one who is not a samiti member cannot take resort to the provision contained under Section 45-B of the Panchayat Samiti Act. Admittedly, opposite party No.1 is not a Samiti member, so he could not have legally filed a petition under the said provision. In the case of Chandrakanti Bhoi (supra), this Court while dealing with Section 26 of the Orissa Gram Panchayat Act, which is pari-materia to the provision under Section 45-B of the Samiti Act held that the Collector, cannot be restrained from proceeding under Section 26 of the Gram Panchayat Act on the ground that an election petition is pending before the Civil Court. It has also been held in the said case that a person who contested the election, cannot file an application under Section 26 of the Orissa Gram Panchayat Act, he can only file an election petition. Furthermore, it has been held therein that a member of the Samiti cannot move an election petition challenging the qualification of a returned candidate, the course open to him is to file a petition under Section 26 of the Gram Panchayat Act, before the Collector. The decisions cited by learned counsel for the petitioner shall not be applicable to the present case. So, it is held that the election petition is maintainable.

16. Now, coming to the offence involving moral turpitude, in the present case, the petitioner on being convicted under Section 304-II of I.P.C. was sentenced to undergo imprisonment for five years. It would be profitable at this stage to quote Section 304-II of I.P.C. which reads as follows:-

"304.**Punishment for culpable homicide not amounting to murder**- Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

One is liable to be punished on the second part of the above quoted section, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. As appears from the record, while the deceased, who is no other than father of the petitioner was engaged in digging earth to construct a boundary wall, the petitioner being armed with a spear rushed there and pierced it on his abdomen causing the intestinal matters emerged

out. As found from the judgment of the District Judge, Koraput-Jeypore, on perusal of the post mortem report, it found one incised wound of size 3"x12"x2" on the epigestric region, slightly towards right side of the abdomen and another incised wound of size 2"x12"x1" just below the scapula of the right side of the body, the first injury being the entrance and the 2nd one the exit. So the intensity of the force applied for piercing the spear appears to be very high. This Court in Criminal AppealNo.307 of 1992 held that the appellant (petitioner) had the knowledge that his act was likely to cause death. In a Hindu Society, father is considered to be taller than sky. According to Manu, the great seer of India, the son delivers his father from the hell called 'put', hence he is called 'putra'. He further says by a son, a man obtains victory over all people. A couplet of Manu which rings through the ages runs as follows:

BRUDHOU CHA MAATAAPITARAU SADHWI VARYA SUTAHA SISHUHU
APYAKARJASATANKRUTWA BHARTABYA MANURABRABIT

It means aged parents, a chaste wife, and an infant son should be maintained even by doing a hundred misdeeds. In other words, the sin one incurs in leaving the aged parents, a chaste wife and an infant son in lurch outweighs the sin he incurs in doing hundred misdeeds. This is the relationship between the father and son in a Hindu Society. The apex court in the case of **Pawan Kumar** v. **State of Hariyana and another** (1996) 4 SCC, 17 held that:-

> "Moral turpitude is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity."

In the case of Baleshwar Singh v. District Magistrate and Collector, Banaras 2, AIR 1959,All-71, it was observed as follows:

> "The expression moral turpitude is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private

and social duty which a person owes to his fellowmen or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man."

Relying on those two preceding decisions, the apex Court in the case of Allahabad Bank and another (supra) held as follows:-

> "What is an offence involving "moral turpitude" must depend upon the facts of each case. But whatever may be the meaning which may be given to the term "moral turpitude" it appears to us that one of the most serious offences involving "moral turpitude" would be where a person employed in a banking company dealing with money of the general public, commits forgery and wrongfully withdraws money which he is not entitled to withdraw."

I have already stated about the status of the father in Hindu Society and the obligation of the son towards him, so also the circumstance and the manner in which the petitioner killed his father by piercing the spear on his abdomen causing the intestinal matters emerged out.). Taking into consideration the relationship between the petitioner and the deceased and the propensity of the force in piercing the spear, the conduct of the petitioner must be held to be due to vileness and depravity. It is contrary to accepted customary rule and duty between the father and son**.** Under such circumstances, I am of the view that the conviction of the petitioner under Section 304-II of I.P.C. involves 'moral turpitude'.

17. Now the question is, whether the said disqualification had already been efaced due to efflux of time, by the time, petitioner filed the nomination to contest the election. The incident took place on 26.6.1991. On being arrested the petitioner was remanded to jail in the same year. He was convicted for the offence under Section 302 of I.P.C. on 7.7.1992 and was sentenced to undergo imprisonment for life. As submitted by learned counsel for the petitioner, he was released on bail on 19.9.1996.Criminal appeal no.307 of 1992 was disposed of on 17.7.2001, wherein the offence was altered to one under Section 304-II of I.P.C. and the petitioner was sentenced to undergo imprisonment for five years, by which time he had already undergone the sentence of five years. He filed his nomination in January 2007 by which time more than six years from the date of his release had already been elapsed. Article 243-F(I) of the Constitution reads as follows:

"243-F.**Disqualifications for membership- (1)** A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State."

Sub-section (3) of Section 8 of the Representation of the People Act, 1951 envisages that:

"A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release".

There is no provision like sub-section (3) of Section 8 of the Representation of the People Act in the Samiti Act. But the question is whether the said provision of Representation of the People Act would be applicable to the present case. Article 243-F(1)(a)of the Constitution of India stipulates that a person is disqualified for being chosen as a member, if he has been disqualified under any law prescribed for the purposes of election to the Legislature of the State. The said Article comes under Part-IX of the Constitution, which deals with Panchayats. Learned counsel for the petitioner submits that Section 16-B(2)of the Samiti Act provides that in absence of any provision in the Samiti Act the provision laid down under the Representation of the People Act shall mutatis mutandis apply to it. So, according to learned counsel for the petitioner since there is no provision with regard to ceasation of the disqualification in the Samiti Act, the provision contained under Section 8 of the Representation of People Act shall be fully applicable. Section 16-B of the Panchayat Samiti Act reads as follows:

"16-B.**Superintendence, direction and control of elections to vest in the Election Commission** (1) The Superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Samitis shall be vested in the Election Commission.

(2)In the absence of any provision in this Act or the rules made there under the provisions contained in the Representation of the People Act,43 of 1950 and the Representation of the People Act,1951 shall mutatis mutandis apply for the purposes of election to Samitis in the following matter, namely:

(i) preparation, revision and updating of electoral rolls;

(ii)appointment of Electoral Registration Officers, Presiding Officers and Polling Officers;

(iii)qualifications and disqualifications for registration as voter;

(iv) such other matters which have to be, or may be required to be, deal with for the purpose of conducting free and fair election

(3) Unless the Election Commission, by order published in the Gazette, directs otherwise, so much of the electoral roll of the Assembly constituency for the time being in force as relates to a Samiti constituency shall, subject to such revision or updating as may be necessary, be the electoral roll of the Samiti constituency for the purpose of election to the Samiti."

As found from the above quoted section, it only deals with superintendence, direction and control of elections by the Election Commission so far preparation of electoral rolls and conduct of election of the Samitis are concerned. It does not speak of qualification for becoming a member of a Panchayat Samiti. As quoted earlier, as per Article 243-F(1) of the Constitution of India, a person shall be disqualified for being chosen as, and for being, a member of a Panchayat, if he is so disqualified by or under any law, for the purposes of elections to the Legislature of the State. The petitioner is disqualified under Section 45(h) of the Samiti Act, enacted by State Legislature, as he has been convicted for an offence involving moral turpitude. There is a provision under Section 25(1) (g) of the Gram Panchayat Act, 1964, wherein it is laid down that a person shall be disqualified for being elected or nominated as a Sarapanch or any other member of the Gram Panchayat, if he is convicted of an offence involving moral turpitude and sentenced to imprisonment of not less than six months, unless a period of five years has elapsed since his release. But no such provision is there in the Samiti Act. It appears that the State Legislature consciously have not incorporated such a provision in the Samiti Act. It has been held by the apex Court in the case of Thampanoor Ravi v. Charupara Rabi(supra) as follows:

"Under what circumstances and subject to what limitations a person could be declared to have incurred disqualification is a matter of policy of law and the Courts have cautioned themselves by stating that right to vote, right to elect or contest an election is a creature of statute and circumscribed by the limitations contained therein."

So, in my view Section 8 of the Representation of People Act shall not be applicable to the present case. Accordingly, it is held that the disqualification of the petitioner has not been efaced by efflux of time.

18. Now coming to the point of absence of pleading with regard to conviction of the petitioner for an offence involving moral turpitude, it would be profitable to quote para-4 of the election petition, which reads as follows:-

> "During scrutiny the petitioner and opposite party No.2 objected to the candidature of the opposite party No.1 on the ground that the opposite party No.1 is a convicted person having been convicted for an offence involving moral turpitude".

Again, in paragraph-6 of the election petition it is found to have pleaded as follows:-

> "The opposite party No.1 is a resident of Village: Kusumi where the petitioner also resides. He was tried in S.C. Case No.297 of 1991 by the Hon'ble Sessions Judge, Koraput at Jeypore alleging commission of an offence punishable U/s 302 I.P.C. He was convicted by the Hon'ble Sessions Judge, Koraput at Jeypore and upon an appeal preferred by him before the Hon'ble High Court of Orissa, Cuttack vide Criminal Appeal Case No.307/92 the conviction U/s 302 I.P.C. was altered to a conviction U/s.304 II I.P.C. vide order dated 17.7.2001. Thus the opposite party No.1 possesses disqualification U/s.45 (h) of Panchayat Samiti Act and the Election is vitiated".

So, it can not be said that there is no pleading that the petitioner was convicted for an offence involving moral turpitude, unlike the submission made by learned counsel for the petitioner.

19. With regard to the point of violation of natural justice, it is found from the judgment of the Civil Judge (Senior Division), Jeypore, that the petitioner kept himself aloof from the proceeding in the election petition. He did not choose to examine himself as a witness. Admittedly, one witness was examined on his behalf. He should have been examined as first witness. So, as submitted by the learned counsel for the petitioner that he was not given opportunity to examine himself, cannot be accepted. Furthermore, had he been examined, he could not have improved his case. He could not have denied that he was not convicted under section 302 of I.P.C. and was sentenced to undergo R.I. for life in S.C. Case No.297 of 1991 of the court of learned Sessions Judge, Koraput, Jeypore. Similarly, he could not have denied that on appeal the said order of conviction was altered to section 304-II of I.P.C. and the sentence was reduced to 5 years. So, there was no violation of natural justice. This view is supported by the decision in the case of Paurnamasi Lenka (supra), wherein a division bench of this court held:-

"Therefore, whether the principles of natural justice should be applled in a given case depends upon the facts and circumstances of that case. In case the principles have not been applied but if even after their observation result could have been the same, enforcing the observance of such principles would be a futile exercise".

Under such circumstances, the writ petition stands dismissed. No cost.

Writ petition dismissed.

2010 (II) ILR – CUT-170

INDRAJIT MAHANTY, J.

CRLMC NO.3927 OF 2009 (Decided on 10.3.2010)

LAXMAN SAHU ……. Petitioner.

.Vrs.

STATE OF ORISSA …….. Opp.Parties.

