2010(I)ILR – CUT-757

V.GOPALA GOWDA, CJ.

ARBP No. 25 of 2009 (Decided on 30.04. 2010.)

M/S. SUBASH CHANDRA KANCHAN & ANR ..... Appellant

.Vrs.

B.S.N.L. & ANR. ..... Respondent

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF1996) – SEC.11(6).

Appointment of Arbitrator – Construction work – Payment not made as per agreement – Direction issued for appointment of arbitrator and completion of the proceeding – Proceeding not completed in time and the arbitrator resigned – Delay in completion of proceeding is not deliberate but for the administrative reasons – Held, the present petition filed by the petitioner can not be maintained as the arbitrator is already appointed by the Opp.Parties in conformity with Clause 25 of the agreement to resolve the dispute between the Parties.

(Para 7)

Case laws Referred to:-

1.2009 AIR SCW 3374 : (Union of India -V- M/s. Singh Builders).
2.2004(2)Arb.L.R. 364 : (Haryana Telecom Ltd.-V-Union of India & Anr.).
3.2003(2) ArbL.R.523 : (Devi SBI Industries Ltd.-V-Government of NCT of Delhi & Ors.).

For Petitioner – M/s. S.K.Sanganeria, P.C.Patnaik & P.C.Nayak.
For Opp.Parties – M/s. S.Ku.Das & B.C.Pradhan.

GOPALA GOWDA, C.J. The petitioners have filed this petition under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the Act' in short) seeking for appointment of an arbitrator or to constitute an arbitral Tribunal unconnected with and independent of the opposite parties to adjudicate the claims and resolve the dispute between the parties urging various facts and legal contentions.

2. Relevant facts are stated for the purpose of examining and considering the claim of the petitioners herein. The petitioners herein submitted tender quotation for the execution of the work, namely, "Construction of administrative building including water supply, sanitary installation and external services at Koraput (Orissa)" by offering tender of the value of Rs.1,11,14,351.00 with a stipulation to commence the work immediately to complete the same within the period of 20 months as per letter No.1124 dated 24.9.1998 of the Executive Engineer-opposite party no.1.Even before

execution of the agreement the petitioners started the work and vide letter dated 15.12.1998 requested the opposite party no.1 to enter into an agreement and to include the detail items of work and also to give the detail working drawings which were not provided to the petitioners by opposite party no.1, is the allegation made in the petition.

3. Subsequently, the first petitioner entered into an agreement for the aforesaid work vide Agreement No.28/CDB/98-99 which agreement contains clause 25 relating to arbitration. Relevant portion of the said clause reads thus :

> " …..The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or administrative head of the Telecommunication/Postal as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the Telecommunication/Postal Department as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases, where the amount of the claim in dispute is Rs.50,000/- (Rupees fifty thousand) and above, the arbitrator shall give reasons for the award."

3. It is the case of the petitioners that on 27.3.1999 they sent a letter to the opposite party no.1 to furnish a certified copy of the agreement, other papers and documents and requested for issuance of the departmental materials. During the course of execution of the work, there arose some dispute between the parties, as the opposite party no.1 went on changing the instructions from time to time and also failed to make payment in terms of the agreement and, therefore, petitioner raised demand with opposite party no.1 and as opposite party no.1 did not settle the demand, they approached opposite party no.2 in terms of clause 25 of the agreement by way of a notice dated 11.10.2004 sending the same by speed post to appoint an arbitrator. When no arbitrator was appointed in terms of the aforesaid clause 25 of the agreement, the petitioner approached the Chief Justice of this Court which was registered as ARBP No.55 of 2004. Opposite party no.2 in its reply agreed to appoint an arbitrator. ARBP No.55 of 2004 was disposed of by the then Chief Justice of this Court vide order dated 28.9.2007 with a direction to opposite party no.2 to appoint an arbitrator and complete the proceeding with the stipulated period. After disposal of the aforesaid ARBP No.55 of 2004, one Mr.A.K.Nagar, the

Principal Chief Engineer (Arbitration) was appointed as arbitrator to adjudicate the claims and disputes between the parties. He sent a notice to the petitioners on 19.10.2007 to submit their claim statements and documents. Since the said Mr.A.K.Nagar resigned as he was transferred, in his place another Chief Engineer by name Mr.V.K.Malhan was appointed as arbitrator vide order No.1236 dated 30.9.2008. It is the case of the petitioners that Mr.V.K.Malhan did not hold a single sitting of the arbitration proceeding and therefore the matter has been pending. Therefore, not only he has delayed the proceedings but the petitioners have lost faith in him as he was negligent in not holding the arbitral proceedings and to resolve the claims and disputes. Therefore, it is contended that his appointment is non-est in the eye of law. Hence, the present petition is filed seeking the aforesaid reliefs.

4. Counter affidavit has been filed on behalf of the opposite parties by one Makara Marindi who is serving as Executive Engineer-opposite party no.1 and is duly instructed and authorized to file the same by the opposite party no.2. In the counter affidavit he has stated that the arbitration petition filed by the petitioners is not maintainable in law and prayer of the petitioners cannot be granted to appoint a new arbitrator who is unconnected with and independent of opposite parties to adjudicate the claims and disputes between the parties. The arbitrator Mr.A.K.Nagar, Principal Chief Engineer, after his appointment sent notice to the parties to submit their statement of claim and documents vide his letter dated 19.10.2007. The petitioners submitted their claim on 14.1.2008 and the opposite parties submitted their counter claims on 2.2.2008. Rejoinder was submitted by the petitioners on 27.6.2008 and the reply to the rejoinder was filed by the opposite parties on 19.11.2008. The arbitrator in exercise of his power under Section 26 of the Act decided to appoint an expert to assess the correct work done by the claimant and requested the Chief Engineer (Civil), Civil Orissa Zone, Bhubaneswar vide letter dated 26.5.2008 (Annexure-B) to nominate an officer for the said purpose. As per the request, one P.K.Mohapatra, Executive Engineer (Civil), BSNL Civil Division –I, Bhubaneswar was nominated as inspecting officer to carry out the direction vide letter dated 5.6.2008 (Annexure-C).

It is further stated that since Mr.A.K.Nagar, Principal Chief Engineer, resigned from the arbitral Tribunal due to his transfer, one Mr.V.K.Malhan, Chief Engineer, was appointed as arbitrator on 30.9.2008. In the proceedings held by him on 16.10.2008, he intimated the parties about his appointment and requested the Chief Engineer (C), BSNL Civil Orissa Zone, Bhubaneswar to ensure the report of the nominated/inspecting officer. The said inspecting officer being promoted as Superintending Engineer, the Chief Engineer appointed his successor Shri P.K.Mallick as the inspecting

officer. Again on 2.1.2009, Mr.V.K.Malhan intimated the parties to ensure submission of report by the nominated officer. It is the further case of the opposite parties that in spite of letter dated 12.5.2009 issued by the inspecting officer for joint verification on 10.6.2009 and 11.6.2009 to verify the construction of building at Koraput, the same could not be done on account of the personal difficulties and work of the petitioners. Though the inspecting officer contacted the first petitioner from time to time, a suitable joint verification date could not be fixed. In the reply letter received from the petitioners by the Inspecting Officer, it is stated that since Arbitration Case No.25 of 2008 is pending before the Chief Justice of this Court, they are unable to visit the site on 10.6.2009 and 11.6.2009.

5. When the matter stood thus, Mr.V.K.Malhan resigned from the proceedings due to his transfer. Therefore, S.S.Dahiya, another Chief Engineer, has been appointed as the sole arbitrator by letter dated 30. 7.2009. He had in turn vide his letter dated 11.9.2009 intimated the parties and directed the inspecting officer to submit the report as per direction issued by the arbitral Tribunal earlier and he has allowed one more chance to the petitioners to attend the joint verification and submit the report by 30.11.2009. Shri P.K.Mallick, inspecting officer fixed 26.10.2009 and 27.10.2009 as the dates for joint verification and issued notice to the parties accordingly. He had reached the site as per the schedule date and time, but the petitioners did not attend the joint verification. After receipt of the letter dated 31.10.2009 from the inspecting officer, arbitrator Mr.S.S.Dahiya fixed the date of hearing to 18.1.2010 at 11.00 hours and intimated the petitioners and the opposite parties.

6. The allegations of the petitioners that the opposite parties are delaying the proceedings on account of negligence on the part of the arbitrator are all denied as false. Further it is specifically stated that there is no cause of action for the petitioners to approach this Court seeking for appointment of an arbitrator as prayed for. Rejoinder affidavit is filed denying certain averments made in the counter affidavit. Reply to the rejoinder affidavit is also filed by the opposite parties reiterating its stand. Learned counsel for the petitioners placed reliance on Union of India v. M/s. Singh Builders, 2009 AIR SCW 3374, Haryana Telecom Limited v. Union of India and another, 2004 (2) Arb.L.R. 364 and Devi SBI Industries Ltd. V. Government of NCT of Delhi and others, 2003 (2) Arb.L.R.523 in support of the contention that the petition is maintainable and the learned Chief Justice of this Court is empowered to appoint an arbitrator as section 15 is attracted to the facts of the case.

7. I have carefully gone through the facts pleaded by both parties to find out as to whether this Court is required to exercise its power under section 11(6) of the Act and grant the relief of appointment of an arbitrator

unconnected with and independent of the opposite parties to adjudicate the claims, as prayed by the petitioners. My answer to the said question is in the negative for the following reasons. It is an undisputed fact that pursuant to the orders of this Court dated 28.9.2007 in ARBP No.55 of 2007, opposite party no.1 has appointed Mr.A.K.Nagar, Principal Chief Engineer to arbitrate the matter and resolve the dispute between the parties and it is alleged that he has not held a single sitting of the proceeding, nor completed the arbitration proceedings within 6 months as directed by this Court nor sought extension and without notice he resigned with an intention to delay the proceeding. The said allegations are denied by the opposite parties in their counter statement, wherein they have narrated in what circumstances the proceedings were not held by him and subsequently two officers of the rank of Chief Engineer were appointed as arbitrator and how successors of the arbitrator, namely, A.K.Nagar, V.K.Malhan and S.S.Dahiya, Chief Engineers, in exercise of power under section 26 of the Arbitration and Conciliation Act, 1996 wanted to ascertain the correct work done by the petitioners and pursuant to the same one P.K.Mohapatra, Executive Engineer was nominated as inspecting officer and upon his promotion one P.K.Mallick was nominated as the Inspecting Officer on 29.1.2009 who by letter dated 12.5.2009 to the petitioners fixed the date of inspection to 10.6.2009 and 11.6.2009 to verify the building at Koraput to assess the correct work done by the petitioners and submit his report. The petitioners did not co-operate with him and did not attend the same for the purpose of verification. Thereafter, the Inspecting Officer P.K.Mallick again issued notice on 5.10.2009 to the petitioners fixing date of inspection to 26.10.2009 and 27.10.2009 but the petitioners have not cooperated for inspection. Thereafter the arbitrator himself has fixed the date of hearing to 18.1.2010 at 11 hours vide notice dated 10.11.2009 for which also the petitioners have not co-operated. The petitioners are not participating in the arbitral proceedings. The delay attributed to the opposite parties in the petition is not deliberate but for the administrative reasons. Therefore, the appointment of the arbitrator and termination of the same and again appointment of another arbitrator by the opposite parties is in exercise of their power under clause 25 of the agreement read with sections 11 and 15 of the Arbitration and Conciliation Act, 1996. Therefore, the present petition filed by the petitioners cannot be maintained as the arbitrator is already appointed by the opposite parties in conformity with clause 25 of the agreement to resolve the dispute between the parties. Reliance placed by the petitioners' counsel on various decisions of the apex court and High Court which are referred above are wholly misplaced to the fact situation and, therefore, those decisions cannot be applied to the case on hand. For the aforesaid reasons,

the petition is misconceived and devoid of merit and is dismissed but without costs.

Application dismissed.

2010(I)ILR – CUT-763

V.GOPALA GOWDA, CJ & B.P.DAS, J.

W.A No. 212 of 2009 (Decided on 03.05.2010.)

TARACHAND MAJHI …. .. ……. Appellant

-V-

LALIT PADHAN …….. Respondent

Letters Patent – Clause 10 – Read with Orissa High Court Rules-1948 – Chapter-VIII – Rule 2 – Appeal challenging the order of the learned Single Judge – Maintainability – Held, appeal maintainable against the judgment and order of the learned Single Judge – Election of Sarpanch – Election Tribunal granted relief of recounting of votes – Order challenged in writ petition before the learned Single Judge – Writ dismissed – Hence the writ appeal – Order of the Election Tribunal is perfectly legal and valid and is based on pleadings, evidence on record and legal principles – Held, Order of the learned Single Judge does not call for interference.

(Para 5 & 6)

Case laws Referred to :-

1.AIR 1986 SC 1972 : (Umaji Keshao Meshram & Ors.-V- Smt.Radhika Bai & Anr.).
2.(2001)9 SCC 609 : (Kanhiyalal & Ors.-V- Factory Manager, Gwallior Sugar & Co.).
3.AIR 2003 SC 3044 : (Surya Dev Rai-V-Ram Ch.Rai).
4.2009(Supp-1) OLR 513 : (Narayan Chandra Nayak -V- Harish Ch.Jena).
5.(1999) 8 SCC 692 : (T.S.Musthaffa -V- M.P.Varghese & Ors.).
6.AIR 1987 SC 1242 : (Ram Sarup Gupta(dead) by L.Rs. -V- Bishnu Narain Inter College & Ors.).
7.AIR 1966 SC 735 : (Bhagwati Prasad -V- Chandramaul).
8.AIR 1995 Bombay 333 : (Appa Babaji Misal Patil & Ors.-V-Dagdu Chandru Misal & Ors.).

For Appellant – Mr.Gautam Mishra.
For Respondent – M/s. A.R.Dash, S.K.Nanda, B.Mohapatra, S.N.Sahoo & K.S.Sahu.

V. GOPALA GOWDA,C.J. This writ appeal is filed by the unsuccessful petitioner in W.P.(C) No.13194 of 2009 who is the opposite party in the Election Petition No.5 of 2007 before the Civil Judge (Junior Division), S.Rampur who has allowed the application of the respondent herein to recount the ballots of polling booth nos. 1, 2,6,10 and 11 which order is

affirmed in the impugned order passed by the learned Single Judge in dismissing the petition filed by the appellant herein vide its order dated 20.11.2009 is challenged urging various legal grounds.

2. When this matter was listed for admission on 15.4.2010, learned counsel appearing on behalf of the respondent raised the preliminary objection regarding the maintainability of this writ appeal by placing reliance upon the Full Bench decision of this Court in the case of Mohammed Saud & others v. Dr.(Maj) Shaikh Mahfooz and another reported in 2008 (II) OLR (FB) 725 placing reliance upon paragraph 45 wherein the Full Bench of this Court having regard to the conflicting Division Bench judgments of this Court with reference to Section 100-A of the Code of Civil Procedure as amended by Act 22 of 2002 has held that appeal against the judgment/order of a learned Single Judge to a Division Bench notwithstanding anything contained in the Letters Patent is not available as it is held that no provision for filing an appeal to a Division Bench against the judgment/decree/order of a learned Single Judge has been made. In this view of the matter, the learned counsel for the respondent contends that appeal against the order of the learned Single Judge in view of the aforesaid Full Bench decision of this Court which has answered the reference holding that against the judgment or order passed by a learned Single Judge in view of Section 100-A of C.P.C. letters patent appeal is not provided, the appeal is not maintainable in law and, therefore, requested to dismiss this appeal on this count itself.

3. Learned counsel appearing on behalf of the appellant herein rebuts the said contention placing reliance on the very same Full Bench decision at paragraph 47 (3) wherein this Court after interpretation of Section 100-A and the various decisions of the Supreme Court with regard to jurisdiction of judicial review power of this Court under Articles 226 and 227 of the Constitution and also the remedy of appeal under Clause 10 of the Letters Patent read with Orissa High Court Order, 1948 held that no Letters Patent Appeal shall lie against judgment/order passed by a learned Single Judge in view of the amendment of the CPC by Amendment Act 22 of 2002 and further the Full Bench has examined the remedy of an aggrieved party keeping in view the decision of the Supreme Court in the case of Umaji Keshao Meshram & others v. Smt.Radhika Bai and another, AIR 1986 SC 1972 and another decision of the Supreme Court, namely, Kanhaiyalal & others v. Factory Manager, Gwalllior Sugar & Co., (2001) 9 SCC 609, wherein the Apex Court held that if, the Single Judge of a High Court in considering the question under Articles 226 and 227 does not state under which provision he has decided the matter and how the facts satisfied filing of petition both under the aforesaid articles of the Constitution and the petition so filed is dismissed on merit, the matter may be considered in proper perspective in appeal. It also further placed reliance upon various

other decisions of the Supreme Court particularly the decision in the case of Surya Dev Rai v.Ram Ch.Rai, AIR 2003 SC 3044 wherein the apex Court examined the power of the High Court under Articles 226 and 227 of the Constitution of India and the appeal power of a party and at paragraph 47 sub-para 3 while summing up the legal contentions answered the reference which reads thus:

> "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. Further strong reliance is placed upon another Division Bench decision of this Court in the case of Narayan Chandra Nayak v. Harish Ch.Jena, reported in 2009 (Supp-1) OLR 513. In that case the learned Civil Judge passed order directing recounting of votes. Against the said order writ petition was filed before this Court and the learned Single Judge rejected the writ petition against which writ appeal was filed before this Court. This Court after interpretation of Rule 30 of the Orissa Panchayat Samiti Election Rules, 1991, held that recounting of votes can be allowed in exceptional circumstances, where the Court comes to the conclusion that the election petitioner is not seeking a roving and fishing inquiry. Against the order of the learned Single Judge, writ appeal was filed and the Division Bench of this Court examining the various decisions of the Supreme Court held that finding of fact in election cases should not be interfered with in the appeal by the Division Bench unless palpable errors are present, after holding that the writ appeal against the order of the learned Single Judge is maintainable. The said decision with all fours is aptly applicable to the fact situation of this case.

5. Having regard to the rival legal contentions urged by the learned counsel on behalf of the parties, we have very carefully examined the Full Bench decision of this Court and another Division Bench decision of this Court and various decisions of the Supreme Court referred to in both the said decisions, particularly, the decision in the case of Umaji Keshao Meshram & others v. Smt.Radhika Bai and another, and also the decision in Surya Dev Rai v. Ram Ch.Rai, referred to supra, upon which reliance is placed by the Full Bench and the Division Bench and rightly held that against the judgment and order of the learned Single Judge right of appeal is available to the aggrieved person. In the conclusion of the Full Bench at sub-para (3), of paragraph 47, the relevant portion of which is extracted above

where the similar contention as urged by the learned counsel on behalf of the appellant is adverted to in the said case and held that Writ Appeal is maintainable. Therefore, the said case is aptly applicable to the fact situation at hand. In this view of the matter, the preliminary objection raised by the respondent's counsel is wholly untenable in law and the same is liable to be rejected. Accordingly, the same is rejected.

6. We have heard both the learned counsel for the appellant and the learned counsel for the respondent on the merits of the case. After careful consideration of the rival legal contentions urged with reference to the grounds urged in the writ appeal by the appellant's counsel questioning the correctness of the order of the election Tribunal, whose order is affirmed by the learned Single Judge by dismissing the writ petition filed by the appellant, with a view to find out as to whether the order impugned in this appeal or the order of the Tribunal impugned in the writ petition needs interference by this Court on the ground that substantial question of law does arise in the appeal for the reason that the findings which have been recorded by the learned Single Judge in the impugned order by affirming the order of the Election Tribunal suffers from palpable error in law as there is no pleading or issue framed ? It is urged on behalf of the appellant that the said order of the Tribunal is erroneous in law for the reason that the Tribunal has exceeded in its jurisdiction in granting the relief of recounting, as prayed for by the election petitioner (present respondent) before the Election Tribunal, which contention was rejected in its order, whose order is affirmed by the learned Single Judge. The said contention is carefully examined by us. We have carefully examined the order of the Election Tribunal. The Election Tribunal, after adverting to the relevant facts and circumstances of the case and also the evidence of the appellant and the respondent adduced in the election petition before it, has examined the claim of the respondent as to whether he is entitled for recounting of votes of certain booths on the basis of facts pleaded, namely, the respondent has secured 1190 votes whereas the appellant secured 1229 votes and while counting the total votes polled the counting officials have added more than 40 invalid votes to the account of the appellant and 24 valid votes of the respondent were rejected. Therefore, the election Tribunal on the basis of the pleadings and the evidence of P.W.1, the respondent herein who has corroborated the averment in the election petition and whose evidence is corroborated by the evidence of P.Ws. 2 and 4 regarding addition of invalid votes in favour of the appellant and rejection of valid votes of the respondent in favour of the appellant and that of P.W.5 who has corroborated the evidence of P.W.1 regarding declaration of 19 votes in favaour of the appellant by the election officials though the appellant has not secured the same and after satisfying about prima facie case and relevant aspects of the case for ordering

recounting of votes has allowed the application of the respondent. The said order was challenged by the appellant before this Court in a writ petition and the same was examined by the learned Single Judge in the impugned order with reference to the legal contentions urged in the writ petition and also after adverting to the decisions of the apex Court in the case of T.S.Musthaffa v. M.P.Varghese and others, (1999) 8 SCC 692, in support of the contention wherein the apex Court has held that unless pleading contains necessary foundation for raising an appropriate issue, no amount of evidence is sufficient for raising the issue and granting the relief sought for by the respondent and considering the evidence that 40 invalid votes were added to the credit of the appellant herein and 24 valid votes of the respondent were rejected illegally, the learned Single Judge held that there was improper addition of votes in favour of the appellant and rejection of valid votes in favour of respondent and the case of the respondent is that the appellant was illegally elected as Sarpancha of Lingamarani Gram Panchayat. After referring to the case of the apex Court in the case of Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College and others, AIR 1987 SC 1242 the Apex Court has observed that some times pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question and that of Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735, wherein it was held that the general rule for that relief should be founded on the pleadings of the parties, but where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is: Did the parties know that the matter in question was involved in the trial and did they lead evidence about it, the learned Single Judge held that there were sufficient materials in the pleading showing rejection of valid votes and acceptance of invalid votes. The learned Single Judge has further placed reliance upon the Division Bench decision of the Bombay High Court in Appa Babaji Misal Patil and others v. Dagdu Chandru Misal and others, AIR 1995 Bombay 333, the learned Single Judge has accepted the conclusion arrived at by the learned election Tribunal in allowing the application of the respondent. The learned Single Judge has examined all the legal contentions urged on behalf of the parties to find out as to whether the Election Tribunal's order is vitiated on account of erroneous reasoning or error in law and found that the said order is perfectly legal and valid as the same is based on the pleadings, evidence on records and legal principle laid down by the apex Court and Bombay High Court in

the cases referred to supra and rightly held that the order impugned in the writ petition does not call for interference. In our considered view, the said view of the learned Single Judge is perfectly legal and valid and does not call for interference by this Court in this appeal as we find that there is no palpable error present in the order or there is no compelling circumstances to interfere with the same. Therefore, the writ appeal is devoid of merit and is accordingly dismissed.

Writ appeal dismissed.

2010(I)ILR – CUT-769

V.GOPALA GOWDA, CJ & B.P.DAS, J.

W.P.(C). No.2862 OF 2010 (Decided on 19 05. 2010.)

THE ORISSA PRINTERS & BINDERS MAHASANGHA …… Petitioner

-V-

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

CONSTITUTION OF INDIA, 1950 – ART.226 & 227, Micro, Small & Medium Enterprises Development Act, 2006,Sec.11

Resolution to invite National Tender for Printing of Nationalised Text Books – Petitioner a micro enterpriser – Competition between two un equals in which poor binders/printers will suffer – Resolution challenged – Industrial Policy Resolution 1980 for benefit of small entrepreneurs – Nothing to show that the incentive given in IPR 1980 have been withdrawn – Industrial Incentive Policy was issued by the Govt. and was approved by the cabinet – Directive principles of State Policy - Government can not deny any benefit, which is otherwise available to the SSI Units under the I.P.R. – Held, Resolution for national tender quashed – Direction issued to award printing and binding of Text books work to SSI Units of the State.

(Para 7 to 12)

Case laws Referred to:-

1.AIR 1986 SC 180 : (Olga Tellis & Ors. -V- Bombay Municipal Corporation & Ors.)

2.AIR 1999 SC 303 : (State of Bihar & Ors. -v- Suprabhat Steel Ltd.& Ors.)

For Petitioner – M/s. M.Kanungo, S.Das, S.K.Mishra, Y.Mohanty, & S.N.Das.

For Opp.Parties – Mr. Ashok Mohanty, Learned Advocate General for the State.
M/s. Sidheswar Mohanty & P.K.Mohanty (For Intervenor)

B.P.DAS, J. The petitioner-The Orissa Printers & Binders Mahasangha being represented by its President, Sri Rabindranath Kar, has filed this writ petition challenging the resolution made on 25.8.2009 by the State Government in the Department of School & Mass Education under Annexure-1 deciding to invite national tender with regard to printing of Nationalised Text Books for the academic session 2010-11 and the Tender

Call Notice issued by the Director, Text Book Production & Marketing, Bhubaneswar, O.P.3, on 11.2.2010 in the local newspaper "The Samaj" (Annexure-7), which according to the petitioner, contravenes the Industrial Policy Resolutions 1988 to 2009 issued by the State Government in Industries Department.

2. The case of the petitioner, in brief, is that it is a member of the Small Scale Industry, which involves in the business of printing and binding of books and the association comprises of 5000 printing presses and binding units, which were set up under the approval of the respective District Industries Centers and come within the meaning of Small Scale Industries. Nearly 70000 workers including Technicians, Skilled and Unskilled Labourers have been engaged in this trade and they mainly depend upon the printing presses to earn their livelihood.

According to the petitioner, in the Industrial Policy Resolution 1980, several incentives were given to Small Scale Industrial Units (SSI Units) and the Policy of the State Government is to ensure that those SSI Units get marketing support and the said marketing support includes facility of preferential purchase of the products manufactured by those industries by the State Government Departments and Agencies under its control. A Purchase Review Committee has been constituted with the Additional Chief Secretary to Government as its Chairman and the Secretaries to Government, Finance Department and Industries Department and the Director, Export, Promotion and Marketing as its Members to review and see proper implementation of the policies by the State Government Departments and the Agencies under its control.