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

Quashing of the order of cognizance – Offence U/s.20(b) (ii) (e) of the NDPS Act against three persons – In this case F.I.R. discloses that three persons were coming with three bicycles loaded with Ganja and while one of the accused persons was apprehended on the spot the present petitioner & another ran away from the spot – Since the F.I.R. itself speaks of presence of these two accused persons it can not presently be accepted that the order of cognizance against the two accused persons who fled away from the spot is merely based on a co-accused statement.

Held, this court is not inclined to exercise extraordinary power U/s.482 Cr.P.C. in favour of the present petitioner.

Case law Referred to:-

AIR 1964 SC 1184 : (Haricharan Kurmi -V- State of Bihar).

For Petitioner - M/s. L.Samantaray, T.K.Acharya, B.Pasayat & D.Samantaray.

For Opp.Party - Mr.V.Narasingh, A.G.A.

I.MAHANTY, J. Challenge in the present application under Section 482, Cr.P.C. has been made to an order of cognizance dated 5.10.2009 passed in Special Case No.21 of 2009 by which order the learned Judge, Special

Court, Angul was pleased to take cognizance of the offence under Section 20(b) (ii) (C) of the N.D.P.S. Act against three persons, namely, Laxman Sahu S/o. Birabara Sahu, Laxman Sahu S/o. Janaka Sahu & Jaya Sahu S/.o.Dunu Sahu.

It appears from the proceeding of the case that one Albinus Kerketta, Inspector-in-Charge of Chhendidpada Police Station drew a plain paper F.I.R. to the effect that on 6.8.2009 at about 9.00 A.M. he got a telephonic message regarding illegal transportation of Ganja by the accused persons. After obtaining such information he along with his staff proceeded to the post and found that three persons were coming with cycle loading with Ganja and on seeming the police officials, two of them, namely, Laxman Sahu S/o.

Janaka Sahu (present petitioner) as well as Jaya Sahu S/o. Dunu Sahu, fled away from the spot and one of the accused persons, namely, laxman Sahu S/o. Birabara Sahu was caught/apprehended raid handed at the site.

Learned counsel for the petitioner submits that on perusal of the F.I.R. it appears that only Laxman Sahu S/o. Birabara Sahu was apprehended on the spot and it is only after the detention of the apprehended accused Laxman Sahu S/o. Birabara Sahu, charge sheet was filed against the present petitioner as well as two others while showing the petitioner as absconder. It is submitted by the petitioner's counsel that the only evidence presently available on record is 161 Cr.P.C. statements various witnesses and while confession of the apprehended accused Laxman Sahu before the Police was not admissible in law as evidence, the learned Special Judge passed order of cognizance without application of judicial mind.

In this respect learned counsel for the petitioner placed reliance upon a judgment of the Hon'ble Supreme Court in the case of Haricharan Kurmi – Vrs. State of Bihar, represented in AIR 1964 SC 1184 as well as the un reported decision of this Court in the case of Pramod Banka Vrs. State of Orissa in CRLMC No.1033 of 2008 disposed of on 23.9.2008.

Mr. Narasingh, learned Additional Government Advocate for the State on the other had submits that the petitioner remains as an absconder and at the present stage of the proceeding since cognizance alone has been taken of the offence, this is not the right stage to consider as to what is admissible evidence or not. Since in course of the trial the evidence produced by the prosecution, which obviously would have to stand the test of law as mandated by Code of Criminal Procedure as well as Evidence Act.

On perusal of the judgment of the Hon'ble Supreme Court in the case of Haricharan Kurmi (supra), the Hon'ble Supreme Court, dealt with scope of Sections 30 and 3 of the Evidence Act and came to hold that, the confession of a co-accused person cannot be treated as "substantive evidence" and can be pressed in to service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of

its conclusion deducible from the said evidence. Hon'ble Supreme Court in that case was considering a case in which the accused persons had been found guilty of an offence and had directed conviction thereof and sentenced them to imprisonment for life. In course of such proceeding the Hon'ble Court was considering as to whether the "evidence" relied upon by the trial court and the appellate court could have been relied upon or not. In other word in the said case trial had been concluded, obviously after evidence had been led by prosecution.

In the present case at hand the stage of proceeding is merely the passing of an order of cognizance. Therefore, the prosecution is yet to lead

any evidence in support of the charge against the accused persons and there can be no question of weighing such evidence, until and unless such trial is concluded. Therefore, I am of the considered view that the aforesaid judgment on the facts of the present case is clearly not applicable.

Learned counsel for the petitioner relied upon the judgment of this Court in the case of Pramod Banka (supra), the petitioner therein has sought to challenge the order of cognizance on the ground that he had been implicated on the statement of the co-accused persons given before the police and on the confession statement of the petitioner had been implicated as an accused.

In the present case at hand, it is noted in the F.I.R. that, three persons were coming with three bicycles loaded with Kg.52.300 Grama of Ganja, while one of the accused persons was apprehended on the spot the present accused-petitioner had another co-accused Jaya Sahu ran away from the spot on seeing the police officials. Therefore, since the F.I.R. itself speaks of presence of these two accused persons it cannot presently be accepted that the order of cognizance against the two accused persons who fled away from the spit is merely based on a co-accused statement.

Accordingly, in consideration of the above, I am not inclined to exercise extraordinary power under Section 482 Cr.P.C. in favour of the petitioner and also find no merit in the present application of the petitioner. Hence, the same stands dismissed and the order of cognizance dated 5.10.2009 passed by the learned Judge, Special Court, Angul is affirmed.

The interim order dated 25.2.2010 passed in Misc.Case No.3421 of 2009 stands vacated.

Application dismissed.

2010 (II) ILR – CUT-173

B.N.MAHAPATRA, J.

M.A. NO.245 OF 2000.(Decided on 07.05.2010)

GURU CHARAN PATTNAIK & ORS. …….Petitioner

.Vrs.

BIJAY KUMAR PATTNAIK ……Respondents

(A) MOTOR VEHICLES ACT, 1988 (ACT NO. 59 OF 1988) – SEC.173.

Award fixing liability on the owner – Merely because the owner has not preferred any appeal, the claimants should not suffer if they are otherwise entitled to get the compensation amount from the insurer of the offending vehicle.

Held, the appellants are the "persons aggrieved" by the order of the Tribunal and the appeal at their instance is maintainable.

(Para 9)

(B) MOTOR VEHICLES ACT,1988(ACT NO. 59 OF 1988) – SEC.147 (1).

Gratuitous passenger – Tribunal fixed liability on the owner as the deceased was a gratuitous passenger – Claimants preferred appeal to get the compensation amount from the insurer as the offending vehicle possess comprehensive policy covering the date of accident.

Held, gratuitous passengers are covered under a comprehensive policy. (Para 11)

Case laws Referred to:-

1.2007 AIR SCW 3591 : (Oriental Insurance Co.Ltd. -V- Premalata Shukla & Ors.)
2.2005(2) TAC 1 : (National Insurance Co.Ltd. -V- Bommithi Subhayamma & Ors.)
3.2009 AIR SCW 992 : (National Insurance Co.Ltd.-V- Rattani & Ors.).
4.1998 ACJ 531 (SC) : (Amritlal Sood & Anr. -V- Kaushalya

Debi Thappar & Ors.)
5.(1980) 4 SCC 62 : (Thammanna -V- K.Veera Reddy & Ors.)
6.(83) 1997 CLT 506 : (Smt. Anita Jena & Ors. -V- Sarat Chandra Patnaik & Anr.).
7.2006 ACJ 803 (DB) : (Nanhu Singh -V- Jaheer & Ors.).
8.1994 ACJ 1303 (Orissa) : (Mataji Bewa & Ors.-V- Hemanta Kumar Jena & Ors.)
9.2008(1) CLR 168 : (United India Ins.Co.Ltd.-V-Dhana Bhotra & Ors.).
10.1994 ACJ 1137 : (National Insurance Co.Ltd.-V- Ashalata Rout & Ors.).

11.1994 ACJ 138 : (New India Assurance Co.Ltd. & Ors. -V-Kanchan Bewa &Ors)
12.AIR 2009 SC 3104 : (Smt.Sarala Verma & Ors.-V-Delhi Transport Corpn.&] Anr.)

For Appellants – M/s. D.P.Sarangi, K.C.Baral, P.C.Patnaik & G.C.Das.
For Respondent – M/s. A.K.Mohanty, M.C.Nayak & D.C.Dey (R-2) & M/s. S.C.Sahoo & S.Pattanayak (R-1)

B.N.MAHAPATRA, J. This appeal is directed against the impugned award dated 3rd September, 1999 passed in Misc. Case Nos.92/90 and 173/90 by the Second Motor Accident Claims Tribunal, Cuttack (for short, "the Tribunal").

2. The case of the claimants before the Tribunal was that on 5.11.1989 at about 4 A.M. the deceased Janak Ranjan Pattnaik was standing near Somapur Bazar on Cuttack-Paradip road waiting for arrival of his fish in mini truck bearing registration No.OIU-2483. The offending mini truck coming from Paradip side lost its balance at the place of accident and suddenly swerved to its extreme right and ran over the deceased causing instantaneous death and capsized in Taladanda canal. At the time of death the age of the deceased was 28 years and he was earning Rs.3,000/- per month. With these averments, the claimants filed claim petition before the Tribunal claiming compensation of Rs.2,06,000/-

3. Opposite party-respondent no.1 the owner of the offending vehicle entered appearance and filed written statement almost admitting the case of the claimants-petitioners. It was averred that the mini truck was duly insured with respondent-opposite party no.2 M/s. Oriental Insurance Company Ltd., Link Road, Cuttack, covering the date of accident bearing Policy No.31515/6/604/MV/84/89/Comp. valid from 13.1.1989 to 12.1.1990 and the Insurance Company was liable to pay the compensation amount on his behalf, if any.

Opposite party no.2, the Insurance Company filed its written statement and contested the case. It called upon the claimants to prove the accident,

death due to accident, income of the deceased and the insurance policy of the offending mini truck by adducing proper evidence. It was pleaded *inter alia* that the offending mini truck being a goods vehicle was not supposed to carry passengers and hence the Insurance Company was not liable to pay any compensation as claimed by the claimants.

As many as four witnesses were examined on behalf of the claimants. None has been examined on behalf of the respondents.

The documents filed in Accident Misc. Case No.92 of 1990 have been marked as Exts.1, 2, 3, 4 and 5. No document has been exhibited on behalf of respondents. Certified copy of the MVI report and certified copy of the

P.M. report filed by the claimants in Misc. Case No. 173/90 have been marked as Exts. 6 and 7 respectively.

4. Learned Tribunal taking into consideration the oral and documentary evidence came to the conclusion that the accident took place due to rash and negligent driving of the offending vehicle resulting in death of the deceased. The income of the deceased was determined at Rs.1000/- per month against claim of Rs. 3000/- made by the claimants. Relying on the contents of the FIR and final report, the deceased was held to be traveling in the offending mini truck. The owner of the offending vehicle respondent no.1 was made liable to pay a sum of Rs.1,34,000/-.

5. Mr. Sarangi, learned counsel appearing on behalf of the appellants vehemently argued that determination of monthly income and multiplier as applied by the learned Tribunal is extremely low. The learned Tribunal has erred in relying upon the contents of the F.I.R. (Ext.2) and the final form (Ext.5) and to hold that the owner of the offending mini truck was liable to pay the compensation. The author of the FIR Nakula Mallik, the Gram Rakhi was examined as P.W.2 who has categorically stated that the deceased Janak Ranjan Patnaik was standing along with the deceased Subash near a mini truck parked by the side of the Taladanda Canal. He arrived at the spot after the accident and ascertained about the accident from the persons who were assembled at the spot and thereafter he asked one Kabi Bhoi to scribe the FIR. He specifically stated that he did not instruct the scribe to write in the FIR that five occupants in the mini truck died in the accident. In view of the evidence of P.W.2, learned Tribunal has erred in law holding that the deceased was a passenger in the offending truck. The insurer neither pleaded nor proved the deceased to be a gratuitous passenger in the offending truck. The FIR (Ext.2) and the final report (Ext.5) having not been proved in the process of law, learned Tribunal ought not to have relied upon those documents while determining the liability. It was nobody's case that the deceased was a gratuitous passenger in the offending vehicle. Mr. Sarangi relied upon some of the judicial pronouncements and contended

that the Court should not have relied on the FIR discarding the oral evidence led by the informant. The insurer also did not file the policy in the Tribunal in support of its contention that the policy does not cover the liability in respect of a gratuitous passenger. Hence, adverse inference should have been drawn against the insurer under Section 114(g) of the Evidence Act. The policy number was disclosed not only by the claimants in their claim application but also by the owner in his written statement.

6. Mr Ajay Mohanty, learned counsel appearing for opposite party no.2-Insurance Company vehemently argued that the appeal is not maintainable according to the provisions contemplated under Section 173 of the M.V. Act, 1988. As per the provisions contained in the said section an aggrieved party

can only prefer appeal. In the instant case, the appellants are not the aggrieved parties. Aggrieved party is the owner of the offending vehicle on whom liability to pay the compensation amount has been fastened. The appellants in order to prove their case have filed certified copies of police papers on their behalf which were taken into evidence marked as Exts.2,3,4,5,6 and 7. Relying on Ext.2, learned Tribunal held that the deceased was a passenger in the goods vehicle at the time of accident and not a pedestrian as pleaded by the appellants. Law is well settled that if a party relies on the document he cannot resile from the same. In support of his contention, learned counsel relied on a judgment of the apex Court in ***Oriental Insurance Co. Ltd. Vs. Premalata Shukla & Ors.***, 2007 AIR SCW 3591.

The deceased having been travelled as passenger in the goods vehicle, the Insurance Company is not liable to pay any compensation. The owner of the vehicle is liable to pay compensation. In support of his contention, he relied on the decision of ***National Insurance Co. Ltd. Vs. Bommithi Subbhayamma & Ors.,*** 2005(2) TAC 1 and ***National Insurance Co. Ltd. Vs. Rattani & Ors.,*** 2009 AIR SCW 992. The appellants have utterly failed to establish that the deceased was a pedestrian at the time of accident. As the case has been deliberately belated by the appellants, they are not entitled to any compensation.

7. Mr. Sarangi in his reply submitted that the deceased was a bystander at the place of accident and was not a gratuitous passenger. Therefore, the decisions cited by Mr Mohanty dealing with gratuitous passenger are not applicable to the present case. Moreover, a three Judges' Bench of the apex Court in ***Amritlal Sood and another v. Kaushalya Debi Thappar and others***, ***1998 ACJ 531 (SC),*** held that gratuitous passenger are also covered under a policy if it is a comprehensive policy. In the instant case, the policy is a comprehensive one. Therefore, even if accepting for the sake of argument that the deceased was a gratuitous passenger, the Insurance Company is liable to pay the amount of compensation. The appellants are

certainly aggrieved by the order under appeal which recorded erroneous findings contrary to the materials on record and on the basis of inadmissible evidence to exonerate the insurer from the liability. Further, the amount awarded was also not based on materials on record and was inadequate.

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

(i) Whether the appellants are persons aggrieved by the award of the Tribunal in terms of Section 173 of the M.V. Act and are eligible to file appeal challenging the legality of the award as regards fastening the liability for payment of compensation on the owner of the vehicle, who preferred not to challenge the award in appeal.

(ii) Whether the Tribunal is justified to hold that the deceased Janak Ranjan Patnaik was travelling as a passenger in the offending vehicle bearing registration No.OIU 2483 and was not a bystander at the time of accident?

(iii) Whether the Insurance Company or the owner of the offending vehicle is liable to pay the amount of compensation to the appellants?

(iv) Whether the amount of compensation, as determined by the Tribunal, is the just compensation?

9. The first question relates to preliminary objection raised by Mr. Mohanty regarding maintainability of the appeal. According to Mr. Mohanty, only a person aggrieved by the award of the Tribunal can file an appeal before this Court in terms of Section 173 of the M.V. Act. The Tribunal fastened the liability for payment of compensation on the owner of the vehicle. The aggrieved party in the present case is the owner of the vehicle, who has not challenged the award being aggrieved by the same. In such a situation, the claimant-respondents cannot be said to be the persons aggrieved so far as the liability to pay the compensation amount which is fastened on the owner of the vehicle.

Mr. Sarangi, on the other hand, submitted that basically the appellants have challenged the award on two grounds, viz., (i) wrong determination of the quantum of compensation by the Tribunal, and (ii) recording of erroneous findings by the Tribunal basing upon inadmissible evidence contrary to the material on record exonerating the insurer from liability which has caused immense hardship to the appellant to realize the amount of compensation.

Paragraphs 10 and 16 of the claim petition which are relevant for the purpose of answering Question No.1 read as follows:-

"**10)** Has the person in respect of whom compensation is claimed, travelling by the NO

vehicle involved in the accident? If so, give the name and place of starting of journey and destination	
16) Name and address of the Insurer of the Vehicle	Oriental Insurance Co. Ltd., Link Road, Cuttack, represented through it's Branch Manager, Policy No. 31515/ 6/604/ MV/84/89/Comprehensive Valid from 13.1.89 to 12.1.90"

Thus, the claim of the claimant-petitioners under paragraph 10 is that the person in respect of whom the compensation is claimed was not travelling in the vehicle involved in the accident. As per paragraph 16, the insurer of the offending vehicle was Oriental Insurance Co. Ltd., Link Road, Cuttack, having Policy No. 31515/ 6/604/ MV/84/89/Comprehensive valid from 13.01.89 to 12.1.90. Findings of the Tribunal being contrary to the above claims of the claimant-petitioners made in paragraphs 10 and 16 of the claim petition, the petitioners are certainly the persons aggrieved so far their claim with regard to not travelling in the offending vehicle and liability of the insurer of the offending vehicle for payment of compensation are concerned.

The apex Court in ***Thammanna Vs. K.Veera Reddy & Ors., (1980) 4 SCC 62***, while dealing with meaning of expression "aggrieved person" held as follows:-

> "Although the meaning of the expression 'person aggrieved' may vary according to the context of the statute and the facts of the case, nevertheless, normally, "a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. As per James, L.J., in Re Sidebothem referred to by this Court in *Bar Council of Maharashtra V. M.V.Debholkar and F.A.Desai V.Roshan Kumar*."

Merely because the owner of the vehicle has not preferred any appeal challenging the award of the Tribunal by which liability has been fixed on him, the claimants should not suffer, if they are otherwise entitled to get the compensation amount from the insurer of the offending vehicle. There may be a case where owner of the vehicle wants to challenge the judgment of the Tribunal fixing liability to pay amount of compensation on him but due to stringent financial condition, the owner of the vehicle may not be able to deposit with the High Court Rs.25,000/- or 50% of the award amount

whichever is less, as required by Section 173 of the M.V. Act to maintain the appeal before the High Court. In such peculiar circumstances, it would not be possible on the part of the claimants to realize the amount of compensation from the owner of the vehicle who is not able to maintain an appeal before the High Court because of financial stringency. If the insurer of the offending vehicle is otherwise liable to pay the compensation and the Tribunal has wrongly fastened the liability on the owner of the vehicle, there is no reason why the claimants cannot maintain an appeal in the High Court challenging the findings of the Tribunal. In the instant case, the specific case of the appellants is that relying on the inadmissible evidence the Tribunal has recorded erroneous findings to exonerate the insurer from its liability.

In view of the above, I have no hesitation to hold that the appellants are the persons aggrieved by the order of the Tribunal by which the insurer was exonerated from its liability on the ground that the deceased was a gratuitous passenger in the offending vehicle contrary to petitioners' claims made in paragraphs 10 and 16 of the claim petition.

10. The second question is as to whether the deceased-Janak Ranjan Pattnaik was travelling as a passenger in the offending vehicle or was a by-stander at the time of accident. The finding of the learned Tribunal in this regard is that the deceased Janak Ranjan Pattnaik along with one Subash Chandra Mohapatra was travelling in the offending mini truck at the time of accident as passengers and they had died due to rash and negligent driving by the driver of the said truck. To come to such conclusion, the learned Tribunal relied on the contents of the F.I.R. stated to have been filed by one Grama Rakhi and the final report (Ext.5). According to learned Tribunal, the final report discloses that in the F.I.R. P.W.2-Grama Rakhi mentioned that one mini truck coming from Paradeep side dashed against a parking truck and capsized into the canal water causing death of the sleeping helper and five occupants including the deceased Janak Ranjan Patnaik. While dealing with issue No.2, the Tribunal recorded its findings as follows:

> "P.W. 2 is a gramarakhi and he lodged F.I.R. at the P.S. about 1 ½ hours after the accident. It is stated by him that on 5.11.89 at about 4 A.M. he had come to Taladanda canal to attend the call of nature. At that time a truck had parked near Taladanda Canal facing towards Paradeep and both the deceased persons had stood near that truck. He attended the call of nature and thereafter while he was using water in the canal he heard a sound. Then he came to the road and found that the offending mini truck had fallen inside the water in the ditch and deceased Subash Chandra Mohapatra had fallen in that ditch. P.W.3 claims to have seen the occurrence. According to him, on 5.11.89 at about 4 A.M. the offending Mini Truck coming from

Paradeep side in a high speed suddenly swerved to its right and dashed against both the deceased persons and two others who were standing on the road and ranover another person sleeping in front of the parking truck and thereafter entered into Taladanda canal."

In the cross examination, the evidence of P.Ws. 2 has not been controverted. P.W. 3 is the eyewitness. Evidence of P.Ws. 2 and 3 show that the deceased Janak Ranjan Pattnaik and one Subash Chandra Mohapatra stood near the truck. According to P.W. 3, the occurrence witness, at about 4 A.M. the offending mini truck coming from Paradeep side in high speed suddenly swerved to its right and dashed against both the deceased persons who were standing on the road and also ran over another person who was

sleeping in front of the parking truck and thereafter entered into Taladanda canal. In cross-examination, nothing contrary has been elicited from the mouth of PW-3. Virtually the evidence of PWs 2 and 3 remained unshaken. Learned Tribunal has not assigned any valid and cogent reason for disbelieving the evidence of P.Ws. 2 and 3. The learned Tribunal has simply satisfied itself by the contents of the F.I.R. and final report. There is no reason why much weight has been given by the learned Tribunal to the contents of the F.I.R. and the final report ignoring the un-impeached evidence of P.Ws. 2 and 3.

This Court in ***Smt. Anita Jena and others vrs. Sarat Chandra Patnaik and another***, ***(83) 1997 CLT 506,*** held that the court should not rely on F.I.R. discarding the oral evidence of the informant.

In ***Nanhu Singh vrs. Jaheer and others, 2006 A.C.J. 803 (DB),*** held that version as per the F.I.R. should not be given preference over the testimony of the witness recorded before the Tribunal.