According to the petitioner, the benefits of the Industrial Policy Resolution, as indicated above, were enjoyed by the petitioner for more than 15 years as the petitioner was entrusted with the work of printing and binding of text books by O.P.1 and the decision taken under Annexure-1 for floating national tender for printing and binding of text books will take away the bread of thousands of workers and the same is also in violation of the statutory provision, as contained in the Micro, Small and Medium Enterprises Development Act, 2006 as well as the Industrial Policy Resolution 2007.

Our attention was drawn to the contents of the writ petition wherein it is averred that the Orissa Industrial Policy Resolution 2007 contemplates of marketing support to micro and small enterprises in Government procurement in consonance with the Micro, Small and Medium Enterprises Development Act, 2006 and the corresponding rules.

4. The sum and substance of the argument of Mr.Kanungo, learned counsel for the petitioner, is that the resolution under in Annexure-1 is

contrary to the statutory provision and the benefit conferred by the statutory provision cannot be taken by an executive decision and, therefore, the decision in Annexure-1 for floating national tender for printing and binding of text books is illegal, arbitrary and liable to be quashed.

5. By order dated 18.2.2010, this Court while issuing notice to the O.Ps. directed that till the next date, no final decision would be taken with regard to the Tender Call Notice dated 11.2.2010 under Annexure-7 and the said interim order is still continuing.

6. In the counter affidavit filed on behalf of O.Ps.1 & 3, a stand has been taken that under the policy frameworks of I.P.R. 2007and the Orissa M.S.M.E. Development Policy, 2009, it has been made mandatory for the State Government Departments and the agencies under its control to procure all the goods and services only from "EPM Rate Contract Holders" or from the list of goods and services reserved for "Exclusive Purchase" from Micro and Small Enterprises, located within the State of Orissa. The printing press and book binding are neither enlisted in "E.P.M. Rate Contract" nor find place in the "Exclusive Purchase List" of items/services that are protected for mandatory orders by the State Government or any of its agencies. Moreover, in the Schedule of Annexure-II of the I.P.R.2007 (Annexure-7), such printing press and book binding industries have been excluded from eligible list of industries, which can claim any kind of fiscal incentives. The further stand taken by the O.Ps. is that during the last academic session, the total cost of outsourcing of private printing/binding of nationalized text books was to the tune of Rs.5,73,06,536/-. Since spending of such large amount of public money is involved, it was decided by the Government in School & Mass Education Department to composite both printing and binding operations and go for national tender mechanism.

7. We may refer to Section 11 of the Micro, Small and Medium Enterprises Development Act, 2006, which reads thus :

> "11. Procurement preference policy-For facilitating promotion and development of micro and small enterprises, the Central Government or the State Government may, by order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries or departments, as the case may be, or its aided institutions and public sector enterprises."

In this regard, we may also refer to the notification dated 17th February, 2009 issued by the Industries Department, i.e., Orissa MSME Development Policy, 2009, Clause-2 of which provides for ample opportunity to local entrepreneurial talent and strengthen the institutional support in alignment with the present requirement of the MSME Sector. Clause-5

speaks that State Government will ensure procurement of goods and services by the Government Departments and Agencies from MSEs. located within the State via rate contract system, purchase from exclusive list and purchase by open tender with 10% price preference to local MSEs. K & VI units including Coir, Handloom and Handicrafts vis-à-vis local medium and large industries as well as outside industries. In view of the stand taken in the counter affidavit, that the printing press and book binding are not enlisted in the E.P.M.Rate Contract nor find place in the Exclusive Purchase List of items, preference cannot be given to them and the interested bidders are free to participate and quote competitive rates in the said tender, we may refer to the aims and objective and reasons of the Micro, Small and Medium Enterprises Development Act, 2006.

> " xxx xxx The world over, the emphasis has now been shifted from "industries" to "enterprises". Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary, that in India too, the concerns of the entire small and medium enterprises sector are addressed and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law."
>
> There is no dispute that the petitioner is a micro enterpriser and for the last 18 years they are getting the marketing support, which is legitimate and now by virtue of the national tender, the small entrepreneurs as well as those workers who earn their livelihood by binding the books and printing will lose their job. It is not expected that the small entrepreneur can compete with the bigger industries which will come forward to participate in the national tender. So the very purport of Micro, Small and Medium Enterprises Development Act, 2006 and various provisions in the Industrial Policy Resolution to protect the small scale industries as well as small entrepreneurs will be frustrated. If we accept the argument of the learned counsel for the State that those micro entrepreneurs can participate in the tender, definitely it would be a competition between large mighty industrialists and the micro and small entrepreneurs, i.e., a competition between two unequals, in which ultimately the poor binders and printers will suffer.

10. Part-IV of our Constitution, i.e., Directive Principles of State Policy has been described as forerunners of the U.N.Convention on right to Development as an inalienable human right. Though the same are not

enforceable in court of law, they are fundamental to the governance of the country. The Directives have been held to supplement fundamental rights in achieving a Welfare State. The object of Directive Principles is to embody the concept of Welfare State. In view of the fact that Articles 39(a) and 41 require the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. (**See Olga Tellis & Others vrs. Bombay Municipal Corporation & Others,** AIR 1986 SC 180).

Apart from this, in the Industrial Policy Resolution 1980, several incentives were given to the SSI Units and the policy of the State Government is to ensure that the SSI Units get marketing support, which includes facility of preferential purchase of the products manufactured by those industries and a Purchase Review Committee was constituted, as indicated in the foregoing paragraph, with the Additional Chief Secretary to Government as its Chairman. There is no dispute that the petitioner's units are the SSI Units. That apart, there is nothing to show that the incentives given in the I.P.R. 1980 have ever been withdrawn by the State Government. By virtue of the resolution dated 25.8.2009 made by the State Government in the Department of School & Mass Education, the benefits granted under the I.P.R. 1980 cannot be taken away.

11. Law in this regard is well settled that the Industrial Incentive Policy is issued by the State Government after such Policy is approved by the Cabinet itself and the State Government cannot deny any benefit, which is otherwise available to the Industrial Units under the Incentive Policy.(See **State of Bihar & Others vrs. Suprabhat Steel Ltd. & Others**, AIR 1999 SC 303).

In the present case the Industrial Incentive Policy was issued by the State Government after such policy was approved by the Cabinet itself and, therefore, it is not permissible for the Government Departments to deny any benefit, which is otherwise available to the SSI Units under the Industrial Policy Resolution.

12. In view of the aforesaid judicial pronouncements, we have no hesitation to quash the resolution made on 25.8.2009 by the State Government in the Department of School & Mass Education under Annexure-1 and the Tender Call Notice dated 11.2.2010 issued by the Director, Text Book Production & Marketing, Bhubaneswar, O.P.3, under Annexure-7 and accordingly we do so and direct the O.Ps. to award the printing and binding of text books work to S.S.I. Units of the State.

The writ petition is accordingly allowed but without any order as to cost.

Writ petition allowed.

2010(I)ILR – CUT-774

I.M.QUDDUSI, ACJ & B.N.MAHAPATRA, J.

W.P.(C). No.3242 OF 2008 (Decided on 23. 03. 2010.)

M/S. KUKUMINA CONSTRUCTIONS (P) LTD. ……. Petitioner

-V-

SUB-REGISTRAR-CUM-STAMP COLLECTOR, ..…….. Opp. Parties.
KHURDA & ORS.

(A) **INDIAN REGISTRATION ACT, 1908 (ORISSA AMENDMENT) – SEC.52(1), 61(2),80-A .**

There is an obligation cast on the registering officer to make every endeavour to return the document promptly after the same is registered – He can not withhold any document after the same is registered for any other purpose. (Para 7)

The expression "refer the matter" appearing in Section 47-A(1) of the Indian Stamp Act to the Collector for determination of market value of the property does not mean transmission of the document to the Collector but reference of a doubt or dispute for resolution there of by the Collector. (Para 8)

Section 61(2) of the Indian Registration Act, 1908 Casts an obligation on the registering officer to return the document soon after the formalities of registration are completed – Rule 28 of the Orissa Stamp Rules 1952 can not be stretched Contrary to the obligation cast on the registering officer Under Section 61(2) since the Central Act shall prevail over and above the State Rules. (Para 9)

Held, the registering officer – O.P.1 is not justified to withhold the original document after registration of the same and issue order under Annexure-3 to deposit the deficit stamp duty. (Para 10)

(B) MARKET VALUE – Determination of - Whether valuation of the property determined at the public auction and thereafter re-fixed by the High Court is the true market value for the purpose of registration under the Indian Registration Act – Yes.

The registering officer is not correct to take the valuation of the property on the date of registration as per the rate fixed by the Government to hold that the property was under valued for the purpose of registration and he should have accepted the valuation of the property as settled by this Court during the relevant time in the year 1998, which is binding upon him for the purpose of registration.

(Para 11)

Case laws Referred to:-

1.AIR 1999 SC 22 : (Whirlpool Corpn. -V- Registrar of Trade Marks).
2.(2003) 7 SCC 546 : (Guruvayoor Devaswom Managing Committee & Anr.-V- C.K.Rajan)
3.AIR 2002 Kerala 248 : (Periyar Real Estates & ect.-V-State of Kerala & Ors.)
4.(2006)12 SCC 583 : (Ispat Industries Ltd.-V-Commissioner of Customs, Mumbai).
5.(1979) 3 SCC 431 : (M.Karunanidhi -V- Union of India).
6.2004 CRI.L.J. 286 : (R.Sai Bharathi -V- J.Jayalalitha & Ors.).
III(2003) CLT 223 : (Rambabu Agrawal -V- State of M.P. & Ors.)

For Petitioners - M/s. Prahallad Kar, B.Mohanty, R.Mohanty.
For Opp.parties – Addl. Government Advocate.

B.N.MAHAPATRA, J. This writ petition has been filed seeking a direction to opposite party no.1-Sub-Registrar-cum-Stamp Collector, Khurda to return the original sale deed No.2814/2007 to the petitioner and for quashing the notice dated 16.2.2008 under Annexure-3 by which the opposite party no.1 directed the petitioner either to deposit the deficit amount of stamp duty and registration fee as calculated by him or else to contest the matter to be referred to the next higher forum.

2. Short facts giving rise to this writ petition are that for maintenance of day-to-day affairs of Shree Lord Jagannath Temple, the Managing Committee after receipt of approval of the Government of Orissa for sale of the property in question published a sale notice bearing No.142 dated 8.1.1996 inviting applications from prospective purchasers. Pursuant to the said notice, prospective purchasers applied for the same. On 8.6.1996, an open auction was held. In the said open auction, the present writ petitioner became the highest bidder and knocked the bid at Rs.41,000/- per acre. As per Section 16(2) of the Shree Jagannath Temple Act, 1955, the Government of Orissa, through the Law Department accorded permission vide letter No.9006 dated 26.04.1997 for sale of the scheduled property @ Rs.41,000/- per acre. Subsequently, because of some dispute between the petitioner-vendee and the vendor, the petitioner filed writ petition bearing O.J.C. No.8073 of 1997 before this Court. In the said writ petition, this Court vide its order dated 3.3.1998 directed the vendee-petitioner to deposit the consideration money at the rate of Rs.41,100/- per acre by 31.03.1998. Vide order dated 15.12.1998 in Misc. Case No.16727 of 1998 this Court permitted the petitioner to deposit the balance sum of Rs.2.00 lakhs towards full and final consideration money of Rs.46,09,076/- within two weeks. The Court further ordered that only after deposit of Rs.2.00 lakhs the question of adjustment or forfeiture of the security deposit would be considered. The

petitioner paid this shortfall amount of Rs.2.00 lakhs on 09.01.1999. However, the sale deed was presented on 26.11.2007 before opposite party no.1 for registration. Under Section-52(1)(b) of the Indian Registration Act opp. party No.1 made over receipts to the vendee-petitioner on 26.11.2007. Opposite party no.1 did not hand over the registered sale deed to the petitioner in spite of several approaches even long after expiry of the time for delivery of sale deed. While the matter stood thus, opposite party no.1 issued a notice on 16.2.2008 under Annexure-3 directing the petitioner to deposit Rs.56,15,648/- and Rs.14,03,914/- towards the deficit stamp duty and fees respectively. It was further intimated in the said notice that if the petitioner did not want to make such payment as indicated in Annexure-3 and wanted to contest the case, the matter shall be referred to the next higher forum for valuation and realization of the deficit stamp duty and fees, if any. Hence, this writ petition.

3. Mr Mohanty, learned counsel appearing for the petitioner submitted that the registering officer has no power/authority to withhold the sale deed after it was registered. The amounts of Rs.56,15,648/- and Rs.14,03,914/- assessed towards the deficit stamp duty and fees respectively are based on mere suspicion of opposite party no.1. Since the property in question was put to open auction and the valuation of the property had been fixed by this Court in O.J.C. No. 8073/1997 disposed of on 03.03.1998 and the petitioner accordingly paid the said amount to the vendor by 09.01.1999 in addition to the earnest money of Rs.2.00 lakhs deposited with the vendor, opposite party no.1 has no authority or jurisdiction at all to come to a conclusion that the property had been under valued merely because the sale deed concerning the property was presented for registration on 26.11.2007. Opposite party no.1 has also no authority to initiate Under Valuation Case No.46 of 2008 against the petitioner, as neither the provisions of the Indian Registration Act nor the Indian Stamp Act empowers him to initiate such a case. Under these two Acts no power has been conferred on the registering officer to issue any notice directing the petitioner to deposit deficit amount of stamp duty and registration fee as calculated under Annexure-3 or to contest the matter to be referred to the next higher authority. Therefore, objection with regard to maintainability of the writ petition should not be entertained. As per Rule 100 of the Orissa Registration Rules, the registering officer is to make the documents ready within seven days from the date of their admission and return the same promptly to the presentant. It further speaks that when receipts are granted to the presentant under Clause (b) of Section 52(1), the presentant shall be informed by the registering officer of the probable date on which his documents will be ready for return. The said date shall be noted on the receipt itself and every endeavour shall be made to return the documents on such date. Section 61

(2) of the Indian Registration Act speaks that soon after the registration is complete, the documents shall be returned to the person who presented the same for registration or to the other person (if any), duly nominated in writing in that behalf on the receipt as mentioned in Section 52. As per Section 80-A of the Indian Registration Act, if on inspection or otherwise it is found that the fee payable under that Act in relation to any document, which has been registered, insufficiently paid, deficit fee shall, after failure to pay the same on demand within the prescribed period, be recoverable from the person who had presented that document as arrears of land revenue. After a document is registered, it becomes the property of the vendee. Hence, the actions of the registering officer in withholding the original documents after the same was registered and issuing notice under Annexure-3 being not in conformity with law are unsustainable.

4. Learned Addl. Standing Counsel appearing for the State, on the other hand, submitted that the writ application filed by the petitioner is not maintainable inasmuch as the petitioner neither accepted the valuation fixed by the Sub-Registrar nor disputed the valuation so made by the Sub-Registrar, Khurda by filing objection to the notice in Annexure-3. In the meantime, the matter has been referred to the Inspector General of Revenue for determination of valuation of the land, stamp duty and registration fee on the said documents to which the petitioner has the right to file objection, if any, before the said Revenue authority. Since alternative remedy is very much available to the petitioner, the present writ petition is not at all maintainable.

Referring to the Notification dated 15th February, 1963 of Government of Orissa in Finance Department, it was submitted that the State Government has brought in certain amendments to the Orissa Stamp Rules, 1952. Rule-28 deals with return of instrument. As per Rule 28, when an instrument has been referred to the Collector under Section 47A, the Collector shall, when he has finally dealt with it, return it to the registering officer concerned.

It was further submitted that in the earlier writ petition in O.J.C. No.8073/1997 and Misc. Case dated 3.3.1998, neither the State Government in Revenue Department nor the Collector, Khurda was made a party. Therefore, any decision taken by the Court with regard to valuation of the land in question is not binding on the Sub-Registrar, Khurda at the time of registration of the documents on 26.11.2007. The valuation was not at all acceptable on two grounds: (i) that the auction price that was fixed between the parties, viz., the vendor and the vendee, does not disclose the actual market price in the locality; and (ii) by efflux of time the valuation of the land has been enhanced and the auction price which was held good in the year2007.

1997 cannot be considered to be the same after ten years at the end of Registering Officer has nothing to do with the internal arrangement between the vendor and the vendee with regard to fixation of the land value, but he has to realize the stamp duty, registration fee on the basis of market price of the land as fixed by the State Government for the said land. The opposite party no.3 has rightly issued notice under Annexure-3 to the petitioner. However, the registering officer with abundant caution has also referred the matter to the next higher authority with further opportunity to the petitioner to agitate his claim before the said authority. The registered sale deed does not show the entire amount to have been paid by the petitioner on 31.03.1998, i.e., the date fixed by the High Court. Hence, the writ petition is liable to be dismissed.

5. In view of the rival contentions raised at the Bar, the questions that fall for consideration by this Court are as follows:-

(i) Whether the writ petition is maintainable on the ground of availability of alternative remedy. ?

(ii) Whether the registering officer has the power to withhold original document after the same is registered and he is justified in issuing notice as under Annexure-3?

(iii) Whether the valuation of the property determined at public auction and thereafter re-fixed by the High Court at a higher value is the true market value for the purpose of registration under the Indian Registration Act and the same is binding upon the registering officer?

6. The first question relates to the preliminary objection raised by O.P. No.1 regarding availability of alternative remedy. In the writ petition, the petitioner challenges the action of the registering officer in withholding the original sale deed No.2814 of 2007 after its registration and to quash Annexure-3 dated 06.02.2008 by which the registering officer directed the petitioner to deposit the deficit amount towards stamp duty and registration fee as calculated by him or else to contest the matter to be referred to the next higher forum. The argument of the petitioner is that no power is vested in the registering officer to withhold the sale deed after its registration is completed. The further contention of the petitioner is that the order passed under Annexure-3 is without jurisdiction and hence the same is liable to be quashed. According to the petitioner, there is no such provision either under the Indian Registration Act, 1908 or the Indian Stamp Act, 1899 that empowers the registering officer to issue such notice as under Annexure-3 and to withhold the sale deed after completion of registration. Thus, in the present writ petition, the jurisdiction of the registering officer is under

challenge. In course of hearing, the learned counsel appearing for the opp. parties has not brought to our notice any provision either under the Indian Stamp Act or the Indian Registration Act that confers jurisdiction on the registering officer to issue notice in terms of Annexure-3 and to withhold the sale deed after completion of registration. A bare perusal of Annexure-3 reveals that the registering officer has issued the said notice without referring to any Section or Rule of any statute under which such notice is intended to be issued. Learned counsel for the opposite parties has also failed to bring to our notice any such provisions of law which give right to the petitioner to challenge such action of the registering officer in withholding the sale deed after its registration and the legality and the validity of order passed under Annexure-3 before any statutory authority.

Needless to say, the issue involving jurisdiction always goes to the root of the cause.

Law is well settled that when an order is passed by any authority having no jurisdiction or in violation of the principles of natural justice, the superior court shall not refuse to exercise its jurisdiction although there exists an alternative remedy (See ***Whirlpool Corpn. V. Registrar of Trade Marks***, (***1998) 8 SCC 1; AIR 1999 SC 22.)***

In ***Guruvayoor Devaswom Managing Committee and Another Vs. C.K.Rajan***, ***(2003) 7 SCC 546***, the apex Court observed that alternative remedy has been consistently held by it not to operate as a bar at least in any of the four contingencies, namely, where the writ petition has been filed for enforcement of any of the fundamental rights or where there has been a violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of the Act is challenged.

In view of the above, the preliminary objection raised by the opp. parties regarding maintainability of the writ petition on the ground of alternative remedy merits no consideration.

7. The second question is as to whether the registering officer has any power to withhold the original documents after the same are registered.

To deal with such a question it is pertinent to examine Section 52(1), Section 61(2), Section 80A of the Indian Registration Act, 1908 (Orissa Amendment) and Rule 100 (1) & (2) of Orissa Registration Rules, 1988, which run as under:-

> "52. **Duties of registering officers when document presented**.—(1) (a) The day, hour and place of presentation, the photographs and finger prints affixed under section 32 A, and the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;

(b) a receipt for such document shall be given by the registering officer to the person presenting the same; and
(c) subject to the provisions contained in section 62, where a document is admitted to registration, a true copy thereof shall, without unnecessary delay, be filed in the appropriate book according to the order of its admission."

"61 **Endorsements and certificate to be copied and document returned**.—
(2) The registration of the document shall thereupon be deemed complete, and the document shall then be returned to the person who presented the same for registration, or to such other person (if any) as he has nominated in writing in that behalf on the receipt mentioned in section 52."

"80-A. *Recovery of deficient registration fees as arrears of land revenue*.-- If on inspection or otherwise, it is found that the fee payable under this Act in relation to any document which is registered has been insufficiently paid, the deficient fee shall, after failure to pay the same on demand within the prescribed period, be recoverable from the person who presented such document as arrears of land revenue."

"100. **Prompt return of documents after registration** –
(1) Documents admitted to registration shall be completed and made ready for delivery within seven days from the date of their admission and shall be promptly returned to the presentant or the person authorized to receive them and the duplicate receipt returned by the parties shall be posted on to their respective originals.
(2) When receipts are granted under Clause (b) of Section 52 (1) to the presentant they shall be informed by the registering officer of the probable date on which their documents will be ready for return. The said date shall be noted on the receipt and every endeavour shall be made to return the document on such date."

A conjoint reading of Section 52(1), Section 61(2) and Section 80A of the Indian Registration Act, 1908(Orissa Amendment) and Rule 100 (1) & (2) of Orissa Registration Rules, 1988 makes it amply clear that there is an obligation cast on the registering officer to make every endeavour to return the document promptly after the same is registered. He cannot withhold any document after the same is registered for any other purpose. If upon inspection or otherwise it is found that the fee payable under the Registration Act in relation to any document, which is already registered, has not been paid or has been paid insufficiently, such fee may be recovered from the person who presented such document for registration as an arrear of land revenue.

8. Learned counsel for the State submitted that according to Rule 28 of the Orissa Stamp Rules, 1952, where an instrument has been referred to the Collector under Section 47A, the Collector shall, when he has finally dealt with it, return it to the registering officer concerned.

In paragraph 4 of the counter affidavit, opposite party No.1 relying on the above statutory provisions has justified his action in withholding the registration certificate.

To appreciate this contention, it is necessary to know what is contemplated in Section 47A of Indian Stamp Act, 1899 (Orissa Amendment) and Rule 28 of the Orissa Stamp Rules, 1952. The relevant provisions of Section 47 A are reproduced below:

> "**47-A. Instruments under-valued how to be dealt with-** (1) Where the registering officer under the Registration Act, 16 of 1908, while registering any instrument of conveyance, exchange, gift, partition or settlement has reason to believe that the market value of the property which is the subject matter of such instrument has not been truly set forth in the instrument, he may, after registering such instrument, refer the matter to the Collector for determination of the market value of such property and the proper duty payable thereon.
>
> (2) On receipt of a reference under Sub-section (1), the Collector shall, after giving the parties an opportunity of making their representations and after holding an inquiry in such manner, as may be prescribed by Rules made under this Act, determine the market value of the property which is the subject matter of such instrument, and the duty as aforesaid and the deficient amount, if any, shall be payable by the person liable to pay the duty."

Rule 28 of the Orissa Stamp Rules, 1952 as added under Chapter-V by the Finance Department Notification No.5196-ST-2162 (Pt.)-F dated 15th February, 1963 is quoted below:-

> "28. **Return of instrument –** Where an instrument has been referred to the Collector under Section 47 A the Collector shall, when he has finally dealt with it return it to the Registering Officer concerned."

Section 47A of the India Stamp Act, 1989 (Orissa Amendment) contemplates that if the registering officer while registering any instrument of conveyance has reason to believe that the market value of the property which is the subject matter of such instrument has not been truly set forth in the instrument, he may, after registering such instrument, refer the matter to the Collector for determination of the market value of such property.

The expression "refer the matter" appearing in Section 47A(1) of the Indian Stamp Act to the Collector for determination of market value of the property does not mean transmission of the document to the Collector but reference of a doubt or dispute for resolution thereof by the Collector.

9. Section 61(2) of the Indian Registration Act, 1908 casts an obligation on the registering officer to return the document soon after the formalities of registration are completed. Rule-28 of the Orissa Stamp Rules, 1952 cannot be stretched contrary to the obligation cast on the registering officer under Section 61 (2). After all, the Central Act shall prevail over and above the State rules.

The Kerala High Court ***in Periyar Real Estates & etc. Vs. State of Kerala & Ors., AIR 2002 Kerala 248;*** while interpreting Section 61(2) of the Indian Registration Act, 1908 held that the Registration Act, 1908 is a Central Act. There is an obligation cast on the Registering Officer under Section 61(2) for returning the document as soon as the formalities connected with the registration are completed. The State Act cannot interfere with such obligation nor can it empower the officer to retain possession of the undervalued document after registration, contrary to the obligation cast on him by the Central Act. Thus, even if there is a dispute as to the stamp duty payable on the instrument subject to registration, after registration of the instrument, the registering officer is not entitled to retain possession of the original document under Section 45-B. By reason of Section 61(2) of the Registration Act, 1908, it is obliged to return the document and thereafter takes appropriate proceedings under Section 45-B and other provisions of the Kerala Stamp Act for adjudication and recovery of the underpaid duty.

The settled legal position is that if there is any conflict between the provisions of the Act and the provisions of the Rules, the former will prevail. (***Ispat Industries Ltd. Vs. Commissioner of Customs, Mumbai, (2006) 12 SCC 583***)

Further, it is the settled law that where there is a direct conflict between a provision of law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the State law would be void to the extent of the repugnancy. [see **M. Karunanidhi v. Union of India, (1979) 3 SCC 431**]

10. For the reasons stated in paragraphs 7, 8 & 9 above, we are of the considered view that O.P. No.1-registering officer is not justified to withhold the original document after registration of the same and to issue the impugned order under Annexure-3.