This Court in ***Mataji Bewa and others vs. Hemanta Kumar Jena and others, 1994 ACJ 1303 (Orissa),*** held that positive evidence laid before the Tribunal has to be accepted as evidence and the contents of the charge sheet cannot be treated as evidence in a claim proceeding. It is emphatically observed that the Tribunal must rely upon the evidence laid before it.

Similar view has also been expressed by this Court in of ***United India Ins. Co. Ltd., vrs. Dhana Bhotra and others, 2008 (1) CLR 168 and National Insurance Co. Ltd. vs. Ashalata Rout and others***, ***1994 ACJ 1137.***

Moreover, the order of the Tribunal is silent at whose instance the F.I.R. (Ext. 2) and final report (Ext. 5) were produced before the Tribunal and who had proved the same.

In view of the above, this Court is of the considered view that the Tribunal is not correct to hold that the deceased was travelling in the offending truck at the time of accident. On the other hand, as claimed by the claimants, the deceased was a bystander at the time of accident.

In the fact situation, the decisions cited by learned counsel for the Insurance Company are of no help to the opposite party-Insurance Company.

11. The third question relates as to who is liable to pay the amount of compensation to the appellants. The learned Tribunal relying on the decision of this Court in ***New India Assurance Company. Ltd. & Ors. vs. Kanchan Bewa & Ors, 1994 ACJ 138,*** held that the owner of the vehicle is liable to pay the compensation amount as the deceased was travelling in the offending truck, which was a goods vehicle.

Mr. Mohanty, learned counsel appearing on behalf of the Insurance Company also relies on some decisions to support the above view of the learned Tribunal. Mr. Sarangi, learned counsel for the appellants relying on the judgment of the apex court in *Ambritlal Sood & Another (supra)* contended that a three judges' bench of the apex court held that gratuitous passengers are also covered under a policy if it is a comprehensive policy. Be that as it may, since this Court is of the view that at the time of accident the deceased was a bystander and as per the seizure list marked as Ext. 4/1, the offending mini truck was duly insured with opposite party No.2-Oriental Insurance Co. Ltd. covering the date of accident, the opposite party No. 2 is liable to pay the compensation to the appellants.

12. The fourth question is as to whether the amount of compensation determined by the Tribunal is just compensation. The Tribunal in this regard relying on the post-mortem report marked as (Ext.7) came to the conclusion that the deceased Janak Ranjan Pattnaik was aged about 28 years at the time of his death in the accident. He was carrying fish business. There is no documentary evidence on record to show that he was earning Rs.3,000/- per month from fish business.

With the above observation, the learned Tribunal assessed the monthly income of the appellant at Rs.1,000/-. Perusal of order of the Tribunal reveals that the Tribunal has not given any reason for assessing the monthly income of the deceased at Rs.1,000/-. It further reveals that no evidence was adduced on behalf of the claimants to show that the income of the deceased per month was Rs.3,000/-. No evidence/material was brought to the notice of this Court by the learned counsel appearing on behalf of the appellants in support of the contention that the appellant was earning Rs.3,000/- per month. At this juncture, a reference is made to the 2nd schedule appended to the Motor Vehicles Act in terms of Section 163-A of the M.V. Act. The said schedule prescribes notional income at Rs.15,000/-

per annum for compensation to person who had no income prior to the accident. Therefore, fixation of income of the appellant who was carrying on fish business at Rs.1,000/- per month i.e. Rs.12,000/- per annum does not stand to any logic. In this situation, the annual income should at least be taken at Rs.15,000/- though not more. Learned counsel for the appellants relying on the decision of the apex Court in ***Smt. Sarala Verma & Ors. vs. Delhi Transport Corporation & Anr.,*** AIR 2009 SC 3104, submitted that the appropriate multiplier is 17. Applying the said multiplier and allowing 1/3rd towards personal income, the amount of compensation is determined at Rs.1,70,000/- (Rs.10,000/- x 17). So far as the cost and interest parts are concerned, the Tribunal has rightly allowed the same at Rs.500/- and 9% interest per annum on the amount of compensation from the date of filing of the claim case i.e. 21.02.1990 till the date of payment.

13. In view of the above, the opposite party No.2-Oriental Insurance Company is directed to pay the above compensation amount along with 9% interest from the date of filing of the claim petition till the date of actual payment before the Tribunal. The compensation amount shall be paid within two months from today. After deposit of the compensation amount along with interest as indicated above, the Tribunal shall disburse the same in favour of the claimants in the similar manner indicated in award.

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

Appeal allowed.

2010 (II) ILR – CUT-183

B.P. RAY, J.

CRIMINAL APPEAL NO.50 of1993(Decided on .09.04.2010)

M/S. MAHABIR TRADERS & ORS. …….. Appellants

.Vrs.

STATE OF ORISSA …….. …….Respondent

ESSENTIAL COMMODITIES ACT, 1955 (ACT NO.10 OF 1955) – SEC.7 r/ wClause 13 of Orissa Pulses, Edible Oil Seeds and Edible Oils Dealers (Licensing) Order 1977.

Submission of return by the appellant in the end of the month instead of fortnight interval – Nothing on record to show that such non-submission of return was deliberate and willful violation of the Control order – In a case of this nature Court is required to look into the mensrea regarding the violation alleged – Held, No guilty mind can be attributed to the appellants for non filing of the return as stipulated in Clause 13 of the control order – Conviction and order of sentence is set aside. (Para 7)

For Appellants – Mr.D.P.Sarangi.
For Respondent – Govt. Advocate

B.P. RAY, J. The appellants here in this appeal call in question the judgment of conviction and the order of sentence passed by the learned Special Judge, Cuttack in 2(c) CC Case No. 3 of 1991. The learned Special Judge, Cuttack found the appellants guilty of the charge U/s. 7of the Essential Commodities Act for violating Clause 13 of the Orissa Pulses,

Edible Oil Seeds and Edible Oils Dealers (Licensing) Order, 1977 and sentenced each of the appellant Nos. 2 and 3 to undergo S.I. for six months and to pay fine of Rs.1,000/- each, in default to undergo S.I. for three months each and no separate sentence has been awarded to the appellant partnership firm as the same was represented by the appellant Nos. 2 and 3.

2. The prosecution case against the appellants is that on 28.5.1991 the Civil Supply Officer, Shri Nrusing Patra (P.W.1) raided the firm of the appellant No.1 and found there the appellant Nos. 2 and 3, who are the partners of the firm without properly filling the name and address of the sub-dealers and also the license number as required under condition No.6 of the license and clause 3(c) of the Control Order transacting business. So also it was found that no details of the license number and address were also reflected in the cash memos issued on different dates starting from

18.5.1991 to 25.5.1991. As such the prosecution was lodged by the P.W.1, Civil Supply Officer before the learned Special Judge, Cuttack under the Essential Commodities Act for violation of the Control Order punishable section 7 of the Essential Commodities Act. The appellants were prosecuted for committing offence U/s.7 of the Essential Commodities Act for violation of the aforesaid order.

3. During the course of trial, prosecution examined as many as four witnesses, out of whom, P.W.1 is the Civil Supply Officer, P.Ws. 2, 3 and 4 are the other staff attached to Civil Supply Officer, who had accompanied P.W.1 during such raid of the business premises of the appellant No.1.

4. The appellants who have taken the plea of denial have not adduced any evidence in their defence. On the conclusion of the trial, the trial court while acquitting the appellants of the alleged charge of violation of Clause 6 and Clause 3(c) of the Control Order, held them guilty of violation of Clause 13 of the Control Order and thereby committed an offence U/s. 7 of the Essential Commodities Act and sentenced the appellant Nos. 2 and 3 as stated earlier.

5. Learned counsel appearing for the appellants submitted that though in this case return as stipulated was not filed by the appellants as mandated in Clause 13, but the same can not be attributed to any mens rea. Hence, the conviction of the appellants in such facts and circumstances of the case is indefensible and as such liable to be set aside.

6. In response, learned Addl. Govt. Advocate submitted that mens rea being not a sine qua non to record a conviction under the Essential Commodities Act, the impugned judgment of conviction for violation of the Control Order can not be found fault with.

7. It appears from the record that in this case the appellants had submitted return, but the said return was submitted in the end of the month instead of fortnight interval. There is nothing on the record to show that such

non-submission of return was deliberate and willful violation of the aforesaid Control Order which invites penal provision. Before recording conviction, it goes without saying that the court is required to look into the mens rea regarding the violation alleged in a case of this nature. Considering the facts and circumstances of the case and the evidence on record no guilty mind can be attributed to the appellants for non filing of the return as stipulated in Clause 13 of the Control Order in question, inasmuch as the same can not be said to be willful and deliberate. In such circumstances, this Court is of the opinion that the judgment of conviction and the order of sentence recorded by the trial court in this case are indefensible and as such liable to be set aside.

8. Hence, this Criminal Appeal stands allowed. The impugned judgment of conviction and order of sentence as returned by the trial court are set aside and the appellants are acquitted of the charges.

Appeal allowed.

2010 (II) ILR – CUT-186

B.K.PATEL, J.

Criminal Revision No.252 of 2002 (Decided on 5.5.2010).

MITRA SANKAR NANDA ……. Petitioner.

.*Vrs.*

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

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.300(1)

Persons once convicted or acquitted can not be tried for the same offence subject to exceptions under Sub-sections (2) to (6) of Section 300 Cr.P.C.

G.R.Case No.383/93 for offences U/ss.160, 341, 323, 324 and 294 I.P.C. and G.R.Case No.384/93 for offences U/ss.341, 323 & 506 (ii) I.P.C. instituted against the petitioner – Acquittal in G.R.Case No.383/93 – Conviction in G.R.No.384/93 by the Court below is under challenge.

P.W.(3) the informant categorically admitted that G.R.Case No.383/93 was registered for the self same occurrence – Final report submitted by police U/s.173 Cr.P.C. shows both the cases arose out of the same occurrence – Nature of allegations are such that in G.R.Case No.383/93 charge U/s.506 (ii) I.P.C. could have been made against the petitioner – Held, trial of G.R.Case No.384/93 was barred U/s.300(1) Cr.P.C. – Impugned judgments are set aside.

(Pare 6, 18)

Case laws Referred to:-

1.AIR 1953 SC 325 : (Maqbool Hussain -V- State of Bombay).

2.AIR 1965 SC 83 : (Khartan & Ors. -V-State of Uttar Pradesh).
3.AIR 1966 SC 69 : (Mohammad Safi -V- The State of West Bengal).
4.AIR 1966 SC 911 : (Thakur Ram & Ors.-V-The State of Bihar).
5.2005 Crl.L.J.2569 : (Mukhtiar Ahmed Ansari -V- State (N.C.T of Delhi).
6.AIR 1965 SC 87 : (Manipur Administration, Manipur -V- Thokchom Bira Singh).
7.AIR 1975 SC 856 : (Ravinder Singh -V- State of Haryana).

For Petitioner - M/s. D.K.Mishra, R.P.Mohapatra, D.Panda, S.K.Ratha & R.K.Parida.
M/s. A.K.nanda & G.N.Sahoo.
For Opp.Parties – Addl. Standing counsel
M/s. G.Pr.Mohanty, H.K.Kar, N.K.Das & M.K.Maharana (for O.P.2).

MITRA SANKAR NANDA -V- STATE [*B.K.PATEL,J.*]

B.K.PATEL, J. This revision is directed against judgment dated 31.8.2002 passed by learned Sessions Judge, Sundargarh in Criminal Appeal No.1/21 of 2000 confirming the judgment and order dated 29.2.2000 passed by the learned S.D.J.M., Bonai in G.R. Case No.384 of 1993, corresponding to Gurundia P.S. Case No.25 of 1993, by which the petitioner was convicted under Sections 341, 323 and 506(II) of the I.P.C. and sentenced to undergo simple imprisonment for one month under Section 341 of the I.P.C., for three months under Section 323 of the I.P.C. and for six months under Section 506(II) of the I.P.C.

2. Informant-P.W.3 was the Block Development Officer (B.D.O.), Gurundia and the petitioner was working as Police Constable in Gurundia Police Station during the period of occurrence. Prosecution case is that on 23.11.1993 at about 9.30 P.M. P.W.3 heard that the petitioner was abusing him in a drunken state in filthy and obscene language near his home. When P.W.3 came out from the house and went near the Block Office gate, the petitioner dragged him to the road, assaulted him, threw him on the road and tried to throttle his neck. The petitioner also was asking for a Tangia. Some of the Block personnel intervened to bring the occurrence to an end. Finding the Officer-In-Charge absent from the Gurundia Police Station, P.W.3 submitted F.I.R. Ext.1 to Sub-Divisional Police Officer (S.D.P.O.), Bonai. On being directed by the S.D.P.O., Bonai, Circle Inspector of Police, Bonai took up investigation and submitted final report stating the case to be mistake of law. In response to protest petition filed by P.W.3, enquiry under Section 202 of the Cr.P.C. was conducted by the learned S.D.J.M., Bonai and cognizance of offences under Sections 323, 294 and 506 of the I.P.C. was taken. Petitioner took the plea of complete denial. In order to substantiate the case, prosecution examined three witnesses and relied upon F.I.R. Ext.1. P.Ws.1 and 2 were occurrence witnesses. On appraisal of evidence

on record, learned S.D.J.M. convicted and sentenced the petitioner as stated supra.

3. It was submitted by the learned counsel for the petitioner that from the very beginning the petitioner assailed his prosecution in the present case on the ground of bar under Section 300 of the Cr.P.C. on the assertion that trial in the present case amounted to double jeopardy. It was submitted that on the basis of allegations arising out of the self-same occurrence, the petitioner was tried for alleged commission of offences under Sections 160, 341, 323, 324 and 294 of the I.P.C. and acquitted in G.R. Case No.383 of 1993 in the court of learned S.D.J.M., Bonai. It was strenuously argued that both the learned Courts below failed to appreciate the embargo under Section 300 of the Cr.P.C. It was categorically admitted by the informant-P.W.3 himself in course of his cross-examination that G.R. Case No.383 of 1993 was also registered for the self-same occurrence. It was further argued that non-

examination of the Investigating Police Officer gravely prejudiced the petitioner. On completion of investigation, final report stating the case to be mistake of law was filed by the Investigating Police Officer on the ground that on the basis of allegations arising out of self-same occurrence Gurundia P.S. Case No.24 of 1993 had been registered prior to registration of the present case as Gurundia P.S. Case No.25 of 1993. Confusion, if any, which arose in the mind of both the learned Courts below regarding the cases to have arisen out of the self-same occurrence would have been clarified by the Investigating Police Officer.

4. In reply, it was submitted by the learned counsel for the State and learned counsel for the opposite party no.2-informant that both the learned Courts below have assigned cogent reasons in support of their findings to the effect that facts and circumstances of the case do not attract application of provision under Section 300 of the Cr.P.C. It has also been concluded that non-examination of the Investigating Police Officer has not been prejudicial to the petitioner.

5. The vital question raised in this revision is the applicability of bar under the provision under Section 300 of the Cr.P.C. against the proceeding in G.R. Case No.384 of 1993 in view of earlier judgment in G.R. Case No.383 of 1993. Section 300 of the Cr.P.C. reads:-

> "**Person once convicted or acquitted not to be tried for same offence**.- (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-

section(1) of section 221, or for which he might have been convicted under sub-section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence

constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code."

6. Provision under Article 20 of the Constitution of India provides that no person shall be prosecuted and punished for the self-same offence more than once. But provision under Sub-section (1) of Section 300 of the Cr.P.C. lays down that a person once convicted or acquitted cannot be tried for the same offence subject to exceptions under Sub-section (2) to (6) thereof.

7. In ***Maqbool Hussain –vrs.- State of Bombay :*** AIR 1953 SC 325, it was observed by the Hon'ble Supreme Court :

"(7) The fundamental right which is guaranteed in Art.20(2) enunciates the principle of "*autrefois convict*" or "*double jeopardy*". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per *Charles J. in Reg. v. Miles* (1890) 24 Q. B. D. 423 (A)). To the same effect is the ancient maxim "*Nimo Bis Debet Puniri Pro Uno Delicto*", that is to say that no one ought to be twice punished

for one offence or as it is sometimes written "*Pro Eadem Causa*" that is for the same cause.

(8) This is the principle on which the party pursued has available to him the plea of "*autrefois convict*" or "*autrefois acquit*".

"The plea of '*autrefois convict*' or "*autrefois acquit*" avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned…….The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of "a*utrefois acquit*" is not proved unless it is shown that the verdict of acquittal of the previous charge

necessarily involves an acquittal of the latter". (Vide *Halsbury's Laws of England-Hailsham Edition*-Vol.9, Pages 152 & 153, Para.212.)

(9). This principle found recognition in section 26 of the General Clauses Act, 1897-

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence",

and also in S.403 (1), Criminal P.C., 1898-

"A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S.236, or for which he might have been convicted under S.237"."

8. In ***Khartan and others –vrs.- State of Uttar Pradesh*** : AIR 1965 SC 83, it has been held by the Hon'ble Supreme Court that a plea of *autrefois acquit* which is statutorily recognized in India under Section 403 of the Cr.P.C. (Section 300 of the new Cr.P.C.) arises when a person is tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 (Section 221(1) of the new Cr.P.C.) or for which he might have been convicted under Section 237 (Section 221 (2) of the new Cr.P.C.).

9. In ***Mohammad Safi –vrs.- The State of West Bengal*** : AIR 1966 SC 69, it has been held by the Hon'ble Supreme Court that the provisions of Section 403 are based upon the general principle of *autrefois acquit* recognized by the English Courts. The principle upon which the right to plead *autrefois acquit* depends is that a man may not be put twice in jeopardy for the same offence. This principle is incorporated in Article 20 of the Constitution. In order that the bar in Section 403 (1) of the Cr.P.C. may apply it must be shown that a person has once been actually tried by a competent court for same offence charged in the second trial, or though not actually tried for he same offence charged in the second trial, he could have been on the same facts charged with it under Section 236 or convicted of it under Section 237 of the Cr.P.C.

10. In ***Thakur Ram and others –vrs.- The State of Bihar*** : AIR 1966 SC 911, it has been held that the provisions under Section 403 (1) of the old Cr.P.C. bars the trial of the person again not only for the same offence but also for any other offence based on the same facts.

MITRA SANKAR NANDA -V- STATE [*B.K.PATEL,J.*]

11. In ***Mukhtiar Ahmed Ansari –v.- State (N.C.T. of Delhi)*** : 2005 Crl.L.J. 2569 the appellant and two others had earlier been charged for kidnapping in Sessions Case and acquitted by Additional Sessions Judge. It was held by the Hon'ble Supreme Curt that once the appellant was acquitted in kidnapping case, the doctrine of *autrefois acquit* gets attracted against his trial for kidnapping in the Designated Court under the Terrorists and Disruptive Activities (Prevention) Act, 1987.

12. There is also rule of issue estoppel in a criminal trial. In ***Manipur Administration, Manipur –v.- Thokchom Bira Singh*** : AIR 1965 SC 87 it was held that the rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403 (2) of the Cr.P.C. (Section 300 (2) of the new Cr.P.C.). The rule thus relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court at a previous trial. The rule is not the same as the plea of double jeopardy or *autrefois acquit*, but Section 403 of the Cr.P.C. does not preclude the applicability of this rule of issue estoppel.

13. In ***Ravinder Singh –vrs.- State of Haryana*** : AIR 1975 SC 856, it has been pointed out by the Hon'ble Supreme Court :

> "In order to invoke the rule of issue estoppel in a criminal trial, there is an issue estoppel, if it appears that the same point was determined in favour of an accused in a previous criminal trial which

is brought in issue on a second criminal trial of the same accused. In order to invoke the rule of issue estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial."

14. There is no dispute with regard to legal proposition that a person cannot be exposed to double jeopardy in view of provision under Section 300 of the Cr.P.C. However, it appears that both the Courts below came to a conclusion that allegations in the present case, i.e., in G.R. Case No.384 of 1993 and earlier G.R. Case No.383 of 1993 arose out of two occurrences. On perusal of materials on record it is found that the finding is contrary to evidence on record. P.W.3-informant has categorically admitted in his cross-examination that G.R. Case No.383 of 1993 was also registered by Gurundia Police for the self-same occurrence. He deposed:

"It is a fact that another police case G.R. 383/93 was also registered by Gurundia Police for the same occurrence".

Thus, there is clear admission in unambiguous term that allegations in G.R. Case No.383 of 1993 corresponding to Gurundia P.S. Case No.24 of 1993 also related to the occurrence in the present case.

15. In the final report submitted under Section 173 of the Cr.P.C. in the present case it had been concluded:

"During course of investigation when formal FIR was drawn up vide Gurundia P.S. Case No.25/93, I found that on the same facts, date, hour of occurrence, spot, a case vide Gurundia P.S. Case No.24 dt.24-11-93 U/s. 160/341/323/324/294 IPC was registered and investigated by ASI, M.K. Chodhury, in the capacity of OIC, Gurundia P.S.

Under the above facts and circumstances after supervision and investigation of both the cases it was found that case no.24/93 is a true one u/s.160 IPC and both the accused persons C/776 M.S. Nanda and Sri P.K. Das, Ex-B.D.O., Gurundia Block Office made themselves liable u/s 160 IPC."

16. It appears from the judgment dated 20.1.2000 passed by the learned S.D.J.M., Bonai in G.R. Case No.383 of 1993, i.e., Gurundia P.S. Case No.24 of 1993 and other materials on record that in the said case for alleged occurrence which took place at about 10.00 P.M. on 23.11.1993, case was registered against petitioner as well as informant-P.W.3 for commission of offences under Sections 160, 341, 323, 324 and 294 I.P.C. Both of them faced trial, in course of which as many as seven witnesses were examined, and were acquitted. Allegation, in brief, in the said case was that on hearing some persons abusing him, P.W.3 came out from the Block campus by

climbing over the boundary gate and challenged as to why they were abusing him. During challenge, the informant-P.W.3 and petitioner caught hold of each other and rolled on the road. They also assaulted each other by fist blows and the informant bit petitioner's left thumb. Thus, it is evident that occurrence took place on the public road near the Block gate at about 9.30 to 10.00 P.M. Therefore, on the face of clear admission made by P.W.3 that G.R. Case No.383 of 1993 was also registered for the same occurrence, obviously, the petitioner is found to have been already tried for offences and acquitted thereof on the same fact on the basis of which the present case was registered. In the present case, the petitioner faced prosecution of offences under Sections 341, 323 and 506 (II) of the I.P.C. In the earlier trial in G.R. Case No.383 of 1993 also allegations were made of commission of offences under Sections 341 and 323 as well as 324 and 294 of the I.P.C. Nature of allegations made in the present case as well as the earlier case reveals that in the earlier case also charge under Section 506 (II) of the I.P.C. could have been made against the petitioner. Judgments passed by both the learned courts below suffered from non-consideration of fact

involving both the cases more particularly in G.R. Case No.383 of 1993, which resulted in a trial, barred under Section 300 (1) of the Cr.P.C.