11. The third question is as to whether the valuation of the property determined at the public auction and thereafter re-fixed by the High Court is the true market value for the purpose of registration under the Indian Registration Act. In the instant case, it is not in dispute that the petitioner was the highest bidder in the open auction sale. This very matter came up before this Court in OJC No.8073 of 1997 and this Court re-fixed the consideration money at the rate of Rs.41,100/ per acre. This Court granted time to the petitioner to pay the entire consideration money within December,

1998. The petitioner paid the entire consideration money by 09.01.1999, as per the details given in the sale deed. There is nine days delay in making payment of Rs.2.00 lakhs (rupees two lakhs) only out of the total consideration money of Rs.46,09,076/-, which was accepted by the vendor who executed the sale deed for registration. This delay of nine days cannot be taken as a ground to say that the valuation of the land has been enhanced during these nine days. The copy of the sale deed, inter alia, reveals that as per Section 16(2) of the Shree Jagannath Temple Act, 1955, the Government of Orissa through the Law Department accorded permission for sale of the property in question at the rate of Rs.41,000/- per acre vide letter No.9006 dated 26.04.1997. In view of the same, the contention of opposite party No.1 in paragraph 3 of the counter affidavit that since in the earlier writ application neither the State Government nor the Collector, Khurda was a party, any decision following the auction sale cannot be accepted by opposite parties, is not sustainable.

The Hon'ble Supreme Court in ***R.Sai Bharathi V. J.Jayalalitha & Ors., 2004 CRI.L.J. 286,*** held that price quoted by highest bidder is to be taken as the market value unless tender process is shown to have been vitiated. In the present case, the property was sold through tender process and the bidders quoted their offers and the petitioner's offer was the highest, i.e., Rs.41,000/- per acre. This Court re-fixed the value of the land at Rs.41,100/- per acre, which is more than the rate fixed by the Law Department in Government of Orissa.

The Madhya Pradesh High Court in ***Rambabu Agrawal V. State of M.P. & Ors., III (2003) CLT 223,*** held that the assessment of value of property on the basis of the current existing market value is unsustainable. Market value should be on the date on which the agreement in question was entered into for the purpose of payment of stamp duty on sale deed.

In view of the above propositions of law, the registering officer is not correct to take the valuation of the property on the date of registration as per the rate fixed by the Government to hold that the property was undervalued for the purpose of registration. He should have accepted the valuation of the property as settled by this Court during the relevant time in the year 1998, which is binding upon him for the purpose of registration.

12. For the reasons stated in the foregoing paragraphs, we quash the notice dated 16.02.2008 issued under Annexure-3 by opposite party No.1 and direct opposite party No.1 to return the registered sale deed in question to the petitioner within one week from the date of production of certified copy of this order by the petitioner.

13. The writ petition is allowed, but without any order as to costs.

Writ petition allowed.

2010(I)ILR – CUT-784

I.M.QUDDUSI, ACJ & B.P.RAY,J.

W.P.(C). No.6728 OF 2006 (Decided on 22. 12. 2009.)

BIMAL KANTI GHOSE ……. Petitioners

-V-

STATE OF ORISSA & ORS. ……. Opposite parties

FOREST CONSERVATION ACT, 1980 (ACT NO.69 OF 1980) – SEC.2.

The ban or restriction on felling trees contemplated in Section 2 of the Forest Conservation Act, 1980 shall not apply to any private plantation/orchard/bagan comprising of trees planted in any area which is not a forest – The ban shall also not apply to lease hold land irrespective of date of grant of lease or date of acquisition of title, if the land was not converted from an earlier forest.

Held, impugned orders quashed – Direction issued to O.P.3 to deal with the application of the petitioner for grant of T.T. permit.

(Para 10)

Case law Referred to:-

1.AIR 2004 SC 5080 : (Sri Ram Saha -V- State of West Bengal & Ors.)

For Petitioner - M/s.R.Nayak & Associates.
For Opp.Parties - Addl.Govt.Advocate
(For O.Ps. 1 to 2)
Mr. C.A.Rao (for O.Ps. 3 to 4)

B.P. RAY J. In this writ petition under Articles 226 & 227 of Constitution of India, the petitioner has challenged the order dated 12.03.2007 passed by opp. party no.3-the Divisional Forest Officer, Satkosia Wild Life Division, Angul and order dated 16.04.2008 passed by the opp. party no.4-Conservator of Forests, Angul Circle, Angul rejecting his application for issue of Timber Transit Permit (in short, "T.T.Permit") for removal of trees standing over his private stitiban recorded lands situated in mouza Purunakote, Plot No.3 of Khata No.109/42 measuring an area of Ac.7.93 decimals under Angul Tahasil in the district of Angul.

2. In the year 1962, the petitioner purchased the aforesaid land and has been recorded in the Record of Rights as stitiban status. The kisam of land is Taila. After reclamation of the land, the petitioner planted 3000 teak stumps in the said plot in the year 1971. In May, 1976, by a notification u/s.18 of the Wild Life (Protection) Act, 1972, the State Govt. declared the area to be a sanctuary to be known as Satakosia Gorge Sanctuary. The petitioner made an application for removal of the trees from the land in question under the Orissa Timber and Other Forest Produce Transit Rules,

1980 (in short, "the Rules") and for issuance of T.T. Permit. In pursuance of the said application, on 9.8.1988 a joint verification was made by the Revenue and Forest Officials for the purpose of issuance of T.T. Permit as required under the Rules and subsequently, after obtaining permission from the appropriate authority, the petitioner removed some teak trees in the year 1989. Again in the year 2001, he applied to opp. party no.3 for grant of permission to fell 309 teak trees from the aforesaid land by way of thinning operation to provide more growing space for the remaining & promising teak trees and to transmit the felled trees. The District Forest Officer by order dated 30.5.2005 rejected the application of the petitioner as the plot looks like a forest and is also in continuation of the forests of the above reserved forest and it satisfied all the conditions of a forest. Thereafter, the petitioner approached this Court in the writ application being aggrieved by the aforesaid order. A Division Bench of this Court by order dated 5.5.2006 in W.P.(C) No.9406 of 2005 directed the petitioner to file an appeal within a period of two weeks from the date of order and the appellate authority was directed to dispose of the said appeal within a period of two months thereafter. The petitioner preferred an appeal before the opp. party no.4-Conservator of Forests, Angul, which was under Rule 7(3) of the aforesaid Rules. The appellate authority after giving an opportunity of hearing to the petitioner by order dated 3rd July, 2006 dismissed the appeal vide Anneuxre-7. The petitioner has filed this writ application challenging the aforesaid order.

3. The appellate authority framed as many as 3 issues, namely;

i) Whether the plot of the applicant/appellant comes under purview of Forest Conservation Act, 1980 or not ?

ii) Whether the order of the Supreme Court date 14.2.2000 read with the order dated 28.2.2000 in Writ Petition (Civil) No. 202 of 1995, T.N.Godavarman Thirumulkpad Vrs. Union of India is applicable to the plot of the appellant?

iii) Whether the appellant has lawful right over the plot in question ?

4. The appellate authority after hearing the parties and after perusing the records while setting aside the order remitted the matter to the Divisional Foreest Officer-opp.party no.3 to examine the relevant revenue record to ascertain the ownership of the appellant over the plot in question. The appellate authority further directed that the D.F.O. should examine whether the plot in question attracts the provisions of Forest Conservation Act or not and the appellant should be allowed for removal of trees from his plot in question in accordance with the provisions of the Orissa Timber and Other Forest Produce Transit Rules, 1980.

5. After the aforesaid, the D.F.O. by order dated 12.3.2007 under Annexure-10 rejected the application of the petitioner on the ground that the

removal of trees from the above plot is non-forestry activity and the petitioner shall obtain prior permission from the Government of India under the Forest Conservation Act, 1980. As against the aforesaid order, the petitioner again preferred an appeal before the Conservator of Forest on 7.5.2007 in Annexure-11. As the appellate authority i.e. the Conservator of Forest did not dispose of the appeal, the petitioner approached this Court under Articles 226 & 227 of the Constitution of India in W.P.(C) No. 13822 of 2007. A Division Bench of this Court by order dated 18.3.2008 directed the Conservator of Forests, Angul to dispose of the appeal of the petitioner within a period of one month from the date of communication of the order. Thereafter, by order dated 16.4.2008 in Annexure-14 the Conservator of Forest dismissed the appeal with the following findings :-

> " (1) The plot in question has all the characteristics of forest. This is even evident from the history of the land filed by the Appellant. In the said history of land, the Appellant has himself admitted that that the whole area even has some natural Teack Plots besides the planted crop. In fact , as revealed from the said history, various girth class Teack trees are existing in the plot. Hence, as per the meaning of the forest as defined by the Hon'ble Supreme Court of India in T.N. Godavaran Thirumalpad vrs. Union of India and other (W.P.(C) No. 202/95), the plot in question of the Appellant comes under the category of forest and hence felling of trees being a non-forestry activity attracts the provisions of the Forest Conservation Act. Moreover, the Hon'ble High Court of Orissa in their judgment dtd. 10.7.2002 relating to OJC No. 4819/2001 (Bhagaban Bhoi vrs. State of Orissa and others) have also observed that once the land satisfies description of being a forest land, it has to be taken that the Forest Conservation Act would have its application and no permission to fell the trees can be granted without prior concurrence of the Central Government. In the instant case, no such permission has been given by the Central Government.
>
> (2) The land in question is within Satkosia Gorge sanctuary notified u/s 18 of the Wildlife Protection Act. This position has even been admitted by the Appellant in his appeal under reference. As per Section 18-A of the Wildlife Protection Act, the provisions of Section 29 are equally applicable to the Sanctuary notified under Section 18 of the said Act. The Section 29 prohibits removal of any forest produce except in accordance with the provisions as well as concurrence of the State Wildlife Board; such removal is permitted only for the benefit of the Wildlife. In the instant case, such removal will be detrimental to the Wildlife habitat since admittedly, the area is

frequented by the wild animals as is even seen from the history of the land filed by the appellant as Annexure-9 in W.P.(C) No. 739 of 2005 before the Hon'ble High Court of Orissa. Moreover, the Hon'ble Supreme Court of India vide their order dated 14.2.2000 in Writ Petition Civil (No.202/95) have prohibited any removal of trees from the Sanctuary and National parks. In fact, the Central Empowered Committee (constituted by the Hon'ble Supreme Court of India) in their letter dtd. 2.7.2004 have categorically requested the State to ensure strict compliance of Hon'ble Supreme Court order as above; if for better management of protected area (Sanctuary in the instant case) if any felling of trees is required to be undertaken, prior permission of the Hon'ble Supreme Court is required to be obtained before undertaking such activity. However, no such permission is granted by the Hon'ble Supreme Court in the instant case."

6. Acounter affidavit has been filed on behalf of the opp.parties reiterating the facts stated in the impunged orders.

7. The petitioner has filed a rejoinder affidavit enclosing a letter No.1188, dated 24.7.1998 under Annexure-R/1 written by the Collector, Angul to the Principal Secretary to Govt., Forest and Environment Department, Orissa, Bhubaneswar-opp. party no.1. The said letter was written after making enquiry in exercise of power under Sections 19 to 25 of the Wild Life (Protection) Act, 1972. Even though, the Collector has submitted the aforesaid letter/report, no action has been taken by the State Govt. By order dated 2.9.2008, this Court directed to file an affidavit as to whether the area in question has been notified as reserved forest or forest sanctuary. Pursuant to that, the Divisional Forest Officer, Satkosia, Wild Life Division, Angul filed an affidavit indicating that even though the Collector has submitted a report, final notification under Section 26(A) is not yet done. But in the said affidavit, it has been indicated that basing on the order of this Court dated 8.6.2002 in OJC No.1222/2002 one Smt. Rebati Sahu of Tikarpada within Satkosia Gorge Sanctuary has been permitted to remove the trees from her land.

8. Learned counsel for the petitioner relying upon a decision reported in AIR 2004 SC 5080 (**Sri Ram Saha v. State of West Bengal and others)** stated that the statutory authority by mis-representing and mis-construing the judgment passed by the apex Court has come to the conclusion that even though the land in question is not a forest land, the ratios of the decision are applicable. On perusal of the aforesaid judgment, it would be found that the apex Court has elaborately interpreted the earlier judgment in the case of **T.N. Godavarman Thirumulkpad v. Union of India and others** and held that :-

"The apex Court in the said appeal had the occasion to deal with the provisions of Forest Conservation Act, 1980 and the legislative intent behind its enactment and interpreting the decision in T.N. Godavarman (supra) in their judgment, quoted the direction given in paragraph 5 which we would profitably extract below some of which we consider relevant for our purpose:-

(i) In view of the meaning of the word 'forest' in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any 'forest'. In accordance with Section 2 of the Act all ongoing activity within any forest in any State throughout the Country without prior approval of the Central Government must cease forthwith…."

Xx xx xxxx xx xx

(iv) …… "The ban will also not affect felling in any private plantation comprising of trees planted in any area which is not a forest."

Learned counsel for the petitioner submitted that the apex Court in the judgment of Sri Ram Saha (supra) in paragraphs 9 & 10 has elaborately interpreted the earlier judgment in T.N. Godavarman (supra) and the effects of the direction given therein and has made it abundantly clear that the direction given by the Court is clearly confined to felling of trees in forest land and the said ban was not extended to non-forest private plantation. Learned counsel took us through the relevant paragraphs of the judgment which are quoted below:-

> "9. It is clear from the aforesaid judgment of this Court that the observations made and directions given were in relation to Forest Land. The term of 'forest land' occurring in Section 2 of the Conservation Act will not only include 'forest' as understood in the dictionary sense but also includes any land recorded as forest in the Government record irrespective of the ownership. It is also stated that the provisions of the Conservation Act for the conservation of Forest and the matters connected therewith must apply clearly to all forests so understood irrespective of ownership or the classification thereof. By the directions given in the said judgment, certain bans are imposed including a ban in respect of felling of trees in forest, irrespective of the nature of the forest, i.e. whether the forest is public forest or private, reserved, protected or otherwise. It is clear from the observations made and directions given in the aforesaid judgment of this Court that though ban was imposed in respect of undesirable activities in the forest irrespective of the nature of the forest and its ownership but such a ban did not affect felling of trees in any private plantation in an area which is not a forest. Thus, it is clear that the direction given by this Court is clearly confined to felling of trees in forest land and the said ban was not extended to

non-forest private plantation. It is made clear in the judgment that the directions given are to be implemented notwithstanding any order variance made or which may be made by Government or any authority, tribunal or Court including the High Court."

The Apex Court in the concluding paragraph held that no permission is required for felling trees in the non-forest private plantation/orchard/bagan. The Apex Court said, "……at any rate in the guise of positive interpretation courts cannot re-write a statute. A purposive interpretation may permit a reading of the provision consistent with the purposes and object of the Act, but the Courts cannot legislate and enact the provisions eitpher creating or taking away substantial rights by stretching or straining a piece of legislations."

9. Now that the Apex Court in Sri Ram Saha (supra) after interpreting its judgment in T.N. Godavarman and considering the definition of forerst as per the Forest Conservation Act, 1980 has in clear and categorical terms held that the ban imposed in T.N. Godavarman in the matter of felling of trees does not extend to non-forest private plantation/orchard/bagan and admittedly there being no State enactment felling of trees in non-forest private plantation, the authorities cannot refuse T.T. permit to the owner of such forest produce if after due enquiry under Section 7(2) of the Orissa Timber and Other Forest Produce Transit Rules, 1980, he is found entitled to.

10. Before parting, we would like to make it clear that the ban or restriction on felling trees contemplated in Section 2 of the Forest Conservation Act, 1980 shall not apply to any private plantation/orchard/bagan comprising of trees planted in any area which is not a forest. The ban shall also not apply to lease hold land irrespective of date of grant of lease or date of acquisition of title, if the land was not converted from an earlier forest.

11. The writ petition is accordingly allowed. The impugned order dated 12.3.2007 passed by the opp. party no.3-Divisional Forest Officer, Satakosia Wild Life Division,Angul and the dated 16.4.2008 passed by the Conservator of Forest, Angul Circle under Annexure-14 are quashed .Opp. party no.3 is directed to deal with the application of the petitioner for grant of T.T. Permit in terms of the observations made in the foregoing paragraphs keeping in view the provision if the Rule 7(8) of Rule and pass necessary orders on the same within a period of two months from the date of receipt of a copy of this judgment.

There shall be not order as to cost.

Writ petition allowed.

2010(I)ILR – CUT-790

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

W.P.(C). No.6366 OF 2006 (Decided on 30 03. 2010.)

M/S. JALARAM TRANSPORT & ANR . …. …… Petitioners

-V-

MAHANADI COALFIELDS LTD. & ORS. ……Opposite parties

CONSTITUTION OF INDIA, 1950 – ART.226.

Tender by MCL for transportation of curshed coal – Alleged over payment of previous contract was deducted from the bills of the subsequent contract – Opp.Parties can not recover the amount as the same is not the over payment but paid in terms of the contract – Clause 16 of the Tender agreement will not apply – Held, direction issued for refund of the amount to the petitioners recovered by the Opp.Parties from the subsisting contract of the petitioners – Writ Petition allowed.

(Para 6 to 10)

For Petitioners – Shri Ashok Mohanty, Sr.Advocate
M/s. H.M.Dhal, B.B.Swain, J.Dash, A.S.Das.
For Opp.Parties – M/s. N.Ch.Sahoo, A.Mohapatra.

B. P. DAS, J. The petitioners in this writ application challenge the letter dated 6.3.2006 (Annexure-7) issued by the Sr. Accounts Officer (Bill), Mahanadi Coalfields Limited, with regard to deduction on account of Transportation from the bills of the petitioners.

2. The brief facts leading to the writ application are as follows:-

Petitioner No.1 is a Proprietorship firm, which is represented through O.P.2, the power of attorney holder of the firm. O.P.1, i.e. Mahanadi Coalfields Limited ('MCL' in short) floated a tender for transportation of crushed coal from Samaleswari OCP CHP/Crushed Coal stock to Siding Nos. 1, II and III and Siding IV &V for a period of 255 days for a total quantity of 30.60 lakh tonnes @ 12000 tonnes per day. Accordingly, the petitioners submitted their tender and after negotiation, the Letter Of Intent (LOI) dated 22.08.1998 was issued to the petitioners by opposite party No.2 and ultimately the final work order was issued to the petitioners on 2.2.1999 to execute the transportation work in different sidings. The contract was taken for an amount of Rs.17.75 per ton in siding nos. 1 and II, the lead M/S. distance of which was 4-5 km. Similarly the rate was Rs.21.50 per ton for sidings Nos. III, the lead distance of which is 6-7 kms and Rs.22.50 per ton

for siding Nos. IV and V having lead distance 7-8 kms. Accordingly, the agreement was entered into between the parties to execute the transport work. There is no dispute about the fact that the petitioners have fulfilled their contractual obligation within the time stipulated and entire bill amount for the contract was paid after closure of the contract. Thereafter the letter dated 06.03.2006 under Annexure-7 was issued informing the petitioners that as per the directive of the Competent Authority, an amount of Rs.15,61,743.34 was deducted from the running account bill of the other contract work executed by the petitioners.

It is worthwhile to mention here that the running bill from which the amount was sought to be recovered is the work in respect of another contract entered into in the year 2005 and the petitioners are continuing the said contract with the opposite parties. Ultimately under Annexure-7 deduction was made. The said deduction is under challenge in the present writ application.

3. Mr. Mohanty, learned senior counsel for the petitioners submits that once the contract was closed and the petitioners had also got back their earnest money deposit as per the conditions of the contract and since there was no default on the part of the petitioners in performing the work as per the terms and conditions of the contract, the opposite parties has no authority to deduct any amount from another subsisting contract, which has no connection with the previous contract, which has been closed.4.

4. Counter affidavit has been filed by the MCL indicating therein that it is true that the petitioners had been given contract for transportation combinedly to siding nos. I and II indicating the quantity to be handled, rate, lead distance and amount of work value and the same had been agreed to between the parties. But after closure of the contract work in the year 2005, due to certain audit objections and irregularities found, the same were inquired into by the internal vigilance department as well as C.B.I. and by virtue of the report of the committee formed by the MCL, they measured the distance and found that the lead distance for siding no. 1 would be 3-4 kms and siding no.II would be 5-6 km, for which the petitioners were liable to refund the excess amount which had been paid to them.

5. According to Mr. Sahoo for the MCL, they have acted in terms of clause-16 of the general terms and conditions of the agreement, relevant portion of which is quoted herein under:-

> "The Company reserves the right to recover/enforce recovery of any over payment detected as a result of post-payment audit or technical examination or any other means notwithstanding the fact that the amount of disputed claims, if any, of the contractor exceeds the amount of such over payment. The amount of such over

> payments may be recovered from the subsequent bills under the contract, failing that from contractor's claim under any other contract with the company or from the contractor's security deposit or the contractors shall pay the amount of over payment on demand."

Apart from that, according to Mr. Sahoo, such deduction amount was treated as an over payment made to the petitioners and rightly recovered by deducting from the subsequent bills payable to the petitioners in a subsequent contract.

6. Having regard to the rival contentions advanced by learned counsel for both the parties, let us see whether the amount recovered from the subsequent bill of the contract entered into in the year 2005 is due to the over payment made by MCL to the petitioners inregard to the previous contract which had been closed. Meaning of "over payment," in our considered opinion, would be the amount paid in excess of the contractual rate that is payable to the petitioners by the opposite parties. Here is a case, where the amount was paid to the petitioners according to the rate agreed to by both the parties. So, it cannot be said to be an over payment made to the petitioners.

7. Now, learned counsel for the petitioners submits that during the investigation, even though it is found that the lead distance for siding no. 1 would be 3-4 kms and siding no. II would be 5-6 km, the petitioners cannot be said to have any fault, but it may be due to the act of some of the officers of the MCL, who had given the contract for transportation to siding nos.1 and II showing the lead distance to be 4-5 kms and bringing loss to the opposite parties. To the said submission, Mr. Sahoo submits that such officers have been punished after being found guilty.

8. Be that as it may, if an officer incorporated a clause in the agreement and subsequently it was found that the same should not have been done, the contractor who has done the work and got his payment should not suffer. Here in this case, the amount which had been sought to be recovered from the petitioners from the previous contract, however recovered from the subsisting contract by segregating the rate agreed to in the agreement for siding nos. I and II in the previous contract.

9. All these hypothetical situations cannot prevail, as a combined rate is provided for siding nos. I and II. So the opposite parties cannot recover the amount as the same is not the over payment, but paid in terms of the contract and as such the provisions of clause-16 of the general terms and conditions of the agreement will not apply and at no stretch of imagination, the same cannot be treated as an over payment made to the petitioners.

10. In view of the above, we quash the impugned letter dated 6.3.2006 issued by the Sr. Accounts Officer (Bill), MCL under Annexure-7 and direct

that the amount so recovered by the opposite parties from the subsisting contract of the petitioners shall be refunded to the petitioners, as early as possible.

The writ application is accordingly allowed.

Writ petition allowed.

2010(I)ILR – CUT-794

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

W.P.(C). No.1742 OF 2010 (Decided on 30 04. 2010.)

SWAPAN GHOSH & ORS. …….. Petitioners

-V-

CUTTACK DEVELOPMENT AUTHORITY & ORS ……. Opp. parties

ORISSA DEVELOPMENT AUTHORITY ACT, 1982 (ACT NO. 14 OF 1982) – SEC.15

Telephone tower constructed on the roof of the house of Opp.Party No.7 – Adjoining owners feel danger to their life, health and property – They prayed removal of such construction.

Admittedly no permission obtained from C.D.A. for construction of the telephone tower but the Authority has already initiated U.C. Case No.2 of 2010 and issued notice to O.P.7 to show cause as to why unauthorised construction shall not be demolished – Direction issued to O.P.1 & 2 to take appropriate action and dispose of U.C.Case No.2 of 2010 within a period of four months. (Para 10)

For Petitioners – M/s. B.P.Satpathy, B.K.Nayak, A.K.Sahoo & J.Pradhan.
For Opp.Party Nos.1 & 2 – M/s. D.Mohapatra, M.Mohapatra, G.R.Mohapatra, & S.P.Nath.
For Opp.party No.s3,4,5 – Add.Stadning Counsel.
For Opp.Party No.6 – M/s. B.K.Nayak & D.K.Mohanty.
For Opp.Party Nos.7 & 9 – M/s.Basudev Mishra & B.L.Tripathy.
For Opp.Party No.8 - M/s. Srikanta Kumar Nayak.

B.K.NAYAK, J. In this writ application, the petitioners have prayed for issuance of direction to the opposite parties for removal/demolition of the telephone tower illegally constructed on the roof of the house situated over Plot Nos. F/401 and F/402 in Sector-7, C.D.A., belonging to opposite party no.7.

2. Admittedly, the petitioners are lessees under the Cuttack Development Authority (in short 'C.D.A.'), who have been allotted with different 'F' type plots in Sector-7, C.D.A. and have been staying with their families over those plots by constructing houses. Opposite party no.7 and his wife have also been allotted with Plot Nos. F/401 and F/402 near the house of the petitioners and the said opposite party no.7 constructed a house over those two plots. Opposite party no.7 took up construction of a telephone tower on the roof of his house unauthorisedly and apprehending danger to their life, health and property that may result from such unauthorised construction of

the tower, the petitioners submitted applications (Annexures-1 and 2) to opposite party no.1, the C.D.A. authority with a request to stop the unauthorised construction undertaken by opposite party no.7. On receipt of the applications, the Asst. Town Planner, C.D.A. (opposite party no.2) issued a letter to Inspector-in-charge of Markatnagar Police Station, C.D.A., (opposite party no.5) under Annexure-3 requesting to ensure discontinuance of the construction work. It is also indicated in Annexure-3 that notice had been issued to opposite party no.7 to discontinue the construction. It is further alleged by the petitioners that due to some political interference opposite party no.5 failed to take steps, as a result of which opposite party no.7 proceeded with illegal construction of the tower and has let out the same to mobile phone companies, but the tower has not been made operational since electricity connection has not been provided. It is alleged by the petitioners that for the illegal and unauthorised construction of the tower, the petitioners being adjoining house owners are apprehending danger to their life, safety and property. It is also alleged that because of illegal construction undertaken by opposite party no.7, house of petitioner no.1 which adjoins to plot no.F/402 on one side has already developed cracks.