17. It was rightly contended by the learned counsel for the petitioner that non-examination of Investigating Police Officer by the prosecution caused prejudice to the petitioner. Had the Investigating Police Officer been examined, he could have certainly unfolded the circumstance under which final report had been submitted in this case, as mentioned supra at paragraph-15 of this judgment. However, the informant-P.W.3, who also faced trial in G.R. Case No.383 of 1993, has categorically admitted that both the cases arose out of same occurrence. In view of such admission, the learned Courts below committed illegality in not accepting the petitioner's plea of bar against his trial in the present case in view of provision under Section 300(1) of the Cr.P.C. as well as the rule of issue estoppel.

18. In view of above discussions, the revision is allowed. Impugned judgments dated 31.8.2002 passed by learned Sessions Judge, Sundargarh in Criminal Appeal No.1/21 of 2000 and dated 29.2.2000 passed by the learned S.D.J.M., Bonai in G.R. Case No.384 of 1993 are set aside.

Revision allowed.

2010 (II) ILR – CUT-194

S.K.MISHRA, J.

W.P(C) NO. 2785 OF 2008(Decided on 09.03.2010)

RAJ KISHORE SUBUDHI @ BARIK ……Petitioner

.Vrs.

STATE OF ORISSA & ORS . ……Opp.Party.

ORISSA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 (ACT NO. 21 OF 1972) – SEC.37(1) & 41(1).

Whether the Commissioner Consolidation has jurisdiction to entertain a revision U/s.37(1) after the final notification U/s.41(1) of the Act – Yes.

Here the petitioner's case is though a particular measure of land was in his possession and the same has been reflected in the consolidation map the R.O.R issued in his favour reflects a reduced extent of land so the petitioner has a right for ventilating his grievance – Moreover the Commissioner was of the view that the petitioner has not raised such an objection U/s.9(3) proceeding stage – But as a matter of fact the consolidation map reflects the exact measure of land which came to his knowledge much after 9(3) objection stage.

Held, reasons resorted to by the Commissioner are erroneous which is set aside and the matter is remitted back for fresh disposal on merit. (Para 8 & 9)

Case law Referred to:-

76(1993) CLT 161 : (Gulzar Khan -V- Commissioner of Consolidation & Ors.).

For Petitioner – M/s. Satrughan Dash-A.

For Opp.Parties – Addl.Government Advocate (for O.P.1)
M/s.S.S.Das, R.K.Sahu (for O.P.2)
M/s.S.K.Mishra, Mr.Dash & S.K.Senapati (for O.P.3)

S.K.MISHRA, J. The short question which arises in this writ petition is whether the Commissioner, Consolidation has the jurisdiction to entertain a revision under Section 37(1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, hereinafter referred to as the 'Act' for brevity, after the final notification under section 41(1) of the Act.

2. Briefly stated the facts that led to filing of this writ petition are as follows:- Plot no.2216 measuring an area Ac.0.25 decimals and plot no.2213 measuring an area of Ac.0.07 decimals pertaining to sabik khata no.651 of mouza-Beraboi, PS Delanga, district Puri was purchased by Rani Barik

through a registered sale deed dated 01.08.1945. After her death, the petitioner and opposite party no.3 became absolutely owner of the same. They possessed the suit schedule property till 02.04.1998. Thereafter, the schedule property was partitioned and sabik plot no.2216 has been divided into two hal plots, i.e. hal plot nos.1132 and 1133. The case of the petitioner is that the area of the said hal plots was decreased to Ac. 0.03 decimals. In other words, in the hal record of right, only an Ac.0.22 decimal has recorded.

On 23.09.2003, the opposite party no.3 alienated his property measuring Ac. 0.11 decimals of land from hal plot no.1133, hal khata no.35 to the opposite party no.2. The opposite party no.2 filed a mutation case before the learned Tahasildar, Pipili for recording his name on the basis of such sale.

Petitioner further pleads that when the consolidation map was published he compared it with the sabik (1927-28) major settlement map and came to know that there is no error in the map. The area has remained intact measuring Ac.0.25 decimals. It is further pleaded that the corresponding area of hal plot nos.1132 and 1133 has also remained intact but Ac. 0.25 decimals that in the record of right wrongly reduced area has been reflected. Thereafter, the petitioner filed a petition under Section 31(1) of the Act before the Commissioner, Consolidation, Orissa, Bhubaneswar for correction of the area on the strength of the registered sale deed dated 29.05.1936 under which the predecessor and interest of late Rani Barik had purchased the schedule property.

The grievance of the writ petitioner is that the Commissioner, Consolidation holding that the petitioner has not raised such a claim when

the partitioned was effected in 9(3) stage and that after notification under Section 41(1) of the Act, the Consolidation authorities are not empowered to adjudicate the civil disputes, dismissed the Revision Petition.

3. Opposite parties 2 and 3 have filed separate counter affidavits. The substance of both the counter affidavits may be stated briefly as follows:-

The petitioner and the opposite party no.3 are brothers and enjoy equal share over the schedule property belonging to their ancestor. There is also no dispute that the petitioner and the opposite party no.3 had effected partitioned of their ancestor property in question during the consolidation operation in the year 1982 by filing an application under Section 9(3) of the Act. While carving 'Chakkas' in the mouza, the present property was excluded from being part of any 'Chakka' but the original sabik plot nos. 2216 and 2219 in mouza Rench appertaining to khata no.615 was bifurcated into two plots bearing nos. 1132 and 1133 which corresponds to plot no.2216, measuring an area of Ac.0.11 decimals each, where as plot no.2219 was

divided into plot nos. 1134 and 1135 measuring an area of Ac.0.04 decimals. By way of such operation, the petitioner became owner of plot nos. 1132 and 1133 and the opposite party no.3 became the owner of the plot nos. 1133 and 1135 and the parties were in peaceful possession in their respective plots and exercised their right, title and interest without any dispute from any corner.

After publication of the record of rights, finalization of the map and expiry of the objection period, consolidation operation were declared to be closed in the year 2002, as per a notification under section 41(1) of the Act. After such closure of the consolidation operation, the petitioner in 2003 applied for conversion of the lands fallen into his share for homestead purpose and after obtaining such operation constructed plot no.1132 and has retained the area as per his possession in respect of the area mentioned in the ROR.

During such period the opposite party no.3 sold the land allotted to his share to the opposite party no.2 through a registered sale deed on 23.09.2003 and handed over possession to the opposite party no.2. Since then, the opposite party no.2 is in possession of the land in question.

It is further pleaded that when the opposite party no.2 started constructing his residential house, the petitioner raised an objection for the first time alleging that he has certain extent of land remaining with the said land purchased by him and filed a Civil Suit bearing C.S. No.92 of 2005 before the learned Civil Judge (Senior Division), Puri praying therein for a declaration to the effect that the plot no.1132 measuring Ac. 0.15 ½ decimals and recovery of Ac. 0.2 1/2 decimals of property from the plot no.1133, inter

alia, praying for easementary right over the suit schedule property. Petitioner also filed an application for interim injunction but the prayer was rejected. He also approached the appellate court against such order. The opposite parties, therefore, claimed that the writ petition is not maintainable and the same should be dismissed.

4. While disposing the revision application filed by the petitioner, learned Commissioner, Consolidation, Orissa, Bhubaneswar in Consolidation Revision Case No.272 of 2006 held as follows.

" 4.0. Considered the merit of the case. The petitioner has not raised such claim when partition was effected in 9(3) case no.1849 to 1981. He has never filed any appeal against the order passed in the above 9(3) case. The Consolidation authorities have prepared the map and record after due field enquiry. It is a well-settled principle of law that when the whole plot will be transferred, the vendee will get the benefit of the actual area. Moreover, Consolidation Operation of the village has been closed u/s 41(1) of the Act since, 2002. The Consolidation authorities are not empowered to adjudicate the matter

after such notification which is supported by the decision reported in 2003(Supp.) OLR-882. A Civil suit bearing C.S. No.92/2005 is now pending before the Civil Judge (Sr. Division), Puri for the same relief."

5. As far as the jurisdiction of the Commissioner, Consolidation after publication of Section 41(1) notification, under Section 37(1) of the Act is concerned; the matter is no more *res integra*. It has been settled by the full Bench of this Court in ***Gulzar Khan v. Commissioner of Consolidation and others***, 76 (1993) CLT 161. While considering the powers of the Civil Court, the Commissioner after notification under Section 41(1), the full Bench has held that the Civil Court quo jurisdiction would be available after closure consolidation operation only in any of the following circumstances, namely,

i. The cause of action accruing after the closure of the consolidation operations.
ii. If the consolidation authority has taken the decision without complying with the provisions of the Act or has not acted in conformity with fundamental principles of judicial procedure which would be taken to be case of the violation of natural justice and
iii. Obtaining order from the hand(s) of consolidation authorities by playing fraud on the party who seeks to approach the Civil Court.

6. The full Bench of this Court in Gulzar Khan's case took note of provisions of Sections 41, 51 and 36 of the Act and held that any order passed under Section 36 should not be called in court of law. Section 51 provides that notwithstanding anything contained in any other law for the time being in force but subject to the provisions contained in clause (3) of section 4 and sub-section (1) of section 7, all questions relating to right shall

be decided under the provisions of the Act and no Civil Court in a proceeding in respect of any matter which is an officer or authority empowered under the Act is competent to decide. The full Bench then raised the question and held that however it is apparent, if any cause of action were arose after closure of the operations, it is the Civil Court which has to be approached because in that case the consolidation authorities could not be available. That apart, if the case which attracts clause-I and III of the preceding paragraph, then also the Civil Court could entertain a suit. In no other case, the Civil Court can entertain in question relating to the civil disputes between the parties.

7. However, a party cannot be left without a forum. The principle of *ubijusibi remedium* means that whenever there is a right there is a remedy. Therefore, the full Bench of this Court, in the aforesaid case held that a forum has to be available to a person, who was to be aggrieved, after the Section 41 notification has been issued, with an order having been passed or anything having been done during the consolidation operations effecting his right, title and interest and accordingly the remedy can be made available principally by Section 37 of the Act. The full Bench has also reflected as to

when a situation may arose, need not be spelt out, indeed, it cannot be. Thus, this Court in the aforesaid case held that the Commissioner, Consolidation has the jurisdiction under Section 37 to decide a case depending upon facts and circumstances of that case even after the Section 41(1) notification.

8. The ratio laid down is squarely applicable to this case. It is not the case of the petitioner that cause of action arose after closure of consolidation operation or the consolidation operation had not acted in conformity with the fundamental judicial procedure or orders have been obtained from the consolidation authority by applying fraud. His simple case is that though a particular measure of land is in his possession and the same has been reflected in the consolidation map, the record of right issued in his favour reflects a reduced extent of land. Whether the petitioner has a remedy for ventilating his grievance? The answer is an emphatic yes and the Commissioner, Consolidation Commissioner is to decide, whether the petitioner is entitled to the relief claimed.