3. During the course of hearing of the writ petition, it came to light that Essar Telecom Infrastructure Pvt. Ltd. (in short 'Essar Telecom') has undertaken the construction of the tower on the roof top of house of petitioner no.7 by entering into an agreement with him. Therefore, the Cuttack Municipal Corporation and Essar Telecom were impleaded as opposite party nos. 8 and 9 respectively and notices were issued to them.

4. Opposite party nos.7 and 9 have filed separate counter affidavits taking almost identical stands. It is stated by them that the construction of the telephone tower in question is coming within the meaning of 'operational construction' as defined in the Orissa Development Authorities Act,1982 (in short "the Act") and, therefore, no permission from the C.D.A. under Section 15 of the Act is required. It is also stated that for the purpose of removal of the construction in question, which has been undertaken without permission, C.D.A. has already initiated proceeding bearing U.C. Case No.2 of 2010 against opposite party no.7 and issued notice to him and in view of pendency of the proceeding the petitioner is not entitled to any relief in this writ petition.

It is additionally stated in the counter of opposite party no.9 that Essar Telecom has brought necessary license from the Telecom Regulatory Authority of India (in short 'TRAI') to operate through out the country and to meet the need of mobile telephone service in the Markatnagar locality in the Cuttack City, opposite party no.9 entered into an agreement with opposite party no.7 and his wife and took up the construction of the telephone tower.

It is also stated that by virtue of notification dated 16.8.2007 issued by the Commerce and Transport Department, Government of Orissa (Annexure-I/3) the Cuttack Municipal Corporation is the competent authority to issue no objection certificate for construction of the telephone tower and that opposite party no.9 has already made application to the Cuttack Municipal Corporation for grant of no objection. Opposite party no.9 has ensured adequate protection against heavy velocity wind and cyclonic weather and other safety measures like lightening arrester and there is absolutely no apprehension or risk to life and property.

In their counter affidavit, the C.D.A. authorities (opposite party no.1 and 2) have stated that having received information about the construction of mobile tower unauthorisedly and without permission on the roof of the house of opposite party no.7 and on the report submitted by Field Staff of C.D.A., U.C. Case No.2 of 2010 has been initiated against opposite party no.7 and notice has been issued to him to show cause as to why the unauthorised construction shall not be demolished. Notice was also sent to opposite party no.7 directing him to stop further construction of the tower. It is further stated that though the construction of the tower in question may be treated to be "operational construction", opposite party nos.7 & 9 are not exempted from taking permission from C.D.A. as per proviso-(c) of Clause-(ii) of sub Section (1) of Section 15 of the Act inasmuch as the construction is not undertaken by any Department of Central or State Government or a local authority or a body corporate constituted under any law. It is also stated that Government notification dated 16.8.2007 under Annexure-B/1 (which has also been filed by opposite party no.9 as Annexure-I/3) provided for obtaining no objection certificate from the concerned local body in case of construction of towers though such notification does not bar the requirement of permission from the Development Authority. Lastly, it is stated that proceeding for removal/demolition of unauthorised construction of the tower has already been started against opposite party no.7 by the C.D.A. which shall be disposed of following due process of law.

Opposite party no.6, the S.D.O., Electrical, Sub-Division(6), C.D.A. has stated in his counter affidavit that application was received for giving power supply to the mobile telephone tower in question and that since no permission has been received from C.D.A. for the construction, the application has not been processed as yet.

5. No counter affidavit has been filed on behalf of the Cuttack Municipal Corporation. Even though vide order no.6 dated 10.3.2010 it was directed that the Secretary to Government, Commerce and Transport Department shall file an affidavit on the next date indicating his competency to issue notification dated 16.8.2007 and a copy of the writ petition was served on

learned State Counsel for that purpose, no affidavit on behalf of the State has been filed.

6. Under Section 15(1) of the Act permission from the Development Authority in writing is necessary to institute or change the use of any land or building or for undertaking or carrying out any development in any building or in or over any land. However, the proviso (a) (b) (c) carve out certain exceptions where permission from the development authority is not required. While contesting opposite party nos. 7 and 9 take the stand that the construction of the telephone tower in question comes within the meaning of 'operational construction' as defined in the Act and, therefore, the same is exempted from permission in accordance with proviso (c) under Sub section (1) of Section 15, the C.D.A. authorities (opposite party nos.1 and 2) contend that though the construction of the tower is said to be an 'operational construction', opposite party nos. 7 and 9 cannot claim the exemption as they are not coming within any of the categories of persons or authorities as described in proviso (c).

7. The provisions of Section 15 (1) of the Act, in so far as they are relevant for the purpose of the case, are quoted hereunder :

> "15. **Prohibition of development without permission**- (1) Notwithstanding anything contained in any other law, after the constitution of an Authority for any development area under Sub-section (2) of Section 3, no person including a department of the central or a State Government or a local authority or a body corporate constituted under any law shall within the development area-
>
> (i) subdivide any land for utilising, selling, leasing out or otherwise disposing it of unless he, after obtaining written permission from the Authority, lays down and makes a street or streets giving access and right of way to all the plots into which he intends to subdivide the land so as to connect them with an existing public or private street and also provides amenities, if any, specified by the development plan in: operation or regulations pertaining to planning or building standards made in this behalf;
>
> (ii) institute or change the use of any land or building or undertake or carry out any development in any building or in or over any land without obtaining permission in writing from the concerned Authority:
>
> Provided that no such permission shall be necessary for-
>
> (a)…….. xxx xxx
>
> (b)…… xxx xxx

(c) Operational construction by a department of Central or a State Government or a local authority or a body corporate constituted under any law."

8. It is seen from the aforesaid proviso (c) under Sub Section (1) of Section 15 that 'operational construction', which is undertaken by any Department of the Central or a State Government or a local authority or a body corporate constituted under any law is only exempted from obtaining permission from the Development Authority. While opposite party no.7 is an individual, opposite party no.9 is a Company registered under the Indian Companies Act, 1956. A company registered under the Companies Act, though a legal person, is not a body corporate constituted under a law. The expression "body corporate constituted under any law" occurring in proviso (c) under Section 15(1) of the Act would only mean a corporation, which is otherwise called a statutory corporation. A company registered under the Companies Act cannot be said to be a statutory corporation. Opposite party nos.7 and 9, therefore, cannot claim exemption under proviso (c) of Section 15 (1) of the Act.

9. The other plea taken by opposite party no.9 is that the State Government in the Commerce and Transport Department have issued notification dated 16.8.2007 (Annexurel/3), by virtue of which the Cuttack Municipal Corporation and not the Cuttack Development Authority is to issue no objection certificate for construction of the telephone tower, and that opposite party no.9 has already made application to the Cuttack Municipal Corporation for grant of no objection. A bare perusal of the Government notification dated 16.8.2007 revels that it is not one authorising the Urban Local Bodies to issue no objection certificate for erection of telephone tower, but it is with regard to formulation of detailed guidelines for levy of uniform license fee for installation of telephone towers and for laying optical fibre cables in different Urban Local Bodies in the State. The Orissa Municipal Act,1950 and the Orissa Municipal Corporation Act,2003 empower the Urban Local Bodies to levy fees for granting license for different types of user of private properties as well as properties belonging to the Urban Local Bodies within the Urban area. In particular, Section 194 of the Orissa Municipal Corporation Act,2003 empowers the Municipal Corporation to levy fees for issue of Corporation license for various non-residential use of land and building. Where a particular land or building comes within the jurisdiction of an Urban Local Body and also within a Development area under the Provisions of the Orissa Development Authorities Act, there the provisions of both the Orissa Development Authorities Act and the Orissa Municipal Act or the Municipal Corporation Act, as the case may be, shall apply. The application of both the Acts is not alternative but simultaneous. This is amply made clear from the non-abstante clause appearing in sub Section (1) of

Section 15 of the Act as seen above. Therefore, issuance of Government Notification dated 16.08.2007 which merely formulates guidelines for collection of uniform license fees by Urban Local Bodies would not exempt opposite party nos. 7 & 9 from obtaining permission from the Cuttack Development authority for construction of the telephone tower in question.

10. Admittedly, no permission from Cuttack Development Authority has been obtained for construction of the telephone tower in question on the roof of the house of the opposite party no.7, for which the Authority has already initiated U.C. Case No.2 of 2010 and issued notice to opposite party no.7 to show cause as to why the unauthorised construction shall not be demolished. Having regard to the allegations made by the petitioners it is desirable that the Authority should dispose of the proceeding early. We, therefore, direct opposite party nos.1 and 2 to take appropriate action and dispose of U.C.Case No.2 of 2010 in accordance with law within a period of four months from the date of communication of this order.

11. The writ application is accordingly disposed of. The parties shall bear their own costs.

Writ petition disposed of.

2010(I)ILR – CUT-800

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

W.P.(C). No.6567 OF 2010 (Decided on 08 04. 2010.)

M/S. SPONGE UDYOT PVT. LTD. …….petitioner

-V-

THE ASST.COMMISSIONER OF SALES TAX, ROUTKELA-II CIRCLE, ROURKELA. ……..Opp.Party

ORISSA VALUE ADDED TAX ACT, 2004 (ACT NO. 4 OF 2005) – SEC.30.

Suspension of registration Certificate – Opportunity to show cause not given prior to issue of the said order – No provision in the Act or Rules for service of notice to show cause.

When a valuable right is sought to be taken away an opportunity of hearing, though not specifically provided in the Act, is desirable to be given – Moreover suspension/cancellation of registration certificate of a dealer is an administrative action, involving Civil consequences so doctrine of natural justice must be held to be applicable unless the statute conferring the power excludes its application by express language – Held, suspension of registration certificate is liable to be quashed. (Para 7)

Case laws Referred to:-

1.2007 (I) OLR 534 : (M/s. Ramkumar Jaigopal -V- Asst.Commissioner of Sales Tax, Sambalpur).

2.1999, Vol.115, : Sales Tax Cases, P.478 : (Sidhartha Engineering Pvt.Ltd.- V-Asst.Commissioner of Sales Tax & Anr.).

3.AIR 1978 SC 597 : (Smt.Maneka Gandhi -V- Union of India & Anr.).

4. (2008) 300 ITR 403 (SC) : (Sahara India (Firm) -V- Commissioner of Income Tax & Anr.).

5.1995 (I) OLR 402 : (M/s.Iron Exchange India Ltd. -V-State of Orissa & Ors.).

6.1990 (II) OLR 408 : (Basanta Kumar Sahoo -V- The State of Orissa & Ors,).

7.(1997) Vol.105 Sales Tax Cases 112 : (Kanak Cement Pvt. Ltd.-V- Sales Tax Officer, Assessment Unit, Rajgangpur.).

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

For Opp.Party – Shri Rudra Prasad Kar, Standing Counsel (Commercial Taxes).

L.MOHAPATRA, J. The petitioner, a Private Limited Company questions the legality of the order in Annexure-2 passed by the opposite party suspending its registration certificate as a dealer.

2. The petitioner-Company has its factory at Jiabahal, Kalinga, in the district of Sundargarh and has registered itself under the Orissa Value Added Tax Act (OVAT). It carries on business of manufacturing and deals with pig iron, sponge iron, steel, alloy steel, iron ore, all Ferro and metals and also carries on different business connected thereto. On 25.3.2010, a notice was issued to the petitioner under Rule 32(2) of OVAT Rules, 2005 requiring the petitioner to produce evidence, record/documents on the allegation that it has knowingly furnished incomplete/incorrect information in the return furnished for the tax period/periods and failed to pay tax, interest and penalty due under the Act for the said period. The other allegation is that the petitioner conducted business in such manner that there is reasonable apprehension of evasion of tax or attempt to evade tax. Though this notice was given in Annexure-1, copy of the order in Annexure-2 suspending the registration certificate was not enclosed. After submitting application for supply of copy of the order of suspension, the same was supplied on 5.4.2010 whereas the order in Annexure-1 was passed on 25.3.2010. After obtaining a copy of the said order, this writ application has been filed challenging the legality of the same solely on the ground that prior to issue of the said order the petitioner had not been given an opportunity to show cause.

3. Shri A.K. Parija, the learned Senior Counsel appearing for the petitioner relied on a decision of this Court in the case of ***M/s. Ramkumar Jaigopal v. Assistant Commissioner of Sales Tax, Sambalpur, reported in 2007 (I) OLR 534*** and another decision of this Court in the case of ***Sidhartha Engineering Pvt. Ltd. v. Assistant Commissioner of Sales Tax and another, reported in 1999, Vol.115, Sales Tax Cases, page-478*** to support the above contention.

4. The learned Standing Counsel for Commercial Tax Department opposed the petition on the ground that under the OVAT Act, prior to passing of an order of suspension, there is no requirement of issue notice to show cause and the petitioner can apply for restoration of the registration under the Act. Shri Kar, the learned counsel for the Department further submitted that considering the allegation against the petitioner, suspension of the registration became absolutely necessary in order to stop the business. Keeping such eventuality in mind, the legislators never thought of issuance of a notice to show cause prior to suspension of the registration. So far as

the two decisions cited by the learned Senior Counsel for the petitioner is concerned, Shri Kar, the learned counsel appearing for the Department tried to distinguish both the decisions on facts.

5. Admittedly before issuance of the order of suspension, the petitioner had not been served with any notice to show cause. Admittedly there is no provision in the Act or the Rules for service of a notice to show cause before an order of suspension is passed. Under these circumstances, the Court is called upon to decide as to whether a notice in the present case is required to be served on the petitioner to show cause before the order of suspension was passed or not. In the case of M/s. Ramkumar Jaigopal v. Assistant Commissioner of Sales Tax, Sambalpur, the challenge was in relation to cancellation of registration certificate. The petitioner therein was a registered dealer under the Sales Tax authorities for more than 58 years and without giving an opportunity of hearing, the registration certificate was cancelled. The Court not only dealt with Section 31 of the Act dealing with cancellation of certificate of registration but also Section 30 of the Act which dealing with suspension of registration certificate. In paragraph-8 of the judgment relying on an earlier decision of the Hon'ble Supreme Court in the case of ***Smt. Maneka Gandhi v. Union of India and another, reported in AIR 1978 SC 597***, the Court made the following observation:

> " xxx xxx xxx xxx
>
> It must be kept in mind that the power of suspension/cancellation of registration certificate of a dealer, clearly imposes civil consequence and in this respect law is well settled in the case of **Smt. Maneka Gandhi v. Union of India and another** reported in AIR 1978 SC 597 wherein, the Apex Court has held that the rule of natural justice is embodied in every Statute and even where there is no specific provision for the same and when an administrative action involves civil consequence, the doctrine of natural justice must be held to be applicable."

6. As is evident from reading of the judgment though the case related to cancellation of registration certificate, the Court not only considered the question of cancellation of registration certificate but also suspension thereof and came to hold that the power of suspension/cancellation of registration certificate of a dealer clearly imposes civil consequence and therefore, even where there is no specific provision to follow the principles of natural justice, when an administrative action involves civil consequence, the doctrine of natural justice must be held to be applicable.

In the case of Sidhartha Engineering Pvt. Ltd. v. Assistant Commissioner of Sales Tax and another, in paragraph-8 of the judgment,

the Court held that natural justice is an inseparable ingredient of fairness and reasonableness. Observance of the principles is the pragmatic requirement of fair play in action. The rules of natural justice operate as implied mandatory procedural requirement and non-observance whereof invalidates the action.

Reference may also be made to some other decisions in this connection. In the case of ***Sahara India (Firm) v. Commissioner of Income-Tax and another, reported in (2008) 300 ITR 403 (SC)*** referring to large number of earlier decisions including the case of Maneka Gandhi (Mrs.) v. Union of India (supra), the Hon'ble Supreme Court came to a conclusion that even an administrative order or decision in matters involving civil consequences has to be made consistently with the rules of natural justice. The concept of natural justice is invariably read into administrative actions involving civil consequences, unless the statute conferring the power excludes its application by express language. A similar view was expressed by this Court in the case of ***M/s. Iron Exchange India Ltd. V. State of Orissa and others, reported in 1995 (I) OLR 402.*** The Court held in the aforesaid decision that principle of natural justice must be read into unoccupied interstices of the statute unless there is a clear mandate to the contrary. Such power is inherent in every Tribunal, judicial or quasi-judicial character and the purpose is to avoid miscarriage of justice. In the case of ***Basanta Kumar Sahoo v. The State of Orissa and others, reported in 1990 (II) OLR 408*** while dealing with the case under the Urban Land (Ceiling and Regulation) Act, 1976, the Court held that where valuable right is sought to be taken away, an opportunity of hearing though not specifically provided in the Act, is desirable to be given. In the case of ***Kanak Cement Pvt. Ltd. V. Sales Tax Officer, Assessment Unit, Rajgangpur, reported in (1997) Vol.105 Sales Tax Cases 112,*** the Court observed that it is a fundamental requirement of the principles of natural justice that if any person is likely to be affected by the use of any material collected by the Revenue, those are to be brought to his notice, and disclosed to him. The requirement of natural justice is to disclose by way of confrontation the materials collected and proposed to be used against a dealer.

Admitted in the Act and the Rules, though there is no provision for affording an opportunity of hearing before an order of suspension is passed, the said principle of natural justice has also not been expressly excluded.

7. On reading of above judgments, it is clear that even in respect of suspension of registration certificate, civil consequence follows and therefore, observance of principle of natural justice is a necessity. We are,

therefore, of the view that even though the statute is silent about issuance of a notice to show cause prior to passing of an order of suspension under Section 30 of the Act, when such order of suspension results in civil consequences, the principles of natural justice should be followed. We are, therefore, of the view that the order of suspension of registration certificate is liable to be quashed even though it is open for the petitioner under the Act to seek for restoration of the same.

8. Another submission was made by the learned counsel appearing for the Department that if the order of suspension is quashed, the petitioner is likely to get involved in such activities for which his registration had been put under suspension. In order to avoid such a situation, we dispose of this writ application with the following direction:

The order of suspension in Annexure-2 is quashed and it will be open for the Department to proceed under Section 30 of the Act after giving an opportunity of hearing to the petitioner to meet the allegations contained in Annexure-1. In the event, such action is taken by the Department, till an order is passed under Section 30 of the Act, the petitioner shall be permitted to run its business subject to the condition that the same shall be done under the supervision of an Officer of the opposite party-Department and every day transaction shall be intimated to the Department through the Officer who may be deputed to supervise the same.

Writ petition allowed.

2010(I)ILR – CUT- 805

L.MOHAPATRA, J & INDRAJIT MAHANTY, J.

W.P.(C). No.14248 &14249 OF 2008 (Decided on 19 05. 2010.)

M/S. ORISSA POWER GENERATION CORPORATION LTD. …….. Petitioner

-V-

CONCILIATION OFFICER-CUM-ASST. LABOUR COMMISSIONER, BBSR & ANR. …… Opp. Parties

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

Dismissal of workman without enquiry – Management failed to provide any material for dispensing with the enquiry – Management filed application U/s.33(2)(b) of the Act seeking approval of its action – Application rejected – Hence this writ petition.

The workmen categorically denied receipt of payment or receipt of any offer of payment of their salary for one month simultaneously with the order of dismissal – Held, there is no error in the impugned order refusing to grant approval to the petitioner-company's petition U/s.33(2) (b) of the I.D. Act. **(**Para 13)

Case laws Referred to:-

1.AIR 2001 SC 2090 : (Karnataka State Road Transport Corpn. -V- Smt. Lakshmidevamma & Anr.).
2.AIR 1984 SC 289 : (Sambhunath Goel -V- Bank of Baroda).
3.AIR 1955 SC 258 : (Automobile Products of India ltd.-V- Rukmaji Bala & Ors.)
4.AIR 2002 SC 643 : (Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.-V-Shri Ram Gopal Sharma & Ors.).
5.AIR 1966 SC 380 : (Tata Iron & Steel Co.Ltd. -V- S.N.Modak).

For Petitioner – M/s. Durga Prasad Nanda, M.K.Pati, R.K.Kanungo, S.Rath & B.Panda.
For Opp.Parties – M/s. Suratanaya Mishra & I.Sreedevi.

I.MAHANTY , J. Since both the writ applications relate to the common/similar orders passed under Section 33(2)(b) of the Industrial Dispute Act, against two different employees, namely, Radheshyam Barik (O.P. No.2 in W.P.(C) No.14248 of 2008) and Sri Akrura Dhurua (O.P. No.2 in W.P.(C) No.14249 of 2008), the same were heard together and are being disposed of by this common judgment.

2. M/s Orissa Power Generation Corporation Ltd. (Petitioner in both the cases) has sought to challenge the order dated 10.9.2008 passed by the Conciliation Officer-Cum-Assistant Labour Commissioner (Opposite Party No.1) rejecting the application dated 21.6.2007 filed by the petitioner-company under Section 33(2)(b) of the Industrial Disputes Act, 1947 (in short 'the Act') in which, prayer has been made for approval of their action in awarding punishment of dismissal against Opposite Party No.2 in both the cases.

3. Learned counsel for the petitioner-company contended that the impugned order dated 10.9.2008 passed by Opposite Party No.1 (Conciliation Officer) was illegal and without jurisdiction, inasmuch as, the powers and duties as has been provided under the Act, does not vest in a Conciliation Officer, the authority to carry out "judicial scrutiny" of the action of the Management and even if the Conciliation Officer was of the view that the action of the petitioner-company was not justified, the Conciliation Officer ought to have referred the matter for adjudication to the appropriate court/forum provided under the Act, instead of, merely rejecting the application filed by the petitioner-company under Section 33(2)(b) of the Act. In this respect, reliance was placed by the petitioner under the provisions contained in Sections 11 and 12 of the Act, vis-à-vis the procedures, powers and duties of Conciliation Officer.

Learned counsel for the petitioner further contended that the order of the Conciliation Officer is wholly perverse since he placed reliance on the written submissions of the workman-Opposite Party No.2 in both the cases, without permitting the petitioner-Company to lead evidence as was prayed for by the petitioner-company in its petition and thereby, violating the mandate of the Hon'ble Supreme Court as reported in AIR 2001 SC 2090 (**Karnataka State Road Transport Corpn. V. Smt. Lakshmidevamma and another)** and AIR 1984 SC 289 (**Sambhunath Goel v. Bank of Baroda**).

4. Learned counsel appearing for Opposite Party No.2-workman, in both the cases, on the other hand, submitted that the impugned order under Annexure-1 passed by the Conciliation Officer-Opposite Party No.1 was in consonance with the judgments of the Hon'ble Supreme Court in the case of **the Automobile Products of India Ltd. v. Rukmaji Bala and others,** AIR 1955 SC 258 as well as in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Shri Ram Gopal Sharma and others**, AIR 2002 SC 643.

5. In the light of the contentions raised as noted hereinabove, it becomes necessary to take note of the facts leading to the present challenge:

(A) Opposite Party No.2 in both the cases, namely, Radheshyam Barik and Akrura Dhurua who were working as Senior Assistant and Vice-

(B) President of the O.P.G.C. Employees Union respectively, in the petitioner-company, on 19.6.2007, while a DPC meeting was sitting for considering promotion for the cadre of non-executives at ITPS, Banaharpalli, forced their way into the said room and without any provocation assaulted the Senior General Manager (P & A) with fist blows in presence of the Director (Operation) and other senior officers of the petitioner-company.

(B) The Opposite Party No.2 in both the cases were dismissed from service by the order of Management dated 21.6.2007 by dispensing with the enquiry before inflicting the punishment of dismissal for the following reasons: -

a. During and after the incident the offending employee threatened the officers and other employees not to disclose the incident before any authority and also threatened them of dire consequences.
b. The conduct of the employee created an atmosphere of terror.
c. The overt act of the employee necessitated early and stringent action for which the Management took the decision to dismiss the employee without resorting to an enquiry proceeding.
d. The Director (Operation) and the Senior General Manager (P & A) who were assaulted have categorically expressed that the offending employee along with some others unleased a reign of terror at the factory site and the officers and employees were mortally afraid of him for which it was believed that no witness would come forward to depose against the said employee if a disciplinary enquiry is held.
e. After the incident the offending employee had been threatening the officers and the employees to refrain from adducing any evidence against him and such threats have been reported to the police by lodging complaints vide situation report; and lastly,
f. The Management believed that no useful purpose would be served by holding any enquiry since the offending employees were most likely to influence the witnesses by threat and that the witnesses may never come forward to depose.

(C) The petitioner-company in its application before Opposite Party No.1, mentioned that in case it is found that the reasons given for dispensing with the enquiry were found to be adequate, then opportunity should be given to the Management to adduce evidence in support of its action. It appears that the petitioner-company had indicated in its application that as

per the proviso to Clause (b) of Sub-Section (2) of Section 33 of the Act, the dismissed employees have been paid wages for one month vide Pay Orders dated 21.6.2007, drawn on the State Bank Of India, Banharpalli, I.B Thermal Power Station, Jharsuguda.

(D) The Conciliation Officer on receipt of the aforesaid application issued notice to the Management as well as Opposite Party No.2-workmen to appear before it on 4.3.2008 for enquiry along with all connected papers/documents. Opposite Party No.2 (in both the cases) appeared at the enquiry and submitted their written statements, along with documents and categorically denied the incident/occurrence, as alleged by the Management and submitted their views in detail as to the occurrence which took place on 19.6.2007. The Opposite Party No.2-workmen (in both the cases) made counter allegations against the Senior General Manager (P & A) and alleged that they having failed to achieve their object of conducting the DPC interview, without awaiting the finalization of the Seniority List and holding intereview even before the date for filing of the objection to the Draft Seniority List.. It is further alleged by the workmen that the Senior General Manager (P & A) created a situation with dismissing Opposite Party No.2-workmen (in both the cases) as well as other office bearers of the Union, were assaulted by the security guards of the Corporation and, thereafter, directed dismissal of Opposite Party No.2-workmen by way of the punishment based on false accusations.

The Opposite Party No.2-workmen (in both the cases) categorically claimed in their written statements that the petitioner-company contravened the statutory requirement under Section 33(2)(b) of the Act, since they did not offer payment to the dismissed employees their salary for one month simultaneously with issuance of the order of dismissal and submission of the application before the Conciliation Officer under Section 33(2)(b) of the Act.

Further, it appears that on 8.4.2008, the Opposite Party No.2 (in both the cases) filed a reply to the counter application of the applicant.

6. On perusal of the impugned order passed by the Conciliation Officer, it appears that the Conciliation Officer took note of the fact that the dismissed workmen-Opposite Party No.2 (in both the cases) had not been offered payment of salary for one month at the time of the order of dismissal and further submitted that the dismissal order dated 21.6.2007 had not been served on them and had merely been affixed in the Notice Board of ITPS Banaharpali. Opposite Party No.2-workmen (in both the cases) categorically denied the assertion made by the Management of the petitioner-company that they had been paid wages for one month vide Pay orders dated 21.6.2007 and instead submitted that they found from their respective Bank

Account at S.B.I., Banaharpali that their Accounts were credited with a sum of Rs.1,00,002/- and Rs.76,004/- respectively on 25.8.2007. Such act on the part of the Management cannot be construed to constitute payment of his salary of one month simultaneous with the order of dismissal dated 21.6.2007 as required by law.

In this respect, it was submitted on behalf of the dismissed-employees Opposite Party No.2 (in both the cases) that the mere filing of the Cheque and signing the same on 21.6.2007 would not either be conclusive evidence of payment or offer of payment of the amount mentioned therein, until and unless such cheque was duly served on the workman. While Opposite Party No.2-workmen (in both the cases) categorically denied receipt of payment or receipt of any offer of payment of their salary for one month simultaneously with the order of dismissal dated 21.6.2007, the Management did not produce any evidence to controvert the said assertion.

Accordingly, in such circumstance, the Conciliation Officer in Paragraph-14 of his order came to conclude that the dismissed-employees' assertion of non-receipt of payment or offer of payment along with the order of dismissal was found to be correct and genuine. Therefore, Conciliation Officer came to hold that, payment or offer of payment of wages for one month by the Management to the dismissed employees was not made simultaneous with the passing of the order of dismissal and filing of application for approval on 21.6.2007. Therefore, the payment not being a part of the same transaction i.e. along with dismissal, the applications under Section 33(2)(b) for approval were refused.

7. The further contention of the dismissed employees that Clause-(b) of Sub-Section (2) of Section 33 of the Act stipulates that an employer can dismiss or discharge any employee for misconduct not connected with the pending dispute in accordance with the "Standing Orders" applicable to the employees. The petitioner-Corporation accepted the fact that the "standing orders" were followed by it in respect of its employees. Therefore, the employees' contention that in terms of their standing orders, the Management was required to draw up a charge-sheet and hold an enquiry as provided therein and only if the employees were found guilty, in such a proceeding, punishment as provided therein could be inflicted. Therefore, infliction of punishment without holding an enquiry as has been provided in the Model Standing Orders not having been complied with, the Management application under Section 33(2)(b) of the Act deserved to be refused.

8. Opposite Party No.2 (in both the cases) further raised contention that the order of dismissal dated 21.6.2007 as well as the application under Section 33(2)(b) of the Act and the documents appended thereto would

indicate that, the same are merely accusations without any foundation and while referring a report submitted by the Director (Operation) submitted that, the same was created subsequently for the purpose of the present case. In this respect, it had been mentioned in the report that in the occurrence, the Director (Operation) also sustained injury in his hand. The Director (Operation) who claimed to be in his chamber at the time of the alleged occurrence, has not complained that the alleged injury sustained on his hand, was by the assault made by the delinquent employees. In so far as the F.I.R. filed by the Management is concerned, the dismissed employees state that while the same contained false accusations, Sri Radheshyam Barik, working president of the employees union had also lodged an F.I.R. on the same day, before the Banaharpali P.S. and the same was pending investigation, for the alleged assault committed the employees by the security staff of the petitioner-company. The Conciliation Officer also took note of the fact that, there was no report by the Director (Operation) or the Senior General Manager (P & A) that, the concerned employee gave any threat to them either during or after the alleged occurrence took place. Further, no material was produced by the Management of the petitioner-company to indicate that Opposite Party No.2-workmen created any terror in the Organization and that employees were mortally afraid of them. In fact, the Conciliation Officer came to a finding of fact that, there was no police report against Opposite Party No.2-workmen in such regard and accordingly, came to the conclusion that the petitioner-company had failed to provide any material to establish that, there was a prima facie case for dispensing with the enquiry. In the absence of any material on record, the Conciliation Officer concluded that he was not in a position to hold that the Management had been able to make out a prima facie case against the dismissed employees or have been able to show any justifiable ground to sustain the order of termination issued to the Opposite Party No.2-workmen (in both the cases) and that too by dispensing with the requirement to held an enquiry.

9. The Conciliation Officer also dealt with the contention of the petitioner-company of providing opportunity to the Management to lead evidence on merit to prove the misconduct alleged against the employees. While dealing with the application under Section 33(2)(b) of the Act, the Conciliation Officer not being an Adjudicatory Authority under Section 10 read with Section 11-A of the Act, has only limited jurisdiction and, therefore, the prayer made by the Management of the petitioner-company was declined.

10. In the light of the facts as noted hereinabove and the order of the Conciliation Officer, as noted hereinabove, it now becomes essential to deal with the challenge made by the petitioner-company, to the order of the

Conciliation Officer impugned herein under Annexure-1. At the very outset, we may take note of Sections 11 and 12 of the Act which stipulates that the "procedures" and "powers" as well as "duties" of the Conciliation Officer.

Section 33(2)(b) of the Act is quoted hereunder:

> "**33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings**.- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-
>
> (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
>
> (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
>
> (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman]-
>
> (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
>
> (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:
>
> Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

In terms of the provisions as noted hereinabove, it is the clear there from that during the pendency of any conciliation proceeding or any proceeding before or in any proceeding before the appropriate labour court or Tribunal or National Tribunal, in support of the Industrial Dispute, no employer shall discharge punish or dismiss any workman for misconduct "save with the express permission in writing of the authority before which the

proceeding is pending". It is further stipulated in Sub-Section (2) that during the pendency of any such proceeding, an employer may, in accordance with standing orders applicable to a workman concerned in such dispute may dismiss, discharge or punish any workman for misconduct **provided that unless** such dismissed employee has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

11. In the present case, there is no dispute between the parties that the dispute between the workmen and the Management is pending adjudication and it is also not dispute that the contemplated action of dismissal against Opposite Party No.2-workmen (in both the cases) required the approval of the "statutory authority", prior to it being given effect to. In this respect, it needs to be clarified herein that the "Authority" who is required to grant approval in such cases is in none other than the Conciliation Officer-Cum-Assistant Labour Commissioner. It is clear therefrom that the powers and duties of the "Authority" under Section 33 of the Act are distinct from the procedures, powers and duties of the "Conciliation Officer" under Sections 11 and 12 of the Act.

In the present case, the "authority" (Conciliation Officer) while dealing with the application made by the petitioner-company under Section 33(2)(b) of the Act obviously is not acting in his capacity as "Conciliation Officer" under Sections 11 and 12 of the Act. The function of the Conciliation Officer under Sections 11 and 12 of the Act and as the 'Authority' under Section 33 of the Act are distinct and different and to this extent, we approve the views expressed by the Conciliation Officer in the impugned order.

In the light of the aforesaid observations and conclusion reached by us, we are of the considered view that, in the event the authority under Section 33 of the Act does not grant approval of action of the Management against the workmen, it would be incumbent upon the Management to proceed against the employees in terms of the Model Standing Orders applicable to such workmen and not de-hors of the same.

12. On perusal of the judgment of the Hon'ble Supreme Court relied upon by the learned counsel for Opposite Party No.2-workmen in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (supra) rendered by a Constitutional Bench relied on its earlier judgment in the case of **Tata Iron and Steel Co. Ltd. v. S.N.Modak**, AIR 1966 SC 380 and come to hold as follows:

> "9. In the case of Tata Iron and Steel Co. (supra) it is reiterated and stated thus:

"It is now well-settled that the requirements of the proviso have to be satisfied by the employer on the basis that they form part of the same transaction; and stated generally, the employer must either pay or offer the salary for one month to the employee before passing an order of his discharge or dismissal and must apply to the specified authority for approval of his action at the same time, or within such reasonably short time thereafter as to form part of the same transaction. It is also settled that if approval is granted, it takes effect from the date of the order passed by the employer for which approval was sought. If approval is not granted, the order of dismissal or discharge passed by the employer is wholly invalid or inoperative, and the employee can legitimately claim to continue to be in the employment of the employer not-withstanding the order passed by him dismissing or discharging him. In other words, approval by the prescribed authority makes the order of discharge or dismissal effective; in the absence of approval, such an order is invalid and inoperative in law."

13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under S. 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He can not disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or

inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b), Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an

> employee and is intended to save his time and trouble inasmuch as he can straightway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted."

Another judgment relied upon by the petitioner-company, i.e. in the case of **Sambhunath Goel v. Bank of Baroda**, AIR 1984 SC 289. In the said case, the facts of the case were that the Bank of Baroda had filed a writ application seeking quashing of the award passed by the Central Government Industrial Tribunal-Cum-Labour Court, Delhi, whereby, the workman was directed to be re-instated with full back wages. In the said case, an enquiry was held and both the Management as well as the workman were granted opportunities to lead evidence from both the sides and on conclusion of the enquiry, the workman was dismissed. Upon dismissal of the workman and rejection of his appeal, the workman approached the Industrial Tribunal-Cum-Labour Court, Delhi which passed the impugned award.

Considering the aforesaid facts, we are of the view that the facts of the said case have no bearing on the facts in the present case for consideration. In the present case, admittedly, no enquiry whatsoever was conducted and instead, the Management sought the approval of its action from the prescribed authorities under Section 33(2)(b) of the Act. The refusal to accord approval by the prescribed authority is the subject matter of challenge in the present case.

Therefore, the judgments cited by the petitioner-company in support of the contention as noted hereinabove, do not at all come to the aid of the petitioner and instead, the judgment of the Hon'ble Supreme Court in the

case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (supra) clearly and categorically noted that "the employer is required to satisfy the proviso to Section 33(2)(b) of the Act on the basis that the "form part of the same prosecution". In other words, approval of the prescribed authority makes the order of discharge or dismissal effective, in the absence of approval such an order is invalid and in-operational in law.

In view of the proviso to Section 33 (2)(b) of the Act, which was in acted to safeguard interest of workman to act as a shield against victimization and unfair labour practice by the employers, during the pendency of the dispute when the relationship between them are already strained. The employers cannot be permitted to use the provision of Section 33(2)(b) of the Act to ease out the workman without complying with the conditions contained in the said provision for any alleged misconduct.

Apart from the aforesaid judgment, it becomes necessary also to deal with the judgment relied by the learned counsel appearing for Opposite Party No.2 (in both the cases), i.e., the case of **The Automobile Products of India Ltd.** (supra) and in particular, the conclusion of the Hon'ble Supreme Court in Paragraph-22 thereof is quoted herein below:

"22. The object of Section 22 of the 1950 Act like that of section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimization by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object of the two sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen. To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and section 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of these two sections being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these sections is to accord or withhold permission. And so it has been held – we think rightly – by the Labour Appellate Tribunal in Carlsbad Mineral Works Co. Ltd. v. Their Workmen ([1953] 1 Lab. L.J.85) which was a case under section 33 of the 1947 Act. Even a cursory perusal of section 33 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes. It will be noticed that under

section 33 of the 1947 Act the authority invested with the power of grating or withholding permission is the conciliation officer, Board or Tribunal. **The conciliation officer** or the Board normally **has no power**, under the 1947 Act, **to decide any industrial dispute but is only charged with the duty of bringing about a settlement of dispute**. It is only the Tribunal which can by its award decide a dispute referred to it. Section 33 by the same language confers jurisdiction and power on all the three authorities. Power being thus conferred by one and the same section, it cannot mean one thing in relation to the conciliation officer or the Board and a different and larger thing in relation to the Tribunal. There is no reason to think that the legislature, by a side wind as it were, vested in the conciliation officer and the Board the jurisdiction and power of adjudicating upon disputes which they normally do not possess and which they may not be competent or qualified to exercise. Further, if the purpose of the section was to invest all the authorities named therein with power to decide industrial disputes one would have expected some provision enabling them to make and submit an award to which the provisions of the Act would apply such as is provided in section 33-A of the 1947 Act or section 23 of the 1950 Act. There is no machinery provided in section 33 of the 1947 Act or section 23 of the 1950 Act for enforcing the decision of the authority named in those sections. This also indicates that those sections only impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission, i.e to lift or maintain the ban. And so it has been held by this Court in Atherton West & Co., Ltd. v. Suti Mill Mazdoor Union ([1953] S.C.R. 780, 786-7) which was a case under clause 23 of the U.P. Government Notification quoted on p.785. Section 22 of the 1950 Act is in pari material with section 33 of the 1947 Act and the above clause 23 of the U.P.Government Notification and most of the considerations noted above in connection with these provisions apply mutatis mutandis to section 22 of the 1950 Act. Imposition of conditions is wholly collateral to this purpose and the authority cannot impose any condition. And it has been so held – we think correctly – in G.C.Bhattacharji v. Parry & Co., Ltd, Calcutta ([1954] 2 Lab.L.J.635). In view of the scheme of these Acts summarized above and the language of these sections the general principle laid down in the case of The Queen v. The County Council of West Riding supra can have no application to a case governed by these sections. In our judgment the Labour Appellate Tribunal was in error in holding that it had jurisdiction to impose conditions as a prerequisite for granting permission to the company to retrench its workmen and the first question must be answered in the negative."

13. In view of the aforesaid facts, case laws as well as on perusal of the impugned order and after having considered the contentions advanced by

the learned counsel appearing for the respective parties, we are of the considered view that there is no error whatsoever in the impugned order dated 10.9.2008 passed by the Conciliation Officer-Cum-Assistant Labour Commissioner (Opposite Party No.1) under Annexure-1 to the writ application refusing to grant his approval to the petitioner-company's petition under Section 33(2)(b) of the I.D.Act.

Accordingly, the writ applications are dismissed and the order dated 10.9.2008 passed by the Conciliation Officer-Cum-Assistant Labour Commissioner (Opposite Party No.1) is affirmed. Interim order dated 31.10.2008 passed in Misc. Case No.12488 of 2008 stand vacated.

Writ petition dismissed.

2010(I)ILR – CUT-819

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

O.J.C. No.1348 OF 2000 (Decided on 19.05. 2010.)

SRIDHAR PRADHAN ……. Petitioner

-V-

SECRETARY, CO-OPERATION, GOVERNMENT OF ORISSA & ORS. ……. Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.311. Orissa Civil Service (CCA) Rules 1962 – Rule 29.

Reversion – Enquiry Officer did not record any oral evidence or take any document on record as documentary evidence – Petitioner was acquitted by the Criminal Court U/ss. 409, 477-A I.P.C. in G.R.Case No.123/83 and he was dischared in G.R.Case No. 107 of 1982 U/S 409 & 477A I.P.C as the Case was not maintainable agaist him - Recovery proceedings seeking recovery of money allegedly misappropriated by the petitioner came to be dismissed – Held, all the impugned orders basing on the inquiry report are quashed – Petitioner shall be entitled to get all his service benefits as well as salary from the date of suspension – Since the order of dismissal is held illegal he is deemed to be in continuous service from the date of his suspension and he is entitled to get all consequential service benefits.

(Para 16 to 20)

Case law Referred to:-

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

For Petitioner – M/s. S.N.Mohapatra, K.R.Mohapatra & S.Ghosh.

For Opp.Parties – Addl. Govt. Advocate.

I.MAHANTY, J. The petitioner-Sridhar Pradhan has sought to challenge an order dated 25.6.1999(Annexure-9) passed by the Orissa Administrative Tribunal, Bhubaneswar, rejecting the petitioner's original application No. 998 of 1993, wherein the petitioner had sought to challenge an order of reversion passed by the Secretary, Co-operation, Government of Orissa (O.P.1) purportedly being contrary to Rule 29 of the OCS(C.C.A.) Rules, 1962.

2. From the pleadings of the case it appears that the petitioner entered into Government service under the Government of Orissa and was appointed by the Deputy Registrar, Co-operative Societies, Berhampur(O.P.3) as a Lower Division Clerk with effect from 25.10.1968. Thereafter the petitioner was promoted to the post of Upper Division Clerk

on1.10.1970 and while continuing as such, was deputed as Accountant to Soura L.A.M.P.C.S. at Chandragiri. It appears that for the period 1978-79 and 1979-80 accounts of the said society was audited and based on the audit report, a departmental proceeding was initiated against the petitioner on 22.5.1982 on various charges, namely, disobedience of orders, negligence in duty, non-maintenance of Books of Account with malafide intention, misappropriation of Society funds, misutilisation of Society funds unauthorisedly and misconduct.

3. The A.R.C.S., Aska was appointed as Enquiry Officer and pursuant to notices issued, the petitioner submitted his show cause on 13.8.1982. The Enquiry Officer concluded the inquiry on 3.1.1983 and held the petitioner guilty of the charges.

4. Learned counsel for the petitioner submitted that, pending completion of the disciplinary proceeding, two separate Criminal proceedings were drawn against the petitioner on the self-same charges, i.e., for criminal breach of trust and falsification of accounts, in respect of property and documents of Soura L.A.M.P.S. Ltd., Chandragiri. The criminal proceedings against the petitioner were registered as G.R. Case Nos. 107 of 1982 and 123 of 1983 in the courts of Judicial Magistrate First Class, Digapahandi and R.Udayagiri respectively.

It is asserted by the learned counsel for the petitioner that, while the criminal proceedings were pending against him, without conducting any due inquiry and giving any adequate opportunity to the petitioner to defend himself, the disciplinary proceeding was concluded, only on the basis of the show cause reply submitted by the petitioner.

5. Learned counsel for the petitioner further submitted that, the petitioner on receipt of notice dated 20.1.1984, made a representation for supply of copies of statement of the witnesses, in order to enable him to file show cause against purported disciplinary action. It is alleged that the Enquiry Officer had concluded inquiry without even summoning the petitioner and thereby arrived at an ex-parte decision holding the petitioner guilty of charges, merely by referring to the show cause reply of the petitioner to the charge sheet. No opportunity whatsoever was given to the petitioner to explain each of the charges and therefore, it is contended that the finding on the charges arrived by the Enquiry Officer is perverse.

6. It is further submitted that on receipt of the notice from opposite party No.3 (the Deputy Registrar), the petitioner came to know about the proposed action of dismissal and also learnt that the same was based upon the charges which were allegedly found to be proved by the Enquiry Officer, with regard to “misappropriation of Society funds” as would be evident from the notice dated 20.1.1984 under

Annexure-4. Learned counsel for the petitioner further submitted that even though the petitioner filed his show case dated 7.2.1984 and simultaneously requested for supply of the deposition of the witnesses, non-supply of the same to him, amounts to complete violation of principles of natural justice. On 26.5.1984, opposite party No.3 passed the impugned order of dismissal under Anexure-5 without providing the petitioner with copies of documents requested for.

7. The petitioner filed an appeal before the Registrar, Cooperative Societies (O.P.2) against the order of dismissal, which came to be dismissed and thereafter the petitioner sent a memorial to the Government on 2.7.1986. It is most important to note herein that while the memorial of the petitioner was under consideration of the Government, on 8.5.1987 the petitioner was acquitted by the trial court of the offences under Sections 409, 477-A, I.P.C. in G.R. Case No. 123 of 1983, since it was found that the prosecution had failed to prove its case against the petitioner.

8. It is relevant to note here that two separate Dispute Cases had also been initiated against the petitioner for realization of the funds allegedly misappropriated by him and the same were finally dropped and the petitioner was absolved from all the liabilities by the order passed in Dispute Case No. 38/84-85 of the Assistant Registrar of Co-operative Societies, who by order dated 29.10.1986 (Annexure-5-A) came to hold that "the above facts, therefore, do not provide any reason or evidence to make the defendant liable for the amount claimed by the Plaintiff (Society) and hence the defendant(petitioner herein) is let free from the claims and the case is disposed of."

Similarly in Dispute Case No.39/84-85, the Assistant Registrar of Cooperative Societies by order dated 28.10.1986 (Annexure- 5-B) came to hold that ".....The Defendant No.1(petitioner herein) is set free from the claims."

9. It further appears from the records of the proceeding that the State Government (O.P.1), disposed of the petitioner's memorial dated 2.7.1986 vide its decision dated 6.11.1987 while it "set aside the order of dismissal" passed by the Deputy Registrar(O.P.3), but, directed "reversion" of the petitioner to the rank of Junior Clerk under(Annexure-6). But a further order dated 22.12.1988, opposite party No.1 directed that the emoluments of the petitioner for the period of suspension would be limited to "subsistence allowance" only and the period of absence from the date of his dismissal to the date of his rejoining was to be treated as "without pay".

Being aggrieved by order dated 6.11.1987 directing his reversion under Annexure-6 as well as order dated 22.12.1988 under Annexure-7, the petitioner once again submitted a further representation to the Hon'ble Chief

Minister on 2.9.1989, which was ultimately rejected on 7.4.1993 under Annexure-8.Thereafter the petitioner approached the Orissa State Administrative Tribunal, Bhubaneswar in O.A. No. 998 of 1993, which was also rejected by order dated 25.6.1999 under Annexure-9.

10. It is contended by the learned counsel for the petitioner that the order dated 6.11.1987 under Annesure-6 was passed partly allowing the memorial submitted by the petitioner by quashing the order of dismissal but direct his reversion, was not in consonance with Rule 29 of the Orissa Civil Services (C.C.A.) Rules, 1962.

While the matter stood thus,, the petitioner, who was also an accused in G.R. Case No. 107 of 1982, was duly discharged there from by order dated 7.1.1989 with a conclusion that the case was not maintainable against the petitioner and therefore, the petitioner was discharged.

11. In the facts narrated hereinabove, learned counsel for the petitioner further submitted that since the original inquiry report (Annexure-3) was based on no evidence and the Enquiry Officer had summoned no witness and without examining the record had proceeded to record his findings by merely referring to the show cause submitted by the petitioner, it is submitted that the proceeding per se is based on no evidence. Learned counsel for the petitioner further submitted that the original order of dismissal from service was allegedly for "misappropriation of Society funds". It is submitted that the petitioner was never supplied with the copies of evidence, both oral as well as documentary and while the disciplinary authority passed order of dismissal for the alleged 'misappropriation of Society funds', yet the learned Tribunal fell into grave error by failing to appreciate that the criminal complaints lodged against the petitioner, both in G.R. Case Nos. 107 of 1982 & 123 of 1983 had ended in "acquittal/discharge". The tribunal further erred in law by not taking into account the dismissal of the Dispute Cases initiated against the petitioner claiming refund of money from the petitioner, which had ultimately been dismissed by the Assistant Registrar, Co-operative Societies under Annexures- 5-A & 5-B.

Learned counsel for the petitioner further submitted that once the criminal court has acquitted the petitioner and the Dispute Cases filed by the Co-operative Societies, against the petitioner stood dismissed by Annexures- 5-A & 5-B, there was no basis whatsoever, either for dismissing the petitioner from service or for ultimately directing his reversion under Annexure-6 dated 6.11.1987 nor for directing denial of salary to him for the period of suspension as well as the period of dismissal vide order dated 22.12.1988(Annexure-7).

12. Learned counsel for petitioner further submitted that the Tribunal completely misread the inquiry report as well as judgment passed in the

criminal trial and observed that since the applicant- petitioner had failed to convince the court that the set of witnesses and the evidence in the criminal trial were identical to the disciplinary proceeding, therefore, the ratio of the judgment of the Hon'ble Supreme Court in the case of **Capt. M.Paul Anthony V. Bharat Gold Mines Ltd.**, reported in AIR 1999 SC 1416 was not applicable.

13. Learned counsel appearing for the State, on the other hand, submitted that the State had taken a lenient view in the matter by allowing the memorial of the petitioner vide order dated 6.11.1987 and therefore, the petitioner ought to have no grievance either against the order under Annexure-6 or Annexure-7 since, admittedly the petitioner had not performed his duties during the period of suspension as well as period, post order of dismissal. Learned State Counsel also supports the order passed by the Tribunal, inter alia, on the ground that it was not the case of the petitioner that in course of disciplinary proceeding the self-same persons who had given evidence in the criminal cases, in which the petitioner had been acquitted, were also the same witnesses who were examined in course of the disciplinary proceeding. Therefore, there was no error whatsoever in the order of the Tribunal impugned under Annexure-9 to the present application.

14. In the light of the facts noted herein above, the following undisputed facts clearly emanate.

Charges were framed against the petitioner by the order of the Deputy Registrar, Co-operative Societies, Berhampur vide order dated 22.5.1982 under Annexur-1. The petitioner responded to the said charges by submitting his explanation under Annexure-2 dated 13.8.1982 in which he categorical prayed as follows:

> "In the light of the explanation furnished on each charge, I feel that great injustice has been rendered in my case by framing such fabricated charges which have no merit. The charges of misappropriation leveled against me without any base is un judicious and this has invoked mental agony and defamation among my colleagues and others as well.
>
> I therefore request the authority to enquire into the matter and find out the validity of the charges leveled against me. I further pray that I may be allowed personal hearing and cross examine the persons connected with the proceedings before a final decision is taken on the issues involved in the proceedings."

15. In course of hearing of this case, pursuant to direction of this Court, the learned counsel for the State produced the records received from the office of the Deputy Registrar, Co-operative Societies, Berhampur Division, Berhampur, with regard to the departmental proceeding initiated against the petitioner. On perusal of the said records it is clear therefrom that not a

single witness's statement was ever recorded by the Enquiry Officer, either from the side of the department or from the side of the defence and the report of the Enquiry Officer dated 3.1.1984 is totally based only on the audit objection provided by the auditors and on the purported consideration of the show cause explanation provided by the delinquent/petitioner. No evidence whatsoever was recorded by the Enquiry Officer nor has the Marshalling Officer produced any witness or documentary evidence whatsoever. On perusal of the file containing the departmental proceeding, it is clear therefrom that, the inquiry itself has been conducted without complying with the mandatory requirements of the Orissa Civil Services (C.C.A.) Rules, 1962 and in particular Rule-29 thereof as well as the principles of natural justice as mandated by law.