9. The other consideration which was considered by the Commissioner, Consolidation is that the petitioner has not raised such an objection in 9(3) proceeding stage. But a careful consideration of the facts and circumstances of the case reveals the fact that the consolidation map reflects the exact measure of land came to the knowledge much after 9(3) objection stage. So the Commissioner, Consolidation was clearly in error in holding that the absence of raising objection in 9(3) stage should be a bar to further agitate the matter.

Thus, this Court comes to the conclusion that the reasons resorted to by the learned Commissioner, Consolidation are clearly erroneous and, therefore, the order impugned, should be interfered with. The order impugned as at annexure-1 is, therefore, set aside and the matter is remitted back to the court of the Commissioner, Consolidation, Orissa, Bhubaneswar. Learned Commissioner is directed to hear the parties afresh and decide the case on merit, as expeditiously as possible. Parties are directed to appear before the learned Commissioner, Consolidation on 08.04.2010.

Writ petition allowed.

2010 (II) ILR – CUT-199

S.K.MISHRA, J.

CIVIL REVISION PETITION NO.18 OF 2007(Decided on 26.04.2010)

ASRAF ALI KHAN & ORS. …….. Petitioner

.*Vrs.*

MASTAN DARGHA & ORS. …….. Opp. Parties

WAKF ACT, 1995 (ACT NO. 43 OF 1995) – SEC.51, 107.

Wakf property – Managed by Wakf Board through mutawalli – Mutawalli sold the property without valid permission – Plaintiff filed suit to declare the sale deed null & void and for recovery of possession – Tribunal decreed the suit – Order challenged in this revision mainly on the ground that the suit was barred by limitation.

In 1995 the Wakf Act came into force which prescribes that there shall be no limitation prescribed for recovery of the Wakf property – Moreover the law of limitation is a procedural law and the provisions existing on the date of suit apply to it – Held, suit filed by the plaintiff is not barred by limitation and the findings recorded by the Tribunal are confirmed. (Para 21,22)

Case law Referred to:-

AIR 1965 SC 241 : (C.Beepa Thuma & Ors.-V- Delha Sari Shankar Narayan

Kaduru Boli Thaya & Ors.).
For Petitioners – M/s. Pratap Ku.Mishra, Bibhuti Bhusan Dash.
For Opp.Parties – M/s. C.A.Rao, S.K.behera, S.K.Purohit & A.K.Rath
(For Opp.Party No.1)
M/s. Mira Ghose, Rati Mohanty, & B.Rath
(For Opp.Party No.3)
M/s. Bishnupriya Biswal, C.R.Jethi
(For Opp.Party No.4).

S.K.MISHRA, J This is an application under Section 83(9) of the Wakf Act, 1995. The defendant no.3 in W.T. (O)/O.A. No.05/2005 of the State Wakf Tribunal, Orissa has filed this revision application challenging the Judgment of the Tribunal dated 25.01.2007, wherein the Tribunal decreed suit of the plaintiff, i.e., respondent no.1 and declared that the suit schedule property is wakf property and the registered sale deed executed by one Wahab Manawar and his wife Najimun Nissa Bibi in favour of the defendants 1 to 3 to be null and void. The Tribunal also passed the order of recovery of the possession of the suit property.

2. The case of the plaintiff in brief is that the suit schedule property recorded in Unit No.17, Hal Malik Khata No.7, Sikimi Khata No.1, Hal Plot No.534 measuring Ac.0.92 decimals corresponding to C.S. Khata No.37, Plot No.26 belonged to the plaintiff institution. The schedule property was originally recorded in the name of deity Mastan Saheb situated at Buxi Bazar, Cuttack. The property was duly surveyed, registered and notified as Wakf property in the Official Gazette vide Orissa Gazette notification No.1248/OBW, dated 08.11.1968. The Wakf Board, Orissa (that is defendant No.4) is looking after the management of suit property through a Managing Committee, namely, "Mastan Dargha and Jadu Bangala Managing Committee" duly approved and recognized by it. One Wahab Manawar was appointed as mutawalli with respect to the suit property. He and his wife Nazimun Nissa Bibi having no manner right or interest on the property illegally executed a sale deed in favour of defendants 1 to 3, in respect of suit property vide R.S.D. No.1564, dated 06.03.1960. Being emboldened with such fraudulent and illegal sale deed Defendants 1 to 3 managed to record their names in the Hal R.O.R. as sikkim tenants. During November, 2004 defendants 1 to 3 in order to sale away the suit property made negotiations with the prospective purchasers and when this fact came to the knowledge of the Secretary of the plaintiff institution he objected to it and on enquiry he ascertained that defendants 1 to 3 have purchased the suit property from Wahab Manawar under a registered deed of sale. The Secretary of the plaintiff institution immediately applied for a certified copy of the alleged sale deed and after obtaining the same on 18.12.2004 filed the

suit for declaration that the suit property is wakf property, sale deed no.1564 dated 06.03.1960 executed by Wahab Manawar and his wife in favour of defendants 1 to 3 is null and void, and permanent injunction/recovery of possession.

3. Defendant no.4 has filed written statement supporting the case of the plaintiff. The Wakf Board has pleaded that the plaintiff institution is a Muslim religious public institution all along managed by a Managing Committee represented through its Members/Secretary. The suit property was recorded in the name of the plaintiff institution in Sabik R.O.R. published in 1932 in "Sthitiban" status and the property was surveyed and notified as Wakf property vide the Gazette notification in the year 1968. The plaintiff institution being a minor the property was in khas possession of Wahab Manawar, who was a mutawalli. It is further pleaded under the Mohammedan law a mutawalli is merely a Manager of the institution and he cannot alienate the wakf property without prior sanction of the Kazi or the District Judge or the Wakf Board, as the case may be. Since Wahab Manawar alienated property without prior sanction from competent authority,

sale deed in question is void, illegal and inoperative in law. The defendant no.4, therefore, prayed that the suit of the plaintiff be decreed.

4. Defendants 1 to 3 have filed a joint written statement denying the averments made by the plaintiff that the suit property is a wakf property. They specifically pleaded that the suit property was recorded in the name of Wahab Manawar in the Sabik R.O.R. of 1931, who had occupancy right over the same. At the time of his marriage Wahab Manawar gifted suit land to his wife Nazimum Nissa Bibi and thereafter resided there peacefully. Due to legal necessity Wahab Manawar and his wife sold the suit land to defendants 1 to 3 by executing sale deed no.1564 dated 06.03.1960 and delivering possession thereof. After purchase defendants 1 to 3 constructed a single storied house in the year 1965 and possessed the land openly, peacefully and uninterruptedly to the knowledge of all including the plaintiff. On 21.06.1983 defendants 1 to 3 made a division of the suit property among themselves by registered deed of partition. The defendant no.1 constructed a three storied building of his share of property with approval of plan from the Cuttack Development Authority on dated 21.01.1992. Thus, defendants 1 to 3 on the basis of their long possession beyond statutory period have acquired title over the suit land by adverse possession. The contesting defendants also raised objections as to the maintainability of the suit land on the ground of limitation.

5. The defendant no.5 pleaded that he has purchased the suit land from defendant no.1. He filed a separate written statement supporting the sale in his favour on 18.02.2005.

6. On such pleadings, the learned Tribunal cast as many as thirteen issues and addressed itself to decide questions like maintainability of the suit, existence of cause of action, limitation, jurisdiction of the Tribunal, valuation of the suit, non-joinder of necessary parties, adverse possession. It also framed issues to determine whether the suit property is wakf property, whether the respondents 1 to 3 have any manner of right, title, interest or possession of the suit land, whether the applicant is entitled to relief of recovery of possession and whether the sale deed in questions are illegal and void and if the relief prayed for can be granted in favour of the plaintiff.

7. The learned Tribunal deciding issue no.7 has come to the finding that the suit property is a wakf property. Learned Tribunal further held that it has jurisdiction to decide the suit and the suit is maintainable. He further held that Wahab Manawar was a sikkim tenant in respect of the suit schedule property but he had no saleable interest in the suit property and hence, the

sale deed executed by him and his wife is void. On the question of adverse possession, the Tribunal held that the defendant had not acquired right over the suit property by adverse possession. Taking note of Section 107 of the Wakf Act, 1995, learned Tribunal has held that the Limitation Act is not applicable to the suit relating to recovery of possession of immovable property comprised in any wakf and hence, he held that the suit is not barred by limitation. Thus, holding the learned Tribunal decreed the suit on contest against the defendants 1 to 3 and 5 and on admission against the defendant no.4. Such decree is under challenge in this revision.

8. In course of hearing of the revision, learned counsel for the petitioners, inter alia, submitted that the findings recorded by the learned Tribunal, the property is a wakf property by user is incorrect as there is no pleading nor any evidence regarding such wakf by user.

The learned counsel for the petitioners also submitted that once the Tribunal has held that W. Manawara was a sikkimi, the property being homestead property, the right of the sikkim is both heritable and transferable. It is further submitted that the suit is barred by limitation and Section 107 of the Wakf Act, 1995 does not apply to the present suit, as right has vested. Learned counsel for the petitioners also submitted that the notification no.68 did not include the suit land. He also contended that as per Section 40 of the Wakf Act, plaintiff should have approached the Board only then he can approach the Tribunal.

Learned counsel for the opposite party no.1 and counsel appearing for the Wakf, on the other hand, supported the findings recorded by the learned Tribunal and prayed to dismiss the revision.

9. It is evident from the impugned judgment that the learned Tribunal has come to the finding that the property is a Wakf property by user. Section 4 of the Muslim Wakf Act, 1954 (No.29 of 1954) (hereinafter referred to as the "Old Wakf Act" for brevity), provides for preliminary survey of Wakf. Under Sub-section (1), it is provided that the State Government may, by notification in the Official Gazette appoint for the State a Commissioner of Wakfs and as many additional or Assistant Commissioners of Wakfs as may be necessary for the purpose of making survey of wakf properties existing in the State on the date of the commencement of that Act. Sub-Section (3) provides that the Commissioner shall, after making such enquiry as he may consider necessary, submit his report to the State Government contending the particulars. Sub-section (1) of Section 5 provides that on receipt of a report under sub-section (3) of Section 4, the State Government shall forward a copy of the same to the Board. Sub-Section (2) of Section 5 further provides that the Board shall examine the report forwarded to it under sub-section (1) and publish in the Official Gazette a list of wakfs existing in the State containing such particulars as may be prescribed.

10. In pursuance of such provision, some of the wakfs properties has been surveyed and it has been notified in the Official Gazette of the year 1968. The said Notification provides for existence of a Wakf by the name of "Mustana Dargha and Jadu Bangala Managing committee". The notification further reveals that such Wakf has been recognized for the purpose of cremation of people belonging to Islamic faith and providing shelter to Travelers/outsiders. Learned counsel for the petitioner submitted that the land recorded in the said Notification is not the suit land. Such a plea has not been taken in the written statement. In fact, there is no dispute regarding the identity of the suit land. It is in fact admitted that the land was covered under the Gazettee Notification, 1968. Yet the defendant claimed that the said Waheb Manohar has the exclusive right thereon, whereas the plaintiff and the Wakf Board maintained that land to be Wakf properties.