16. Apart from the above, it is most important to note here that since the Enquiry Officer did not record any oral evidence or take any document on record as documentary evidence, apart from the audit report and therefore, there is no lawful basis for the tribunal to conclude that, the petitioner had failed to establish that the evidence produced in course of inquiry were similar to the evidence produced in the course of criminal trial. The judgment of the Hon'ble Supreme Court in the case of **Capt. M.Paul Anthony**(supra) has been rendered in the facts of the said case wherein it has been concluded that "it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex-parte departmental proceedings to stand."

17. In the present case at hand, admittedly, the petitioner was acquitted by the Criminal Court vide order dated 8.5.1987 in G.R. Case No. 123 of 1983 for offences under Sections 409, 477-A, I.P.C. for allegedly having falsified the cash book of which he was in-charge willfully and with intent to defraud. Paragraph 12 of the order of acquittal indicates that regard being had to the aforesaid un-satisfactory features of prosecution evidence, it cannot but be said that the charge under Section 409, I.P.C. has not been established against the accused beyond reasonable doubt and with regard to charge under Section 477-A, I.P.C. there is nothing on record to show that any document had been forged or manufactured by accused willfully with an intent to defraud and therefore, the said charge has no legs to stand.

Similarly in G.R. Case No. 107 of 1982, the petitioner was discharged on a finding that the case was not maintainable against him. In the said case petitioner had been charged under Sections 409 & 477-A, I.P.C.

18. Apart from the above, Soura LAMPS Limited had also initiated recovery proceeding before the Assistant Co-operative Societies seeking recovery of the money misappropriated allegedly by the petitioner and both the dispute cases i.e., Dispute Case Nos. 38/84-85 & 39-84-85 came to be dismissed against the petitioner vide order dated 28.10.1986 and 29.10.1986 respectively.

19. Considering the aforesaid facts, we are of the considered view that the report of the Inquiry Officer was not based on any substantive evidence and therefore order was passed on the basis of no evidence having been recorded by him and without complying with the mandatory requirement of the Orissa Civil Services (C.C.A.) Rules, 1962, as well as in violation of principles of natural justice. Apart from the above, the petitioner having been acquitted by the Criminal Courts, as well as by the Assistant Registrar, Cooperative Societies in Dispute Cases referred to above, no basis whatsoever exists to support the conclusion reached in inquiry report and consequently while directing quashing of Annexure-3 (the inquiry report) we also direct quashing of the order of dismissal (Annexure-5) as well as the orders of reversion dated 6.11.1987 and 22.12.1988(deduction of emoluments) of opposite party No.1 under Annexures-6 and 7 respectively. We also quash the order dated 25.6.1999 passed by the learned Tribunal in O.A. No. 998 of 1983 under Annexure-9.

20. Accordingly, the petitioner shall be entitled to get all his service benefits as well as salary on and from date of suspension. Since the order of dismissal has also been held to be illegal, he shall be deemed to be in continuous service from date of his suspension and therefore, is entitled to get all consequential service benefits. The entire exercise of compliance shall be completed within a period of three months from the date communication of this order.

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

Writ petition allowed.

2010(I)ILR – CUT- 826

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

M.A.T.A. No.40 OF 2006 (Decided on 09.04. 2010.)

DR. N. ANANTA RAVI SHANKAR ……. Appellant

-V-

SNIGDHA DAS ……. Respondent

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

Cruelty – Allegation made by the appellant are not of such nature that it can be termed either as mental or physical cruelty – An isolated incident of assault will not amount to physical cruelty and such conduct of the respondent depends on the circumstances under which one reacts.

Held, allegations made by the appellant with regard to mental and physical cruelty are not abnormal or unusual in marriage life and therefore, shall not amount to cruelty for the purpose of divorce – No justifiable reason to differ with the findings of the learned Judge, Family Court. (Para 5)

For Appellant – M/s. A.K.Mishra, T.Mishra & B.Swain.
For Respondent – M/s. Biswajit Mohanty-I,
Sadasiva Patra, Aditya Kumar Mohapatra,
Pradip Ku.Majhee & Ashutosh Panda.

L.MOHAPATRA, J. The appellant's application under Section 13 of the Hindu Marriage Act seeking for dissolution of marriage by decree of divorce having been dismissed by the learned Judge, Family Court, Rourkela in Civil Proceeding No.66 of 2004, this appeal has been preferred.

2. The case of the appellant is that he married the respondent as per Hindu rites and customs on 21.1.2001 in Panthanivas, Sector-5, Rourkela and the marriage was consummated in the quarter where he was staying with his parents. Immediately after the marriage, they went in a pleasure trip to different places and after returning, he found sudden change of behaviour of the respondent without any reason. The respondent insisted to stay away from the in-laws but the appellant did not agree. From this point, dissension arose between the parties and on 1.4.2001 the respondent went to her father's house, who was staying at Basanti colony. Though the appellant and his parents made several attempts to bring her back, she did not come and ultimately though she agreed to come back on 22.5.2001, she did not keep her promise. The parents of the appellant went back to Visakhapatnam out of shock and demur. In the month of June, 2001 the mother of the appellant

complained of chest pain and on receipt of this information the appellant went to convey the news to the respondent in order to take her back, but he was misbehaved and was not allowed to enter into the house of the respondent. He again went on 24.6.2001 to bring her back to witness the car-festival, but she did not return and in the house of the respondent the appellant was slapped. However, in the mid-night on interference of the younger sister of the respondent, she agreed to come and lived with the appellant from 25.6.2001 to 4.10.2001. Thereafter on two occasions she went to her father's house on different grounds and ultimately on 29.11.2001 she gave birth to a male child. Thereafter she started staying in her father's house. One month after birth of the child when the appellant went to bring her back, he was humiliated by his in-laws and was driven out of the house. Again on 15.7.2002 the parents of the respondent left her with the child in the house of the appellant and she stayed with the appellant till September, 2003 and during the said period she was behaving inhumanly with the appellant. Neither she was serving food nor she was allowing him to work properly and was threatening to lodge false case. Ultimately, she deserted him without any reasonable cause and all attempts for reunion having failed, the application for divorce was filed.

3. The respondent contested the case by filing a written statement denying all the allegations. It was contended by the respondent that she was suffering from T.B. and she was undergoing treatment under the appellant in 2000. In course of such treatment, she developed relationship with the appellant and ultimately married him. Since the parties belonged to different culture and language, the appellant had promised to over come all difficulties that may be faced by her after marriage. At the time of marriage dowry articles such as cash, jewellery and other house hold articles as per demand were given, but she was time and again told that had the appellant married a Telgu girl, he would have got more dowry. After returning from a pleasure trip, she was suffering physically, but was denied any treatment by an Allopathic doctor. In spite of her ill health, the appellant demanded physical relationship with her, which she tried to avoid and in the process dissension arose. She was taken back to her father's house on 1.4.2001 and after regaining health, her parents left her in matrimonial house in June, 2001. After sometime when she went back to the house of the appellant, a further demand of cash of Rs.5,00,000/-(Rupees five lakhs) was made to purchase a house and establish his clinic, but the father of the respondent denied to pay the amount because of his financial condition. She was assaulted once by the appellant and was abused by the mother of the appellant in Telgu language. She was threatened to be killed. It is further case of the respondent that every time her parents consulted her and persuaded to stay with the appellant but because of the conduct of the appellant and his family

members, the respondent suffered physically and mentally and ultimately in February, 2003 the parents of the appellant came to Rourkela and persuaded her to agree for a divorce so that the appellant can marry according to their choice. In September, 2003 she was left in her father's house but no attempts were made to take her back. The reason is for non-fulfilment of dowry demand.

4. On pleadings of the parties, the learned Judge, Family Court framed four issues and found that the marriage was held on 21.1.2001 at Rourkela as per Hindu rites and customs prevalent in Telgu community and the marriage was also consummated in the quarter allotted to the father of the appellant. Though initially the ground of desertion was taken, the statutory period of desertion not being over, the appellant had taken the plea of cruelty. On analysis of the evidence, the learned Judge, Family Court held that the cruelty attributed against the respondent comes within the purview of normal wear and tear in a marital life and the same has not gone to such an extent so as to snap the relationship. The learned Judge, Family Court also found that though the respondent is willing to join with the appellant, without any justifiable cause, the appellant refused to join with the respondent and, therefore, the prayer for divorce could not be granted. On these findings the appeal was dismissed.

5. Shri Mishra, the learned counsel appearing for the appellant assails the judgment solely on the ground that there being sufficient materials on record establishing mental and physical cruelty meted out to the appellant at the instance of the respondent, the petition for divorce should have been allowed. This being the only ground taken in the appeal, we looked into the evidence adduced by the parties in this regard. The appellant examined himself as P.W.1 and in his deposition he stated that after coming back from honeymoon trip the respondent insisted him to stay away from the in-laws which he did not agree. On Ist April, 2001 the respondent went to her father's house and several attempts were made to bring her back, but her parents did not agree. On 12.6.2001 his mother suffered from chest pain at Hyderabad and when he requested her to accompany him to Hyderabad, he was misbehaved and was not allowed to enter into the house. Again on 24th June, 2001 on the insistence of his father, he had gone to bring her back and she came back to his house. From 25.6.2001 till 4.10.2001 the respondent stayed with him and during the said period, she conceived. However, she was taken back in October, 2001 and the child was born on 29.11.2001. A month after the child was born, when he requested the respondent to come, he was abused in filthy language by the respondent but ultimately on 15.7.2002 she came back to his house with the child. Thereafter, she created all types of disturbances in the house by quarreling with every one

and ultimately on 22.9.2003 she went back to her parents house and never came back thereafter.

P.W.2 has no direct knowledge about the allegations made by the appellant but stated that he had a discussion with the respondent and he expressed his dissatisfaction. P.W.3 is the father of the appellant but he has not stated anything about the misbehaviour of the respondent except that during the illness of his wife the respondent had not gone to Hyderabad to see her mother-in-law. On the other hand, in examination-in-chief he has stated that both the spouses led a happy conjugal life with each other. Lateron, on further examination he stated about the circumstances when the respondent had gone to her father's house and one instance has been given by him when he and the appellant were humiliated in the house of the respondent.

The respondent examined herself as O.P.W.1 and supported the plea taken in the written statement in detail. Her evidence was also corroborated by the evidence of her father O.P.W.2. On analysis of the entire evidence, we find that even accepting the evidence of P.W.1 and his father P.W.3, one would find that on certain occasion when the respondent went to her father's house, attempts were made to bring her back, but it did not materialize on certain occasions. If the evidence of P.W.1 and O.P.W.1 are read together, it will be found that on certain occasions there were reasons for leaving the matrimonial house. But the allegations made by the appellant are not of such nature that it can be termed either as mental or physical cruelty. An isolated incident of assault will not amount to physical cruelty and such conduct of the respondent depends on the circumstances under which one reacts. We are therefore of the view that the learned Judge, Family Court was right in holding that the allegations made by the appellant with regard to mental and physical cruelty are not abnormal or unusual in marriage life and, therefore, shall not amount to cruelty for the purpose of divorce.

6. For the reasons stated above, we find no justifiable reason to differ with the findings of the learned Judge, Family Court. Consequently the appeal being devoid of merit is dismissed.

Appeal dismissed.

2010(I)ILR – CUT- 830

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

W.P.(C) No.14807 OF 2009 (Decided on 26.03. 2010.)

M/S. RELIANCE INDUSTRIES LTD DHENKANAL DIVN. . ……. Petitioner

-V-

STATE OF ORISSA & ORS ……. Opposite Parties

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

Closure of industrial undertaking – Held, prior permission from the appropriate Government is mandatory.

Petitioners prayer to close down the Unit was turned down by the appropriate Government as it would result in unemployment to huge number of employees at all levels – However in the meantime there has been a settlement between the employer and the workers which may be brought to the notice of the appropriate Government in a fresh application U/s.25-O seeking closure of the Industry –Writ petition is dismissed. (Para 5)

Case laws Referred to:-

1.AIR 2002 S.C. 708 : (M/s.Orissa Textile & Steel Ltd.-V- State of Orissa & Ors.).
2.(1992)4 S.C.C.680 : (Crescent Iron & Steel Corporation Ltd. -V- Union of India & Anr.).
3.AIR 1959 S.C.781 : (Gherulal Parakh -V-Mahadeodas Maiya & Ors.).
4.AIR 1961 S.C.372 : (Calcutta Discount Co.Ltd. -V-Income-tax Officer, Companies District I, Calcutta & Anr.).
5.AIR 2005 S.C. 1555 : (M/s.Oswal Agro Furane Ltd. & Anr.-V-Oswal Agro Furane Workers Union & Ors.).

For Petitioner – M/s.B.K.Mohanti, Bibek A. Mohanti, S.K.Mishra, S.K.Jena, A.R.Mohanty, P.B.Mohapatra, N.R.Mohanty, M.Rout & S.K.Jena

For Opp.Parties – Advocate General & Additional Standing Counsel (for O.P.No.1 to 3 & 5 to 7) Sr.Standing Counsel (Commercial Tax) Mr.Pravakar Jena, ASC (CT) (for O.P.No.4) M/s.Bimal Prasanna Tripathy, K.K.Pradhan, K.K.Rout & K.K.Muduli (for Intervenors).

L.MOHAPATRA, J. The petitioner in this writ application had initially made the following prayer:

> "Under the aforesaid facts and circumstances, the petitioner prays this Hon'ble Court to be pleased to issue notice to the opp. parties as to why the writ petition shall not be allowed and in case, the opp. parties fail to show cause or show insufficient cause, this Hon'ble Court may be graciously pleased to declare the closure of Dhenkanal Division of the petitioner to be genuine and legal, and permit them to take all necessary steps in furtherance of the same."

By way of amendment, the said prayer has been substituted by the following prayer:

> " Under the aforesaid facts and circumstances, the petitioner prays this Hon'ble Court to be pleased to issue notice to opposite parties as to why the writ petition shall not be allowed and if the opposite parties fail to show cause, this Hon'ble Court may be graciously pleased to quash Annexure-1 for being passed beyond time and without and/or pass such other order/orders as this Hon'ble Court, in the interest of justice may deem fit and proper."

2. As it appears from the averments made in the writ application, the petitioner had submitted an application under sub-section (4) of Section 25-O of the Industrial Disputes Act, 1947 for permission of intended closure of the petitioner-industry with effect from 6.2.2009 on the grounds mentioned in the petition. The said petition was considered by the appropriate Government in the Department of Labour & Employment and the prayer for permission to close the industry was turned down by order dated 26.12.2008 in Annexure-9. The petitioner thereafter filed a petition in Annexure-10 under Section 25-O (5) of the said Act to refer the matter for adjudication by the Industrial Tribunal. The said application having not been disposed of by the appropriate Government, a writ application was filed before this Court by the President of the petitioner-industry for quashing the order dated 26.12.2008 in Annexure-9 refusing permission to close the industry and also for a direction to the Government to make a reference of the matter to the Industrial Tribunal, Bhubaneswar for adjudication. This Court in the aforesaid writ application (W.P.(C) No.1837 of 2009) by order dated 5.3.2009 directed the Government to take a decision on the said petition in accordance with law within a specified time. In pursuance of the said order, the appropriate Government in the Department of Labour & Employment passed the order impugned by way of amendment in Annexure-1 not only rejecting the petition but also refusing to refer the matter to the Industrial Tribunal for adjudication.

3. Shri B.K. Mohanti, the learned Senior Counsel appearing for the petitioner assails the impugned order in Annexure-1 on the ground that the

Government after refusing to grant permission for closure of the industrial unit should have immediately referred the dispute to the Industrial Tribunal for adjudication but kept the matter purposefully pending till this Court in W.P.(C) No.1837 of 2009 vide order dated 5.3.2009 directed the Government to act upon the petition filed for referring the matter to the Industrial Tribunal for adjudication. It was also contended by the learned Senior Counsel that the order in Annexure-1 suffers from non-application of mind and the petition filed in Annexure-10 for referring the matter to Industrial Tribunal has been treated to be a review petition and the same has been rejected illegally.

The learned Advocate General appearing on behalf of the State submitted that in terms of Section 25-O of the Industrial Disputes Act, 1947, against an order of refusal for grant of permission to close the industry, the petitioner can either seek for a review or pray for referring the matter for adjudication by Industrial Tribunal. Both the prayers of the petitioner had been taken into consideration by the Government and the order in Annexure-1 was passed not only rejecting the prayer for review but also the prayer for referring the matter for adjudication by the Industrial Tribunal. According to the learned Advocate General, the order in Annexure-9 refusing to grant permission for closure of the Industry remained in force for one year and therefore, at present the writ application has become infructuous.

4. There is no dispute that the petitioner had submitted an application under sub-section (4) of Section 25-O of the Act for grant of permission to close the Industry with effect from 6.2.2009. The said petition was rejected and permission was refused by the Government by order dated 26.12.2008. Under sub-section (4) of Section 25-O of the Act, an order of the appropriate Government granting or refusing to grant permission shall subject to the provision contained in sub-section (5) of the said Section is final and binding on all the parties and shall remain in force for one year from the date of such order. Sub-section 5 of the said Section provides that the appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication. In the present case the prayer for grant of permission was refused on 26.12.2008 and the application for referring the matter for adjudication by the Industrial Tribunal was filed on 30.12.2008. This petition was not disposed of by the Government and only after an order was passed by this Court in W.P.(C) No.1837 of 2009, the petition was rejected by order dated 22.9.2009 in Annexure-1. The order in Annexure-9 refusing to grant

permission having been passed on 26.12.2008, it spent its force by 25.12.2009. Therefore, so far as the order in Annexure-9 is concerned, this writ application has become infructuous. So far as the order in Annexure-1 dated 22.9.2009 is concerned, the same has been passed in terms of sub-section (5) of Section 25-O. Under the said provision, the appropriate Government on an application filed by the employer can review its order refusing to grant permission or refer the matter to a Tribunal for adjudication. Therefore, an application filed by the employer challenging the order of refusal of permission can be challenged by way of review or by making a prayer for referring the matter for adjudication by Industrial Tribunal. On a reading of Annexure-1, we find that the Government has taken both the aspects into consideration and rejected the same. It further appears from Annexure-1 that while the petition in Annexure-10 was being considered, the Government had heard the parties concerned, i.e., the Management of Reliance Industries Ltd., the Orissa Synthetics Limited Employees' Union through its General Secretary and three others having interest in the matter on 28.7.2009. After consideration of the facts and circumstances, the Government was of the view that the Management as a stake holder has preplanned liquidation and closure of the plant in ignoring the interest of the employees and the general public. It is further held in the impugned order that functioning of the plant supports livelihood of 850 direct employees in various grades apart from direct employment to more than one thousand persons. The plant has acquired 227 acres of land given by the Government on lease. When the Management took over the plant in the year 2000, it must have realized its viability and the present intention for closure of the plant after seven years only presupposes some hidden agenda of the management against larger interest of the State and its people. With these observations, the prayer for review/referring the matter for adjudication by the Industrial Tribunal has been rejected. This being a finding of fact, it may not be possible on the part of this Court in an application under Article 226 of the Constitution of India to interfere with the same. Moreover, the petitioner is not remediless in view of the decision rendered by the Hon'ble Supreme Court in a batch of cases (M/s.Orissa Textile and Steel Ltd. v. State of Orissa and others) reported in ***AIR 2002 Supreme Court 708***. The Hon'ble Supreme Court in paragraph-12 of the judgment made the following observation:

> "Another reason why Section 25-O was struck down was that no time limit had been fixed while refusing permission to close down. This is now cured by sub-section (4) of the amended Section 25-O. This sub-section provides that the order of the appropriate government shall remain in force for one year from the date of such

order. Thus at the end of the year it is always open to the employer to apply again for permission to close. We see no substance in the submission that the employer would not be able to apply again (at the end of the year) on the same grounds. In our view if the reasons were genuine and adequate, the very fact that they have persisted for a year more is sufficient to necessitate a fresh look. Also if the reasons have persisted for a year, it can hardly be said that they are the same. The difficulties faced during the year, provided they are genuine and adequate, would by themselves be additional grounds. Also by the end of the year the interest of the general public or the other relevant factors, which necessitated refusal of permission on the earlier occasion may not prevail. The appropriate Government would necessarily have to make a fresh enquiry, give a reasonable opportunity of being heard to the employer, workmen and all concerned. In our view providing for a period of one year makes the restriction reasonable."

Therefore, the petitioner can again file an application under Section 25-O of the Act for permission for closure of the Industry.

5. The learned Senior Counsel appearing for the petitioner referred to a decision of the Hon'ble Supreme Court in the case of ***Crescent Iron and Steel Corporation Ltd. V. Union of India and another, reported in (1992) 4 Supreme Court Cases 680.*** The said decision relates to Section 15(1) of the Sick Industrial Company (Special Provisions) Act, 1985. The factory declared lock-out of the unit in 1985 and a request was made to the Board under the Act for reviving the undertaking at another location and permission was sought for under Section 25-O of the Industrial Disputes Act to close down the undertaking. The Board proposed for winding up of the undertaking and the concerned State Government also refused permission for closure of the undertaking. Thereafter a new management claiming to have settled the liabilities of all secured and unsecured creditors as well as the workers employed in the foundry decided that the proposal for winding up of the company will not be in the interest of the company. However, the Board under the Act reiterated its earlier stand regarding winding up. The matter went to the appellate authority and the Hon'ble Supreme Court only remitted the matter back to the Board for passing a fresh order on reconsideration. Though this decision has no direct relevance for the purpose of this case, it has been cited to support the argument of the learned Senior Counsel appearing for the petitioner that in the meantime the dues of the workers and officers have been settled and there is no difficulty in granting permission for closure. As held earlier, under the changed

circumstances the petitioner can again apply for permission to close down the undertaking. We are, therefore, of the view that this decision having no direct relevance with the issue, does not help the petitioner in any way. Another decision cited by the learned Senior Counsel is the case of ***Gherulal Parakh v. Mahadeodas Maiya and others, reported in AIR 1959 Supreme Court 781,*** it deals with public policy with reference to Section 23 of the Contract Act. On perusal of the said decision, we also do not find any relevance thereof with the present issue. Another decision relied upon by the learned Senior Counsel for the petitioner is the case of ***Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District I, Calcutta and another, reported in AIR 1961 Supreme Court 372.*** This decision deals with the jurisdiction of the High Court under Article 226 of the Constitution of India to investigate existence of conditions for exercise of jurisdiction under Section 34 of the Income tax Act by the Income Tax Officer. This decision has also no relevance for the purpose of the case since the question as to whether an industrial unit shall be permitted to be closed or not depends on several factors and it is the subjective satisfaction of the appropriate Government to decide the issue depending on facts of each case. We have already held that reasons have been assigned in Annexure-1 for refusing permission and the reasons appear to be justified. Therefore, even if we exercise our jurisdiction under Article 226 of the Constitution of India to investigate the reasons for refusal, we find that prima facie justifiable reasons were existing at the relevant point of time for refusal of permission. However, if the circumstances have changed, a fresh application can be maintained under the changed circumstances. Another decision relied upon by the learned Senior Counsel is the case of ***M/s. Oswal Agro Furane Ltd. and another v. Oswal Agro Furane Workers Union and others, reported in AIR 2005 Supreme Court 1555***. The Hon'ble Supreme Court in the said decision held that obtaining of prior permission from the appropriate Government for closure of an industrial undertaking is mandatory and the settlement arrived at between the employer and the workmen in course of conciliation proceedings would not prevail over statutory requirements under Section 25-N and Section 25-O of the Act. When initially the prayer for closure was turned down by the appropriate Government, the reasons indicate that it would result in unemployment to huge number of employees at all levels. If in the meantime, there has been a settlement between the employer and the workers, the same could be brought to the notice of the appropriate Government in a fresh application under Section 25-O seeking for closure of the Industry.

6. For the reasons stated above, we find no justification to interfere with Annexure-1 and accordingly dismiss the writ application.

Writ petition dismissed.

2010(I)ILR – CUT- 837

A.S.NAIDU, J.

CRLREV No.645 OF 2004 (Decided on 09.04. 2010.)

SAROJ KUMAR MOHAPATRA ……. Petitioner

-V-

STATE OF ORISSA …….. Opp.Parties

CRIMINAL PROCEDURE CODE,1973 (ACT NO.2 OF 1974) - SEC.239.240

Cognizance taken U/s. 13(1)(e) P.C.Act 1988 against the petitioner – Application U/s.239 Cr.P.C. for discharge – Ground is I.O. did not take note of some documents explaining his source of income so also the learned trial Court – Application rejected – Hence this revision.

Held, while framing charges, the Court below is only to consider the materials placed by the investigating agency and not to interfere on hypothesis imagination and other reasons which amount to interdicting trial – This Court is not inclined to interfere with the impugned order.

(Para 5,6)

Case law Referred to:-

(2003)25 OCR 617 : (Dr.Shallendrea Kumar Tomatia -V- Republic of India)

For Petitioners – M/s.S.K.Mund & Associates.
For Opp.Party – Standing counsel (Vig.)

A.S. NAIDU,J. The order dated 16.8.2004 passed by learned Special Judge (Vigilance), Bhubaneswar in T.R.No.71 of 1997 is assailed in this Criminal Revision. By the said order, the petition filed by the petitioner to discharge was rejected.

2. The petitioner was working as an Inspector in O.M.V.D. On 13.8.1986 the house of the petitioner was searched on the strength of a search warrant issued by the Chief Judicial Magistrate, Cuttack and an inventory was made in respect of the house-hold articles and other movables found during the search. After conducting the investigation, an F.I.R. was lodged alleging that the petitioner being a public servant has acquired assets disproportionate to the known sources of income to the tune of Rs.1,16,404.40 and a case under Section 13(2) read with 13(1)(e) of Prevention of Corruption Act was registered and investigation was taken up. After completion of investigation, charge-sheet was submitted. Considering the materials available in the case diary, cognizance of the offence punishable under Section 13(2) read with 13(1)(e) of the P.C. Act, 1988 was taken. While the matter stood thus, the

petitioner filed an application under Section 239, Cr.P.C. praying for discharge. Learned Special Judge after discussing the materials available on record, by the impugned order dated 16.8.2004 came to the conclusion that perusal of the police papers like F.I.R., details of the income-expenditure, assets statement, statement of witnesses, sanction order and other documents reveal sufficient materials to presume that the accused was guilty, consequently the petition praying for discharge was rejected.

3. Learned counsel for the petitioner assails the said order mainly on the ground that the allegations levelled are mischievously false and that sufficient materials are there with the petitioner to reveal that his income is much more than what has been assessed by the Vigilance Department. It is submitted that as the learned Special Judge failed to appreciate the said facts and did not take into consideration the materials produced by the petitioner, it is a fit case where the order refusing to discharge the petitioner needs to be interfered with.

4. The submission made by the petitioner is stoutly repudiated by learned counsel for the Vigilance Department. It is submitted that while taking cognizance of offence, the court below need not take into consideration the documents other than which are available in the case diary and as such, the impugned order suffers from no infirmity at all.

5. Heard learned counsel for the parties at length. Perused all the materials. Admittedly, the accused is a public servant and he has been charge-sheeted under Section 13(1)(e) of the Prevention of Corruption Act, 1988 for possessing disproportionate assets. The submission of the petitioner that while submitting charge-sheet, the investigating officer did not take note of some of the documents explaining the source of income, which he had produced and that the trial court has also acted illegally in not taking into consideration such documents while considering the petition filed by the petitioner to discharge him is not in accordance with law. It is well settled that while framing charges, the court below is only to consider the materials placed by the investigating agency and not to interfere on hypothesis, imagination and other reasons which amount to interdicting trial. A similar view was expressed by this Court in the case of **Dr.ShallendreaKumar Tomatia v. Republic of India**, (2003) 25 OCR, 617. In the said case, relying upon several judgments of the Supreme Court, this Court came to the conclusion that while taking cognizance, the Court is only to consider the materials produced before it by the investigating agency.

6. In view of the aforesaid clear pronouncement and the statutory obligation of the court being not to interfere at the initial stage of framing charges merely on hypothesis and imagination, this Court is not inclined to interfere with the impugned order and disposes of the revision giving liberty

to the petitioner to produce the materials, which he wants to rely upon in his defence in course of trial.

Revision disposed of.

2010 (I) ILR – CUT- 840

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

W.P.(C). No.18298 OF 2009 (Decided on 10 12. 2009.)

ANTARYAMI NANDA …….. Petitioner

-V-

BOARD OF MANAGEMENT,
PRADEEP PORT TRUST & ORS ……. Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – ART.226 r/w ORDER 6, RULE 1 C.P.C.

Pleadings in a writ petition and pleadings in a suit – In a plaint or written statement, the facts and not the evidence are required to be pleaded but in a writ petition or in a counter affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

Held, in the absence of pleadings Court should not entertain the point advanced. (Para 8)

(B) SERVICE - Correction of date of birth in service records – If the petitioner is aware of the fact that his date of birth had been wrongly entered in the service book it was incumbent upon him to file a petition for rectifying the same within five years from the date of entry in service.

Held, petition filed by the petitioner for correction of date of birth was grossly barred by time and the authorities have not committed any illegality in rejecting such petition. (Para 10)

Case law Referred to:-

AIR 1988 SC 2181 : (Bharat Sing & Ors.-V- State of Haryana & Ors.).

For the Petitioner – M/s. A.K.Mohapatra & Associates.

For Opp.Parties No.3 – Addl.Standing Counsel.

A.S.NAIDU,J. The order dated 23rd October, 2009 passed by the Deputy Secretary (P & IR), Paradip Port Trust vide Annexure-4 rejecting the representation filed by the petitioner and declining to change/correct his date of birth recorded in the service book, is assailed in this Writ Petition. The petitioner joined in Paradip Port Trust service on 7th September, 1972. In the service book the date of birth of the petitioner was mentioned as 28th February 1947. The said entry was made in accordance with the H.S.C. Certificate granted by the Board of Secondary Education, Orissa. According to the petitioner on coming to know that his date of birth has been wrongly

entered and his correct date of birth was 8th April, 1951, he filed a representation before the Pardip Port authority for correction of the same. Instead of taking any action, it is alleged, steps were taken to superannuate him as per the date of birth recorded in the service book. Being aggrieved the petitioner had approached this Court earlier in W.P.(C) No.2839/2005. The said Writ Petition was disposed of on 6th September 2005 and the following order was passed:

> "Heard learned counsel for the petitioner. The petitioner in this Writ application challenges the order of superannuation (Annexure-7) passed by the opposite party No.3 on the ground that by relying on wrong date of birth, the petitioner has been superannuated. According to the learned counsel for the petitioner, Annexure-4, which is the age certificate issued to petitioner on 27.12.2004, indicates that his date of birth is 8th April, 1951 whereas High School Certificate Examination (Annexure-1) issued by Board of Secondary Education, Orissa indicates that his date of birth is 20th February, 1947. We have no reason to interfere with the decision of the opposite party No.3 which has been done relying on the matriculation certificate issued by the Board on 8th April, 1947 indicating the date of birth of the petitioner as 20.2.1947. The Writ Petition is disposed of accordingly."

3. The petitioner, however, went on submitting representations before the authorities thereafter. He was superannuated w.e.f. 28th February 2005 on attaining the age of 58. The representation filed by the petitioner was disposed of by the impugned order dtd.23rd October, 2009 with the following observation;

> "As per the Government guideline the request of an employee for change of date of birth can only be considered within five years from the date of entry in the Government service subject to production of authenticated documents. Hence at this belated stage, change of date of birth is beyond the scope of consideration."

4. Mr. Mohanty, learned counsel for the petitioner, forcefully submits that the Paradip Port Trust authority acted illegally and with material irregularity in rejecting the applications filed by him for correction of his date of birth recorded in the service book. It is stated that in fact the date entered in his HSC certificate granted by the Board on 8th April,1974 was wrong and he had applied in accordance with the Rules to the Board authorities for correction of the same. After considering the said application the mistake was corrected and another "age certificate" was granted on 27th December 2004 (Annexure-2). It is submitted that the Port authorities should have

accepted Annexure-2 and corrected his date of birth entered in the service book and should have permitted the petitioner to continue in service.

5. In view of the aforesaid submissionstwo questions arise for consideration; (1) as to whether the reasons assigned in Annexure-1 that the belated application filed by the petitioner should not be considered, is justified or not and (2) whether the plea taken by the petitioner that his date of birth was corrected vide Annexure-2 after due enquiry should have been accepted.

6. So far as the second contention is concerned, this Court finds that the age certificate dated 27th December, 2004 (Annexure-2) itself cannot be accepted as the Section Officer and Senior Assistant has not put any signatures and it appears that the same was an incomplete one and was not properly issued. Even otherwise neither there is any pleadings nor there is any material to show that the petitioner had applied to the Board for correction of his date of birth in accordance with the Rules and that the Board authorities after conducting any enquiry corrected the date of birth.

7. It is settled position of law that a party has to specifically plead the case and produce or adduce or annex sufficient materials or documents to substantiate his submissions made in the petition. In the event the pleadings are not complete, the Court is under no obligation to entertain the plea (**See Bharat Sing & Ors V. State of Haryana & Ors., AIR 1988 SC 2181**)

8. It is settled position of law that when a point, which is ostensibly a point of law, is required to be substantiated by facts, the party raising the point, if he is the Writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the Writ Petition or to the counter affidavit, as the case may be, the Court should not entertain the point advanced. There is no distinction between a hearing under the Code of Civil Procedure and Writ Petition. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded, in a Writ Petition or in the counter affidavit, not only the facts, but also the evidence in proof of such facts have to be pleaded and annexed to it.

9. Perusal of the averments made, in the case at hand, clearly reveals that the petitioner has neither pleaded nor annexed any material/document to reveal that in fact the Board had conducted an enquiry and on being satisfied that there was a mistake in the recording of the age, rectified the same. Even otherwise Annexure-2 does not appear to be a complete document as the signature of the Section Officer concern is lacking.

10. Now coming to the first point, fact remains, the petitioner had approached this Court earlier in W.P.(C) No.2839/2005 alleging that in spite of correction of his date of birth by the Board of Secondary Education, the Port authorities are taking steps to superannuate him relying upon the date of birth recorded in his service records, this Court was not inclined to accept the said plea and disposed of the Writ Petition. Thus, the petitioner is estopped from raising the said point once again. It appears that the petitioner was superannuated from service w.e.f. 28th February, 2005. Thereafter he had filed a representation, on the basis of Annexure-2. If the petitioner was aware of the fact that his date of birth had been wrongly entered in the service book, it was incumbent upon him to file a petition for rectifying the same within five years from the date of entry in the Service. The petitioner admittedly entered into service in the year 1972. The application filed for correction was thus grossly barred by time and we feel that the authorities have not committed any illegality or irregularity in rejecting the representation.

11. After considering the facts and circumstances and in view of the discussions made above, we are not inclined to interfere with the decision taken by the authorities.

The Writ Petition is accordingly disposed of.

Writ petition disposed of

2010(I)ILR – CUT-844

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

W.P.(C). No.3388 & 3752 OF 2010 (Decided on 19 .03. 2010.)

HRUSIKES SETHI & ORS …….. Petitioner

-V-

STATE OF ORISSA & ORS ……. Opp.Parties

ADMINISTRATIVE TRIBUNALS ACT, 1985 (ACT NO.13 OF 1985) – SEC.15.

Civil Service – Recruitment to fillup posts existing in different departments of the Government of Orissa, either contractual or casual, would amount to recruitment to a Civil Service.

Civil Service under the Government of Orissa – This Court lacks initial jurisdiction and power to decide the dispute – Held, the Administrative Tribunal alone has jurisdiction to decide the disputes with regard to matters concerning, Contractual/adhoc/temporary recruitment to Civil Service in consonance with Section 15 of the Act.

(Para 15,16)

Case laws Referred to:-

1.AIR 1981 SC 53 : (Mathuradas Mohanlal Kedia & Orss.-V- S.D.Munshaw & Ors. & State of Gujarat & Ors. -V- Raman Lal Keshav Lal & Ors.)

2.73(1992) CLT 32 : (Basudevpur (R & B) N.M.R. Employees Association & Ors. -V-State of Orissa, represented by the secretary, Works Department & Ors.)

3.AIR 1993 SC 382 : (Union of India & Ors.-V-Deep Chand Pandey & Anr.).

4.AIR 1996 SC 2833 : (Ashwani Kumar & Ors,-V-State of Bihar & Ors.etc.etc.)

For Petitioners - M/s. H.B.Dash, P.K.Nayak, T.Sethy & B.K.Barik.
For Opp.Parties – Mr.B.P.Tripathy, Standing Counsel (SME)
For Petitioner - M/s.Biraja Pr.Satapathy, B.K.Nayak, A.K.Sahoo, S.Pradhan.
For Opp.Parties – Mr.B.P.Tripathy, Standing Counsel (SME)

A.S.NAIDU,J. The controversy in both these writ petitions centers round recruitment on contractual basis in different departments of the State Government.

2. At the out-set, learned counsel for the opposite parties-State raised a preliminary objection with regard to maintainability of the writ petitions in view of Section 15 of the Administrative Tribunals Act, 1985. The said section deals with jurisdiction, powers and authority of State Administrative Tribunals and stipulates that Administrative Tribunals alone shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all Courts except Supreme Court in relation to recruitment and matters concerning to any civil service of the State or to any civil post under the State. According to learned counsel as the appointments are against **"civil services",** the writ petition is not maintainable.

3. For the sake of brevity and better understanding, Section 15 of the Administrative Tribunals Act, 1985, hereinafter to be called as "the Act", in short, is quoted here-in-below:

> "15. Jurisdiction, powers and authority of State Administrative Tribunals: (1) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all Courts expect the Supreme Court in relation to –
>
> (a) recruitment, and matters concerning recruitment, to any civil service of the State or to any civil post under the State;
>
> (b) all service matters concerning a person not being a person referred to in Clause (c) of this Sub-section or a member, person or civilian referred to in Clause (b) of Sub-section (1) of Section 14 appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the State Government or of any Corporation or society owned or controlled by the State Government;
>
> (c) all service matters pertaining to service in connection with the affairs of the State concerning a person appointed to any service or post referred to in Clause (b), being a person whose services have been placed by any such local or other authority or Corporation or society or other body as is controlled or owned by the State Government at the disposal of the State Government for such appointment.

(2) The State Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of Sub-section (3) to local or other authorities and Corporations or societies controlled or owned by the State Government.

(3) Provided that if the State Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this Sub-section in respect of different classes of, or different categories under any class of, local or other authorities or Corporations or societies from which the provisions of this Sub-section apply to any local or other authority or corporation or society all the jurisdiction, powers and authority exercisable immediately before that date by all Courts except the Supreme Court in relation to-

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and

(b) all service matters concerning a person other than a person referred to in clause (b) of Sub-section (1) of this Section or a member, person or civilian referred to in Clause (b) of Sub-section (1) of Section 14 appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs.

(4) For the removal of doubts, it is hereby declared that the jurisdiction, powers and authority of the Administrative Tribunal for a State shall not extend to, or be exercisable in relation to, any matter in relation to which the jurisdiction, powers and authority of the Central Administrative Tribunal extends or is exercisable."

4. The moot question which arises for determination in these two writ petitions is, whether, after enactment of Administrative Tribunals Act, 1985 and adoption of the same by the State of Orissa, this Court has authority, jurisdiction and power to decide any dispute or controversy arising out of recruitment, matters concerning recruitment to any "**civil service**" of the State or to any "**civil post"** under the State.

5. In pursuance of Article 323-A of the Constitution of India, the Administrative Tribunals Act, 1985 was enacted and the same was adopted by the State of Orissa and of the Administrative Tribunal was constituted.

From the date of constitution of such Tribunal, the jurisdiction of all Courts except Supreme Court under Article 136 with respect to the disputes and complaints referred to under clause-(1) of Section 15 have been vested with the State Administrative Tribunal. The expression "all Courts" mentioned in Section 15(1) is comprehensive enough to include the High Court. Thus, if the matter of dispute or controversy is held to be covered under Section 15 of the Act, the logical conclusion would be the said controversy, or dispute has to be adjudicated by the Tribunal. In other words, the High Court having left with no jurisdiction to deal with such controversy lacks power to do so.

6. The submission of learned counsel for the petitioners, on the other hand, is that since the petitioners are not assailing recruitment to any "**civil posts"** under the State of Orissa and the recruitment is only with regard to contractual appointments under the State Government, the provisions of Administrative Tribunals Act are not attracted. According to them, the posts, which are sought to be filled up on "contractual basis" and or "ad hoc basis" or for specific period, do not satisfy the nomenclature of **"civil service"** of the State or **"civil post"** under the State. Thus, the bar imposed under Section 15 of the Act cannot be ipso facto made applicable to the requirement to said posts and it is a fit case where the High Court alone has the jurisdiction to decide the controversy in exercise of the powers conferred upon it under Article 226 of the Constitution more so because there is no other equally efficacious or alternative remedy, available to mitigate the grievance of the petitioners.

7. To appreciate the arguments advanced, it would be necessary to have a bird's eye view to the statements, objects and reasons for enacting Administrative Tribunals Act, 1985, which are as follows:

An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation or Society owned or controlled by the Government in pursuance of Article 323-A of the Constitution and for matters connected therewith or incidental thereto. As would be evident, the Tribunals were constituted to deal with disputes relating to two types of services being "CIVIL SERVICE" and **"civil posts".**

The word "Service matters" has been defined under section 3(q) of the Act and reads as follows:

3(q) "Service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or as the case may be, of any Corporation or society owned or controlled by the Government, as respects-

(i) remuneration (including allowances), pension, promotion, retirement benefits;

(ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(iii) leave of any kind;

(iv) disciplinary matters; or

(v) any other matter whatsoever;

8. Of course, there is no formal definition of 'post' and **"civil posts".** The sense in which the said words are used in Chapter of Part-XIV of the Constitution indicates by their context and setting. A **"civil post**" is distinguished in Article 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration. Under Article 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence.

9. A person holding a post under a State is a person serving or employed under the State. The relationship of master and servant exists between the State and the person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control, the manner and method of his doing the work and the payment of wages or remuneration, as the case may be. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether such a relation between the State and the alleged holder of a post exists or not.

10. A conjoint reading of Articles 309, 310 and 311 gives an impression that post under the State denotes an office. A person who holds a civil post under a State holds an office during the pleasure of the Government except as expressly provided by Article 310 of the Constitution. In other words, a post under the State is an office or a position to which duties in connection with

the affairs of the State are attached. Article 310(2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post.

11. The method of determination of the question as to whether a person holding a post under the government is a member of the civil service came before the Supreme Court in the case of **Mathuradas Mohanlal Kedia and others v. S.D.Munshaw and others and State of Gujarat and others v. Raman Lal Keshav Lal and others**, AIR 1981 S.C. 53, the Supreme Court answering the said question observed as follows:

> "The true test for determination of the question whether a person is holding a civil post or is a member of the civil service is the existence of a relationship of master and servant between the State and the person holding a post under it and that the existence of such relationship was dependent upon the right of the State to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages and remuneration. The relationship of master and servant may be established by the presence of all or some of the factors referred to above in conjunction with other circumstances."

In the said case, the Supreme Court was dealing with the question as to whether "Panchayat service was a civil service of the State" and other ancillary questions. In para 14, the Supreme Court observed as follows:

> "The first question is whether the Panchayat Service constituted under the Panchayats Act is a civil service of the State. The expressions 'civil service' or 'civil post' are not formally defined. Entry 70 of List I of the Seventh Schedule to the Constitution refers to Union Public Services and All India Services, and Entry 41 of List II of that Schedule refers to the State Public Services. Part XIV of the Constitution deals with services under the Union and the States. In Article 309 of the Constitution, we find reference to persons appointed to public services and posts in connection with the affairs of the Union or of any State. Article 310 of the Constitution distinguishes the defence service from the civil service when it refers to members of a 'defence service or of a civil service'. But all persons who are members of a defence service or of a civil service of the Union or of an all-India service or persons who hold any post connected with defence or any civil post under the Union are treated as persons serving the Union and every person who is a member of the civil service of a State or holds any civil post under a State is treated as a person serving a State. The factors which govern the

determination of the question whether a person holds a civil post or is a member of civil service were considered by a Constitution Bench of this Court in State of Assam v. Kanak Chandra Dutta (1967) I SCR 679 : (AIR 1967 SC 884) and Bachawat, J. speaking for the Bench observed thus:-

"There is no formal definition of 'post' and 'civil post'. The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art,. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. See marginal note to Art.311. In Art.311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. See the marginal notes to Arts. 309, 310, and 311. The heading and the sub-heading of Part-XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indica in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post."

The administration of a service under a State involves broadly the following functions:

(i) The organization of the civil service and determination of the remuneration, conditions of service expenses and allowance of persons serving under it;

(ii) The manner of admitting persons to civil service;

(iii) Exercise of disciplinary control over the members of the service and power to transfer, suspend, remove or dismiss them in the public interest as and when occasion to do so arises.

12. Similar questions were also raised before this Court in the case of **Basudevpur (R & B) N.M.R. Employees Association and others V. State of orissa, represented by the Secretary, Works Department and others, reported** in 73(1992) CLT 32. The Full Bench of this Court interpreting Section 15 of the Act observed that State Civil Posts of any class not included in the General State Service of the corresponding class and a Government servant appointed to any such post shall be deemed to be a member of that service unless he is already a member of any other State Civil Service of the same class. After giving anxious thought to the problem and considering the decision of the Supreme Court in various cases, the Full Bench came to the conclusion that engagement of N.M.R. employees being temporary does not carry any scale and they are paid daily wage as approved from time to time by the Labour and Employment Department, the tenure of such N.M.R. employees is for different spells, having regard to the need and requirement of the particular project or works. The absorption on permanent basis in the establishment of a particular project is by its very nature is inconceivable since the project will be completed one day or other and there will be no need thereafter for employment of the workers. The Full Bench arrived at the conclusion that the dispute with regard to recruitment of service of N.M.R. and casual labourers employed by the State Government the Government Corporations in different schemes or projects are to be adjudicated by this Court as the State Administrative Tribunal and no jurisdiction.

13. After going through the entire judgment of the Full Bench, this Court feels that appointments made under contractual basis against different existing posts can not be equated with that of N.M.R. or casual labourers engaged under different schemes or projects. The case of such workers as would be evident from the ratio of the decisions of the Supreme Court being distinctly separate does not come within the ambit of civil services and the disputes arising out of the said appointments are not covered under Section 15 of the Act and has to be adjudicated by the Tribunal. But then 'contractual' or 'ad hoc' appointments made against existing vacancies in Government establishments, being appointments to **"civil service"** are distinctly separate than engagements against schematic posts or against posts under different projects. The appointments are against existing post in Government establishment on a specific scale and satisfy the basic criterias of **"civil service".**The authoritative pronouncement referred to supra gives an impression that merely because the posts are filled up on contractual basis, it cannot be said that the persons appointed/ engaged are not holding civil posts. Discharging the duties assigned to them in Government offices, are governed by the service conditions, they are paid from the State

exchequer and the relationship of employee and employer exists with the State. Thus, the basic ingredients to come to the conclusion that they are holding civil services are satisfied. Similar point once again came before the Supreme Court in the case of **Union of India and others v. Deep Chand Pandey and another**, AIR 1993 SC 382. Interpreting Section 14 of the Act, which deals with power and jurisdiction of the Central Tribunals and is parameteria to section 15, vis-à-vis Section 3(q), which defines "service matters", the Supreme Court held that the Act covers a very wide field, and there is nothing to suggest that the provisions dealing with the jurisdiction of the Tribunal should receive a narrow interpretation. It was further observed that the word 'conditions of service" is of wide expression and an attempt of enumeration would be dangerous. In the said case, the Supreme Court held that the High Court has no jurisdiction to entertain the claim of the respondents who are casual type in Government Department. The same view was also expressed by the Supreme Court in the case of **Ashwani Kumar and others v. State of Bihar and others etc. etc.** AIR 1996 SC 2833. Justice K.Ramaswamy held that a person appointed though on casual basis, but discharges the duties of the existing post or vacancy and need to be appointed to the post or vacancy according to the Rules and if so, he and he alone is the holder of the post. It cannot, therefore, be said that appointment to Class-III and Class-IV casual employees was not to a post. It is common knowledge that existence of a post is a condition precedent for appointment where it is created by statutory rules or under the executive instructions. In the said decision, of course, Justice Hansaria,J. deferred with the aforesaid observations made.

14. After considering all the materials meticulously, this Court feels that the services under the Central Government and the State Government are broadly classified into two categories, being civil services and defence services. In other words, if a person is not serving in any defence establishment, he should be presumed to be a civil service more so when relationship between him and the State Government or the Central Government, as the case may be, is that of employee and employer.

15. Be that as it may, in view of the authoritative conclusions arrived at in the case *of* *Mathuradas Mohanlal Kedia and others (supra)* coupled with the decision of the Supreme Court in the case of *Union of India v. Deep Chand Pandey (supra),* we have no hesitation to hold that the recruitment held for filling up of the post existing in different departments of the Government of Orissa, in whatever form, i.e., either contractual or casual, would amount to recruitment to a "civil service", as the relationship of master and servant between the State and the employee exists and added to it, payments of

remunerations or wages as the case may be is paid out of the Government exchequer.

16. In view of the aforesaid conclusion, we hold that this Court lacks initial jurisdiction, power and authority to decide the dispute with regard to matters concerning contractual/ adhoc/temporary recruitment to civil service in consonance with Section 15 of the Act and the Administrative Tribunal alone has jurisdiction to decide such disputes. We also grant liberty to the petitioners to pursue their remedies before the Tribunal.

17. In both the writ petitions, some of the terms of the advertisement for engagement of contract teachers in Government High Schools during 2009-10 are assailed. The advertisement relates to “civil service” and the posts are existing in Government establishments. Therefore, the writ petitions are not maintainable and the same are disposed of on the question of maintainability only. It is needless to say that this Court has not examined the merits of the case as the same may amount to prejudging the issues and it would be open for the Tribunal to go into the merits, if exigencies arise.

18. With the aforesaid observation, the writ petitions stand disposed of.

Writ petition disposed of.

2010(I)ILR – CUT- 854

PRADIP MOHANTY, J.

CRLREV No.854 OF 2008 (Decided on 30 .04. 2009.)

BIJAYALAXMI PANDA ……. Petitioner

-V-

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

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.397, 401.

Revision against an order of acquittal at the behest of the informant – No doubt the scope for interference is very limited – However in the present case sufficient evidence is there to show that Opp.Party No.2 has committed the offence but the trial Court without considering the prosecution evidence has rendered the order of acquittal.

Held, order of acquittal passed by the learned S.D.J.M. is not sustainable and the same is liable to be set aside.

(Para 10,11)

Case laws Referred to:-

1.(2008) 40 OCR (SC) 572 : (Ashok Kumar Chaudhary & Ors.-V-State of Bihar)
2.(1992) 5 OCR 93 : (Dama Mallik -V- Gurubari Mallik & Ors.)
3.PART II(2009) ILR 228 : (Hiradhar @ Hira Kisan -V- State of Orissa).
4.2009(1) OLR 467 : (State of Orissa -V- Anit Singh @ Rabi & Anr.).
5.2009(1) OLR 750 : (Minu @ Sanjaya Behera -V- State of Orissa).
6.(2008) 40 OCR (SC) 104 : (Johar & Ors.-V-Mangal Prasad & Anr.).
7.2009(II) OLR 419 : (Rajkishore Patra @ Subudhi -V- State of Orissa).

For Petitioner – In person & Mr. Sangram Nayak, Advocate.
For Opp.Parties – Miss. Samapika Mishra, Addl.Standing Counsel (O.P.No.1)
M/s. A.K.Mishra, M.Basu, G.Sethi & P.C.Swain (O.P.No.2).