11. Section 6 of the Old Act provides for disputes regarding Wakfs. In sub-section (1), it is provided that if any question arises, whether a particular property is Wakf property or not or whether a Wakf is Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in the Civil Court of the competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final. It is further provided that no such suit shall be entertained by the civil Court after expiry of one year from the date of

publication of the list of Wakfs under Sub-section (2) of Section 5. Thus, if the defendants claim that they have purchased the property in the year 1960 from Waheb Manohar and his wife and the property was declared to be of Wakf property in the year 1968 Gazette Notification, then the defendants should have preferred a suit under section 6 of the Old Act, within one year of publication of such list, under sub-section (2) of Section 5 of the old Act. The defendants having not done so are precluded at this stage to raise the plea that the property was not wakfs property.

12. There is also other material on record which shows that the properties in question are wakf properties. The witnesses to defendants No.1 to 3 have admitted that the suit properties are wakf properties and their vender was Mutawalli. D.W. 1 has also admitted that the suit properties are utilized for the cause of the institution. Both the defendants and the plaintiff claim that in 1931, the Record of Right was prepared in the name of Mustana Dargha and Jadu Bangla in Stitiban status. It is clear from the evidence of defendant no.1 who has stated in his examination-in-chief that the Record of Rights dated 30.10.1931 was in the name of the Waheb Manohar, even though the Deity Mastana Saheb recorded under Khata no.35, Plot nos. 24, 25,28 and 37 were its niz dakhal land. The examination-in-chief further shows that the plaintiff has led into the evidence, Ext.A i.e. the Record of Rights issued in the year 1931, but strangely, such Record of

Rights has not been exhibited. It does not find place in the list of Exhibits nor the same has been considered by the learned Tribunal while deciding the issue. Since the defendant no.1 himself has relied on the document and in fact the same was in his possession and has gone onto swear the affidavit (examination-in-chief) indicating that the said document should be marked as Ext. A, but the same has been withheld, this Court comes to the conclusion that an adverse inference regarding withholding of such evidence shall be drawn against the defendant no.1. From such evidence it is clear that the land was recorded in the name of the Deity Mustana Saheb. The Defendant's witnesses also admitted that Waheb Manohar was acting as Mutawalli of the said wakf. Thus, it is immaterial that there is no pleading regarding 'Wakf by user' and there is insufficient evidence of the user. Keeping in view the peculiarity of the case, this court comes to the conclusion that the evidence on record clearly established that the property was Wakfs property.

13. Mulla's principle of Mahammadan Law, edited by M.Hidayatullah in XXI Edition, 2001 at paragraph 207 reflects that a Mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange Wakf property or any part thereof, unless he is expressly empowered by the deed of Wakf to do so. The Wakf Act, 1995 (Act 43 of 95) (hereinafter referred to as the 'Act' for brevity), at section 51 provides that alienation made without

sanction of the Board is void. No such provision is there in the Old Act. In view of such provision, the Law as enumerated by Mulla in the aforestated book has to be taken into consideration. It may be noted that the said book is an Authority in Mahammadan Law and can always be referred to understand the principles governing the people of the country who follow Islamic faith. On the basis of the aforesaid discussion, this Court comes to the conclusion that the property was Wakf property and the same was sold by Waheb Manohar in 1960 without any valid permission and therefore the same is void. Any subsequent transfer of the property by the purchasers from Waheb Manohar shall also derive no title.

14. The next contention is that Waheb Manohar was a Sikkim tenant and, therefore, has heritable and alienable right over the property. It is true that in the year 1988, the Record of Rights has been prepared in favour of Mastana Saheb and the opposite party Bijaya Singh Jena and others have been recorded as tenants therein. However, such preparation of Record of Rights does not create any title with the contesting defendants. The said defendants do not claim that they were tenants under Mastana Saheb, rather they have claimed to have purchased the suit property from Waheb Mahohar. It is already noted that the original R.O.R. of 1931 has not been produced by the Defendant to prove that Waheb Manohar was a Sikkimi tenant and adverse inference has been drawn. That being so, the contesting

defendants again claimed that they are Sikkimi tenants under the Deity, which was accepted by the Tribunal. Neither Waheb Manohar nor the subsequent purchasers were Sikkimi tenants. To that extent, the finding of the learned Tribunal is erroneous.

15. Learned counsel for the petitioner further submitted that under Section 40 of the Act, the Board is to decide, whether a property is a Wakf property or not. Section 40 provides for decision, if the property is Wakf property. Sub-section (1) provides that the Board may itself collect information regarding any property which it has reasons to belief to be Wakf property and if any question arises, whether a property is Wakf property or not etc. it may after making such enquiry as it may deem fit, decide the question. Sub-section (2) provides that the decision of the Board on a question under sub-section (1) shall unless revoked or modified by the Tribunal, be final. A plain reading of the section reveals that the mandate of law does not require that before instituting a suit before the Tribunal, the institution should first approach the Wakf Board. It simply empowers the Wakf Board to declare any property as Wakf and in such case, its decision is final unless it is set aside or modified by the Tribunal. It is not necessary for the plaintiff-Institution to approach the Wakf Board first for a decision on the said question and therefore, the contention raised by the learned counsel for the

petitioner that the suit must fail, because there are no such application to the Board by the plaintiff-Institution is without any substance. Moreover, the Board itself has appeared in the suit and filed written statement. The Board does not raise any objection regarding maintainability of the suit. In such case, the contesting defendants have no locus standi to raise such technical plea.

16 Only other point canvassed by the learned counsel for the petitioner is that the suit is barred by limitation. Admittedly, the first sale took place on 06.03.1960 by the Mutawalli Waheb Manohar and his wife. The Limitation Act, 1908 was in force at that time. Article 134 A provides for the limitation to set aside a transfer of immovable property comprised in any Hindu, Mahammadan or Sikh religion or charitable endowment to recover possession of immovable property comprised in the endowment, which has been transferred by a previous Manager for a valuable consideration to be twelve years from the date of death, resignation or removal of the transferor. Article 134-C provides that the Limitation for a suit by the Manager of a Hindu, Mahammadian or Sikh religion or charitable endowment to recover possession of immovable property comprises in the endowment, which has been sold by a previous Manager for a valuable consideration to be 12 years from the death, resignation or removal of the seller.

17. In this case, no evidence is forthcoming when the Waheb Manohar ceases to become a Mutawalli nor there is any evidence of death or

resignation of the said Muttawalli. When the matter stood thus, the Limitation Act, 1963 came into force. Section 31 of the new Limitation Act provides that:

> "31. **Provisions as to barred or pending suits, etc.-** Nothing in this Act shall,-
>
> (a) enable any suit, appeal or application to be instituted, preferred or made, for which the period of limitation prescribed by the Indian Limitation Act, 1908, expired before the commencement of this Act; or
>
> (b) affect any suit, appeal or application instituted, preferred or made before, and pending at, such commencement."

In essence, this section provides that whenever the period of limitation has expired, the passing of new act will not revive the right already extinguished. In this case, admittedly the period of limitation is twelve years and in worst case also the same was not completed before passing of the 1963 Act. Furthermore, it is seen that in the year 1984, an amendment was brought into the old Wakf Act, wherein Section 66-G was introduced, which

prescribed the limitation for recovery of Wakf property to be thirty years and such period shall begin to run when the possession of the defendants becomes adverse to the plaintiff.

18. Learned counsel for the petitioner submitted that Section 66-G of the Old Act, as amended by the Wakf (Amendment) Act, 1984 is not applicable to the State of Orissa. The confusion has been created because of Section 2 of the Amendment Act, which aims to amend Section 1. It has to be understood with reference to Sub-section (3) of Section 1 of the original Muslim Wakfs Act, 1954. Sub-section (3) of Section 1 provides that the Act shall come into force in a State to which this Act extends on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf for that State; and different dates may be appointed for different States. It further provides that in respect of any of the states of Bihar, Delhi, Utter Pradesh and West Bengal, no such notification shall be issued except on the recommendation of the State Government concerned. So the original Act has an application to the State of Orissa by virtue of the Central Government Notification. No additional recommendation of the State Government is required in its applicability to Orissa.

19. In the amendment, Sub-section (3) of Section 1 has been substituted, which reads as follows:

> "Provided that, as soon as may be, after the commencement of the Wakf (Amendment) Act, 1984, the Central Government may, by notification in the Official Gazette, appoint a date on which the provisions of this Act, as amended by the Wakf (Amendment) Act, 1984, shall come into force in the States of Uttar Pradesh and West Bengal and in those parts of the States of Gujarat and Maharashtra in which the provisions of this Act do not apply, and different dates may be appointed for different States or for different areas, and for the different provisions of this Act, as so amended, and, on and from the date so appointed, the corresponding law, applicable to wakfs in force in that State or in any part thereof, or, as the case may be in such area, shall cease to operate, and, on such cesser, such corresponding law shall be deemed to have been repealed by an Act enacted by the Legislature of that State, but such cesser shall not affect the previous operation of such corresponding law, and subject thereto, anything done or any action taken in exercise of any power conferred by or under any such corresponding law shall be deemed to have been done or taken in the exercise of powers conferred by or under this Act, as amended by the Wakf (Amendment) Act, 1984, as if this Act, as so amended, were in force on the date on which such thing was done or action was taken."

In the original Act, Section 2 also provides that the Old Act shall not apply to Durgah Khawaja Saheb, Ajmer. In order to remove the anomaly, Sub-section (2) of the Amendment Act, 1984 has been introduced, so that the Central Government may in the Official Gazette by Notification appoint different dates for application of the Wakf Act as amended in 1984 to the States of West Bengal, Utter Pradesh, Gujarat and Maharasthra, to which the Act itself was not applicable in absence of recommendation by the State Government. In essence, the Amendment obviates the need of recommendation of the State Government provided in the original provision. It is also noted that because of reorganization of the State, the States of Gujarat and Maharasthra were created from the erstwhile State of Bombay. In view of such facts, the contention that the Amendment Act is not applicable to Orissa is wholly unjustified and incorrect.

20. In the year 1995, the Act came into force. Section 107 of the Act provides that nothing contained in the Limitation Act, 1963 (36 of 1963), which applied to any suit for possession of the immovable property comprised in any Wakf or for possession of any interest in such property. In the new Limitation Act, Article 96 provides for limitation for recovery of Wakf property, but the date of starting of limitation has been stipulated to be the date of death, resignation or removal of the transferer or the date of appointment of the plaintiff as the manager of Endowment, whichever is

later. In this case, it is seen that the Secretary of the plaintiff-institution has been examined as P.W. 1 and he has stated that he was working as the Secretary of the Institution since 1997.

21. In such factual backdrop, in the year 1995 the Wakf Act came into force, which prescribes that there shall be no limitation for recovery of the Wakf property. Learned counsel for the petitioner has submitted that such provision shall not restore any right already extinguished by Law of Limitation. Keeping in view the peculiar facts of the case, this Court is of the opinion that the limitation had not expired on the date of coming into force of the Wakf Act, 1995. Thus, the provision of Section 107 of the New Act shall apply to the case in hand.

22. The Supreme Court in ***C.Beepa Thuma and others v. Delha Sari Shankar Narayan Kaduru Boli Thaya and others,*** AIR 1965 SC 241 has held that the law of Limitation is a procedural law and the provisions existing on the date of suit apply to it. Thus, in this case, the Court is of considered opinion that the suit filed by the plaintiff is not barred by limitation.

23. Accordingly, the findings recorded by the learned Tribunal are confirmed and the Revision Petition is dismissed. However, there shall be no order as to costs.

Revision dismissed.