PRADIP MOHANTY, J. In this revision directed against the judgment and order dated 16/26.11.2007 passed by the learned S.D.J.M., Bhubaneswar in G.R. Case No.870 of 2005/Trial No.3288 of 2005 acquitting opposite party no.2 of the charge under Section 498-A IPC, the informant (wife of opposite party no.2) has questioned the correctness of the order of acquittal and sought for interference of this Court.

2. The petitioner was the informant and opposite party no.2 was the accused before the court below.

The allegation of the informant was that her marriage was solemnized with opposite party no.2 on 01.06.2003 according to Hindu rites and customs. At the time of marriage, there was demand for dowry and the same was fulfilled. After a few days of the marriage, accused-opposite party no.2 demanded more money. When the informant protested, she was tortured both physically and mentally by opposite party no.2. It is alleged specifically that accused-opposite party no.2 used to assault the informant time and again. Once accused-opposite party no.2 tried to pour kerosene on her for which in order to save her life she ran through the back side door, concealed herself in a bus stand and finally came to her parents' house. She lodged FIR before the O.I.C., Bhadrak Police Station and accordingly Bhadrak P.S. Case No.65 of 2005 was registered. But on the point of jurisdiction, the same was forwarded to the I.I.C., Mahila Police Station, Bhubaneswar and again registered as Mahila P.S. Case No. 31 of 2005 under sections 498-A/506(II)/34 IPC and section 4 of the D.P. Act. The matter was investigated and on its completion charge sheet was submitted against accused-opposite party no.2 under section 498-A, IPC.

3. Accused-opposite party no.2 took the plea of complete denial.

4. The prosecution, in order to prove the charge, examined as many as eight witnesses and exhibited seven documents. The defence examined none.

5. The learned S.D.J.M., Bhubaneswar after conclusion of trial came to hold that the prosecution has squarely failed to prove the case beyond all reasonable doubts against accused-opposite party no.2 and accordingly acquitted him under section 248(1) Cr.P.C.

6. As it appears from the order-sheet, on 04.03.2010 although the petitioner appeared in person and argued the matter, but later on with her consent this Court appointed Mr. Sangram Nayak to argue the case on her behalf.

7. Learned counsel for the petitioner inter alia seeks to assail the impugned judgment of acquittal on the following grounds:

(i) The trial court has come to a wrong finding and erroneously acquitted opposite party no.2, when the evidence on record established his guilt.

(ii) The trial court has acquitted opposite party no.2 by ignoring the probative value of the FIR and reliable testimony of the eye witnesses.

(iii) The judgment of the trial court is full of inconsistencies and consisted of faulty reasonings.

(iv) If the prosecution declined to examine some of the material and independent witnesses, it is the duty of the court to call and examine them as the court witnesses.

According to Mr. Nayak, it is a fit case where this Court in exercise of revisional power should set aside the order of acquittal and remit the matter back for retrial. In support of his submission, he placed reliance on the decisions in ***Ashok Kumar Chaudhary and ors. v. State of Bihar***, (2008) 40 OCR (SC) 572, ***Dama Mallik v. Gurubari Mallik & ors***.,(1992) 5 OCR 93, ***Hiradhar @ Hira Kisan v. State of Orissa***, PART II (2009) ILR 228, ***State of Orissa v. Anit Singh @ Rabi and another***, 2009 (I) OLR 467 and ***Minu @ Sanjaya Behera v. State of Orissa,*** 2009(1) OLR 750.

8. Miss. Mishra, learned Additional Standing Counsel submitted that it is not necessary to produce all the witnesses; rather the prosecution is free to choose and examine the witnesses in order to prove its case.

Mr. Basu, learned counsel appearing for opposite party no.2, contended that no infirmity or illegality has been committed by the trial court in acquitting opposite party no.2 of the charge under Section 498-A IPC. The trial court not only assessed the evidence on record but also analyzed the matter from various angles. In the instant case, prosecution has failed to prove the cruelty and harassment by the husband, opposite party no.2, to meet the unlawful demand for any property or valuable security. He further submitted that P.W.3 (the mother of the informant) and P.W.4 (the informant-petitioner) in their examination-in-chief have not whispered a single word regarding demand of dowry by opposite party no.2 which contradicts the FIR allegation. The evidence on record also reveals that the informant received divorce notice on 24.09.2004 and thereafter filed the FIR on 10.03.2005. The delay in lodging the FIR has not been satisfactorily explained. His further contention was that the scope of interference of a revisional court with an order of acquittal is limited. To buttress his submission, he relied upon the decisions reported in ***Johar & Ors. V. Mangal Prasad & Anr.,*** 2008) 40 OCR (SC) 104 and ***Rajkishore Patra @ Subudhi v. State of Orissa,*** 2009 (II) OLR 419.

9. Perused the LCR and the decisions cited by the parties. It is the settled principle of law that the scope of interference with an order of acquittal in exercise of revisional jurisdiction particularly at the behest of the informant is limited. But where the conclusions are contrary to the evidence on record and findings are of such nature that unless the revisional court interferes with the order of acquittal and sets aside the same there would be gross miscarriage of justice, the revisional Court can interfere and direct retrial by setting aside the order of acquittal. This Court examined the matter and found that there is no dispute with regard to the marriage of the informant-petitioner with opposite party no.2. The marriage was solemnized on 01.06.2003. The trial court seems to have given much emphasis on the FIR having been lodged about seven months after the occurrence. In the instant case, star witnesses, i.e., P.W. 3 (mother of the informant) and P.W.4 (informant-petitioner) have been examined. They are the most natural and competent witnesses to depose about the ill-treatment and torture meted out by opposite party no.2. But the trial court acquitted opposite party no.2 by ignoring the probative value of FIR. In the FIR itself explanation has been given by the informant and she has also explained in her evidence why she had not lodged the FIR earlier. The evidence of P.W.3 is very clear that she had tried to settle the dispute and dissension amicably without brining the same to the court of law. The commission of offence under Section 498-A IPC being a continuous offence, more stress cannot be given to a single incident. In case of dispute between the spouses and in case of matrimonial differences, delay, if any, in initiating criminal proceeding cannot be adversely viewed for one naturally expects return of normalcy of situation or reunion between the parties. Immediate lodging of FIR before the police makes the chance of reunion bleak. There is specific evidence of P.W.3 that she had tried to settle the dispute. This explanation also reveals from the FIR. In the present case, sufficient cause has been shown about the delay in lodging the FIR in the month of March, 2005. Therefore, it is not fatal to the prosecution. It has been held in ***Ashok Kumar Chaudhary & Ors. v. State of Bihar,*** (2008) 40 OCR (SC) 572 that merely on the ground of delay, the prosecution case cannot be thrown out.

10. In the instant case, the trial court has given more emphasis on the FIR without considering the evidence of P.W.3 and P.W.4. The trial court without considering the evidence of the prosecution has rendered the order of acquittal. Sufficient evidence has been adduced by the prosecution to show that opposite party no.2 has committed the offence. There are several incriminating circumstances which too point guilty finger towards opposite party no.2. From the LCR it reveals that the statement of the accused has not been recorded in accordance with law.

11. For the above reasons and in view of the ratio decided in ***Dama Mallik's*** case (supra), this Court comes to the conclusion that the trial court was not justified in discarding the evidence of the prosecution witnesses without recording the positive findings as to how the same was unacceptable and/or suffered from any unexplained exaggeration. Therefore, the order of acquittal passed by the S.D.J.M. is not sustainable. Accordingly, the same is set aside and the matter is remitted back to the trial court for re-trial, which shall be done on the basis of the evidence already recorded. This Court further directs the trial court to complete the trial by the end of 2010.

12. The Criminal Revision is accordingly disposed of.

Registry is directed to send back the LCR immediately.

Revision disposed of.

2010(I)ILR – CUT-859

PRADIP MOHANTY, J & B.P.RAY, J.

JAIL CRIMINAL APPEAL No.19 OF 2001 (Decided on 18 .03. 2010.)

DHADIA @ RAMESH CHANDRA SAHOO …….. Appellant

-V-

STATE OF ORISSA …… Respondent

(A) CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) -SEC.154

F.I.R. lodged next day of occurrence – Evidence shows police station is at a distance of 20 Kms away from the spot and the area was forest area – No good communication to go to the police station.

Held, in this case delay in lodging F.I.R. is not fatal to the prosecutionCase. (Para 9)

(B) **EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.3.**
Appreciation of evidence – Chemical Examination report and serologist report reveal that human blood noticed on the cloth of the accused – No explanation by the accused as to how human blood came to his cloth – Held, presence of human blood on the cloth of the accused-appellant is a strong piece of evidence – Conviction and sentence passed by the trial Court is upheld. (Para 9)

For Appellant – Sangram Das.
For Respondent – Mr.J.P.Pattnaik,
Addl. Government Advocate.

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment and order dated 27.01.2001 passed by the learned Additional Sessions Judge, Angul in S.T. Case No.52-A of 1997/73 of 1997 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that in the evening of 13.12.1996 when the victim was returning home, the accused-appellant came running with a tangia and dealt a blow to his neck. When the deceased fell down, it is alleged that the accused dealt successive tangia blows on his head and other parts of the body. Due to such assault the deceased died. The informant with others caught hold of the accused and tied him. The incident was reported to the police consequent upon which the police registered thecase, proceeded with the investigation and after its completion submitted final form against the accused-appellant.

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

4. To substantiate the charge under sections 302/323, IPC, the prosecution has examined as many as fifteen witnesses including the doctor and the investigating officer, and exhibited fourteen documents. The defence has examined none.

5. The learned Additional Sessions Judge, Angul on conclusion of the trial by his judgment dated 27.01.2001 convicted the appellant under Section 302, IPC and sentenced him to undergo imprisonment for life basing upon the evidence of P.Ws.3 and 5, the ocular witnesses, P.W.13, the doctor, and the post occurrence witnesses. He, however, acquitted the appellant of the charge under section 323, IPC..

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

(i) Both the ocular witnesses (P.Ws.3 and 5) are interested witnesses being related to the deceased.

(ii) The delay in lodging the FIR is fatal to the prosecution.

(iii) There are major contradictions with regard to the spot of occurrence.

Learned counsel appearing for the appellant also in course of submission drew attention of the Court to the relevant portion of the evidence on which he placed reliance.

7. Mr. Pattnaik, learned Additional Government Advocate, on the other hand, submits that the evidence of P.Ws.3 and 5 is very clear and cogent and it finds corroboration from the post occurrence witnesses. Human blood was detected in the cloth of the accused as well as in the weapon of offence (axe). The accused was apprehended by the villagers including the witnesses immediately after the occurrence and the axe was snatched by them from his hand. There is no infirmity in the judgment of the trial court warranting interference by this Court.

8. Perused the records. P.W.3 is the informant and cousin of the deceased. He deposed that on the date of occurrence he was bringing paddy bundles from his field and keeping them in his threshing floor. He found the accused-appellant going behind Lachhaman Pradhan (P.W.5) holding an axe. One Bisoi Behera was behind the appellant. He shouted

and told Lachhaman Pradhan to go away as the accused-appellant was a wicked man and following him. At that time deceased Palau after tending his bullocks was returning home. He saw that the accused-appellant killed the deceased by means of the axe. First the accused gave one stroke by means of the axe to the head of the deceased. Thereafter, he dealt successive blows by means of the said axe to the neck and other parts of the body of the deceased. As a result, the deceased fell down on the ground and succumbed to the injuries. He also deposed that both Lachhaman Pradhan (P.W.5) and Bisoi Behere were near the deceased at the time of incident. He, Lachhaman Pradhan and Bisoi Behera caught hold of the accused and snatched away the axe which was stained with blood. In that night, they detained the accused-appellant with the assistance of their villagers. Since the police station is at a distance of 20 to 25 kms away from the spot, the following morning he along with the son of the deceased went to the police station and lodged FIR. Ext.2 is the FIR and Ext.2/1 is his signature thereon. He is a witness to the inquest. Ext.1 is the inquest report and Ext.1/3 is his signature thereon. In cross-examination, he stated that from a distance of 100 cubits he saw that the accused was going behind the deceased with an axe in his right hand. The deceased was at a distance of 10 to 20 cubits behind Lachhaman Pradhan. From a distance of 20 to 30 cubits he saw the accused inflicting blows on the deceased. Nothing has been elicited in cross-examination to disbelieve the evidence of this witness. P.W.5 Lachhaman Pradhan is a co-villager. He deposed that he met the deceased near the stream while returning to his village from the bamboo company where he works. At that time, one Bisoi Behera raised hullah that accused was going with an axe and warned them to run away otherwise he would commit murder. Hearing hullah of Bisoi Behera, he looked back and found that the accused was coming with an axe and Bisoi was behind the accused. Seeing the accused, out of fear they tried to go inside the house of Sadasiba Jani (P.W.3). He went to a little distance towards the house of P.W.3. The deceased remained in the village Danda in front of the house of P.W.3. He specifically deposed that the accused dealt an axe blow to the neck of the deceased. The deceased fell down on the ground by keeping his face downward. Immediately, the accused dealt another axe blow to the head of the deceased. Thereafter, he gave successive blows to different parts of the body of the deceased. As a result, the deceased succumbed to the injuries at the spot. P.W.3 immediately caught hold of the accused and snatched away the axe from him. He also assisted Sadasiba Jani (P.W.3) in catching hold of the accused. They raised hullah and other villagers gathered at the spot. The blood stained axe was lying at the spot. The following morning, FIR was lodged and inquest was conducted. In cross-examination, he admitted that the deceased Palau Padhan was his 'Bhanaja ' in village

courtesy. P.W.3, Sadasiba Jani is his grand son in village courtesy. He also stated that there is no house in between the bamboo company camp and the house of Sadasiba Jani (P.W.3). He saw the deceased at a distance of 20 feet from him on the way while he was bringing rice from the bamboo company. He has also admitted that except Bisoi Behera and the deceased he did not find anybody else while Bisoi Behera was raising hullah. He also deposed that Sadasiba Jani (P.W.3) had fenced his house boundary in the Danda side and had not stacked straw or paddy hives in front of his house. He also specifically stated that the accused dealt four successive blows on the person of the deceased. There is no material to demolish the testimony of this witness. In cross-examination, he stated that P.W.3 came to the spot after the accused had given three successive blows to the deceased. The FIR story also corroborates the evidence of P.W.3. P.Ws.1, 2 and 4 are co-villagers and post occurrence witnesses. P.W.1 deposed that he heard hullah from the village side that the deceased had been killed. Immediately, he rushed to the spot and found two cut injuries on the neck of the deceased. He also found the accused being confined by the villagers near the spot. Villagers stated that the accused had killed the deceased. During the whole night, villagers guarded the accused. On the next day, FIR was lodged. He is a witness to the inquest and put his signature in the inquest report. In cross-examination, he stated that he is not related to the deceased. He enquired about the occurrence from a co-villager, namely, Naba (P.W.2). It is elicited by the defence from this witness that the axe was lying near the dead body of the deceased. Further, the police station was at a distance of 23 Kms away from the spot and so they could not send any villager to the police station, as it was forest area. P.W.2 stated that he was a witness to the inquest and he put his signature in the inquest report marked Ext.1/2. He supported the evidence of P.W.1. In cross-examination he stated that P.W.1 came to the spot at the time when he was present and he narrated the incident to P.W.1. P.W.4 also supported the evidence of P.W.1. He proved the inquest report (Ext.1), and the seizure lists (Exts.3, 4 and 5) with regard to the seizure of M.O.I, blood stained earth and the wearing apparels of the deceased. Nothing has been elicited in cross-examination to discard the evidence of P.Ws.1, 2 and 4. P.W.6 is another co-villager and a post occurrence witness. He is also a witness to the seizure of M.O.I vide seizure list (Ext.3), blood stained earth vide seizure list (Ext.4), blood stained wearing apparels of the deceased vide seizure list (Ext.5), and blood stained wearing apparels of the accused vide seizure list (Ext.6). Nothing has been elicited by the defence to demolish the evidence of this witness. P.W.7 is yet another co-villager and he also supported the evidence of P.W.6. He deposed that after hearing about the incident, he proceeded to the spot and found the deceased lying dead. The accused

was tied by the villagers at the spot. Nothing has been elicited in cross-examination. To the same effect is also the evidence of P.Ws.9, 10 and 11. P.Ws.8 and 12 have turned hostile.

P.W.13 is the doctor, who conducted autopsy over the dead body of the deceased, and found the following injuries:

> "i) Rigour motice present in all fore limbs. Incised wound nape of the neck 10 cm x 1 cm x 4 cm. cutting muscle vertebra and smpnal cord completely at the level of C 7-T one,
>
> ii) Incised wound left scapular region above the spinus process of scapula 8 cm x 3 cm cutting mussels and scapula.
>
> iii) Incised wound 10 cm x 1 cm x 4 cm left side of neck 2 cm below ear extending to mid line posteriorly cutting muscles, vessels and vertebral artel at C-2 level.
>
> iv) Incised wound 10 cm x ½ cm x 4 cm left side of scalp over parietal region cutting scalp, skull, membrance and brain matter. All the injuries are ante mortem in nature and all injuries are caused by sharp cutting weapon."

He opined that all the injuries were ante mortem in nature and sufficient to cause death in ordinary course of nature. The injuries were possible by the axe (M.O.I). Cause of death was due to haemorrhage and shock as a result of multiple injuries. In cross-examination he specifically admitted that injury no.2 was sufficient to cause death. Injury no.3 was grievous in nature and it cannot be possible by fall on a hard surface. Injury no.4 was also not possible by fall.

P.W.14 is the Medical Officer who had examined one Sesadev Sahu on 20.12.1996. But prosecution has not examined said Sesadev Sahu as a witness. P.W.15 is the Circle Inspector of Police, Angul, who took charge of the investigation from B.N. Das, A.S.I. of police, Purunakote Police Station, examined the witnesses, dispatched the exhibits to S.F.S.L., Rasulgarh for chemical examination and sent the seized weapon of offence, i.e., Tangia tothe Medical Officer (P.W.13) for examination. He sent requisition to the Tahasildar, Angul to direct the R.I., Purunakote to prepare a spot map. He also sent requisition to Range Officer, Purunakote forest range to prepare a spot map, as the spot belonged to forest area. He proved Ext.12, the spot map, Ext.13, the chemical examination report, and Ext.14, the serologist repot.

9. On perusal of the evidence, it reveals that P.W.3 is related to the deceased. But, P.W.5 is a co-villager and an independent eye witness who supported the evidence of P.W.3. P.Ws.3 and 5 have specifically stated about the assault given by the appellant to the deceased. There is no material to disbelieve the evidence of P.Ws.3 and 5. The evidence of P.Ws.3 and 5 is corroborated by the post-occurrence witnesses and the circumstantial evidence. P.Ws.1, 2, 4, 6, 7, 9, 10 and 11, the post-occurrence witnesses, deposed that after hearing hullah they went to the spot and saw the dead body of the deceased lying and the accused was kept tied on the spot. The medical evidence also supported the version of P.Ws.3 and 5. In fact the F.I.R. was lodged on the next day of the occurrence and the evidence of P.W.1 is very clear to the effect that the police station is at a distance of 20 Kms away from the spot and that the area was forest area. P.W.2 also supported the version of P.W.1. He specifically stated that their village is situated in the forest area and there is no good communication to go to the police station. Therefore, the delay in lodging the FIR is not fatal to the prosecution. The chemical examination report and serologist report marked Exts.13 and 14 respectively reveal that human blood was noticed on the cloth of the accused and no explanation has been given by him as to how human blood came to his cloth. The presence of human blood on the cloth of the accused-appellant is a strong piece of evidence. For all these reasons, this Court is not inclined to interfere with the impugned judgment of conviction and sentence passed by the trial court.

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

Appeal dismissed.

2010(I)ILR – CUT-865

M.M.DAS, J.

RPFAM No.33 OF 2008 (Decided on 19 .05. 2010.)

RANJEET KISHAN …….. Petitioner

-V-

SUMITRA KISHAN & ANR. …… Opp.Parties

(**A) CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.125(3), 128.**

Maintenance granted in favour of minor – Application for arrear maintenance filed beyond the period of one year – Trial Court taking aid of Section 6 of the Limitation Act held the application maintainable and directed for payment – Order challenged.

This Court held, Section 6 & 8 of the Limitation Act is not applicable to the present case – Impugned order directing payment of arrear maintenance within 15 days is quashed and the order is modified to the extent that the petitioner shall pay maintenance as awarded for 12 months preceeding the date of application filed U/s.128 Cr.P.C.

(Para 9)

(B) LIMITATION ACT, 1963 (ACT NO. 36 OF1963) – SEC.6, 8.

Arrear maintenance claimed by minor beyond the period of one year – Trial Court allowed the application holding that Section 6 of the Limitation Act applies to this case – Order challenged – Held, Section 6 & 8 of the Limitation Act has no application to the present case – Impugned order directing payment within 15 days is quashed.

(Para 9)

Case laws Referred to :-

1.1982 CRL. L.J. 491 : (Hagiri Dei & Anr.-V- Budhiram Behera).
2.1986 CRL. L.J.521 : (Bimala Dei -V- Karna Mulia).
3.57(1984) C.L.T.262 : (Kumari Subasini Panda & Ors.-v- State of Orissa & Ors.).
4.2006 (Supp.)Vol-I OLR 223 : (Jasolal Agrawalla @ Jaasolal Jain -V- Smt.Pushpabati Agrawalla).
5.2005 AIR SCW 2613 : (Shantha @ Usha Devi & Anr.-V-B.G.Shiva Nanjappa).

For Petitioner – M/s. A.K.Nanda, G.N.Rana, G.N.Sahu & B.K.Das.
For Opp.Parties – M/s. A.Tripathy & a.K.Behura. (For O.P.No.1).

M.M. DAS, J. This petition has been filed under section 19(4) of the Family Court's Act, 1984 by the husband-petitioner challenging the order

dated 15.09.2008 passed in Criminal Proceeding No.25 of 2008 by the Judge, Family Court, Rourkela. The opposite parties filed an application under section 125, Cr.P.C. for grant of maintenance from the petitioner on the ground that the opposite party no.1 and the petitioner are co-villagers and developed an acquaintance with each other. In course of time, the petitioner proposed to marry her and to create confidence in the mind of the opposite party no.1 applied vermillion on her forehead and later declared that they are husband and wife. On such deceit, the opposite party no.1 cohabitated with the petitioner and when she conceived, the petitioner attempted to force her to abort the pregnancy for which dissension arose between them. The petitioner thereafter neglected the opposite party no.1 for which she convened a village meeting. But as the same did not yield any result, she reported the matter before the I.I.C., Lahunipara Police Station on which the police did not take any action. Accordingly, she was compelled to file a private complaint, being I.C.C. Case No.7 of 2000, under sections 376/493/417, I.P.C. The said case ultimately ended in conviction on 07.04.2003 sentencing the petitioner to undergo R.I. for five years and to pay a fine of Rs.10,000/-,in default, to suffer R.I. for two years more. In due course the opposite party no.1 gave birth to opposite party no.2. As she had no means to maintain herself and the child, for which she filed the application under section 125, Cr.P.C. for grant of maintenance of Rs.1,000/- per month for herself and Rs.500/- per month for her child to be paid by the petitioner.

2. The petitioner filed his show cause denying the entire episode and disowned the parenthood of the opposite party no.2. The learned Judge, Family Court, Rourkela registering the said proceeding under section 125, Cr.P.C. as Criminal Proceeding No.10/2004 and after recording the evidence of both the parties passed a judgment on 18.04.2006 taking note of the fact that the petitioner has filed an appeal against his conviction in the criminal case, which is pending and after analysing the evidence adduced, as a matter of fact, found the so-called marriage between the parties ought to be disbelieved and, therefore, the opposite party no.1 cannot be held to be entitled to get maintenance from the petitioner. The Judge, Family Court, however, held that the opposite party no.2 was born through the petitioner and the child being an illegitimate child is entitled to maintenance. In conclusion, the learned court below quantifying the maintenance to be paid directed that the petitioner shall pay Rs.250/- per month for maintenance of the opposite party no. 2 within 10^{th} of each succeeding month to be effective from the date of the application, i.e., 17.03.2004. The arrear maintenance shall be paid within a month from the date of the order failing which the opposite party no.1 (petitioner no.1 before the court below) is at liberty to realize the same through the process of law. The maintenance

amount for the opposite party no.2 shall be paid through the opposite party no.1.

3. As the amount as directed was not paid by the petitioner, the opposite parties filed the Criminal Proceeding No.25 of 2008 before the Judge, Family Court, Rourkela under section 128, Cr.P.C. for enforcement of the order of maintenance. The petitioner took a stand that the application filed under section 128, Cr.P.C. by the opposite parties on 14.05.2008 having been filed more than one year after the date when the maintenance became due, the application is not maintainable. The opposite party no.1 took a stand that she being a poor, rustic, illiterate and distress woman was not aware of the legal provision as to limitation for which she could not file a petition within the time stipulated on behalf of her minor son aged only three years. The learned court below recorded that the judgment directing payment of maintenance was allowed on 18.04.2006, thus the claim for arrears should have been made by 17.04.2007 and the application under section 128, Cr.P.C. has been filed on 14.05.2008, i.e., beyond one year and one month after the due date. However, he held that the case is clearly an exception from a normal case as in the instant case the opposite party no.2 is a minor child of only three years and therefore, he being a minor is under a legal disability as per section 6 of the Indian Limitation Act, 1963, which provides that during legal disability limitation does not start to run in respect of any suit or petition for execution of a decree until such disability ceases. Section-8 of the Limitation Act gives further chance of three years of limitation after seizure of legal disability. The Court below, therefore, applying the said provisions to the facts of the present case held that the opposite party no.2 is a minor and under a legal disability as per section 6 of the Limitation Act. Limitation for filing a petition under section 128, Cr.P.C. for execution of the order of the maintenance shall not start until his legal disability ceases, i.e, until he attains the age of 18 years. Observing thus, the Court below repelled the objection raised by the petitioner with regard to non-maintainability of the application filed under section 128, Cr.P.C. on the ground of limitation and allowed the application of the opposite parties directing the petitioner to pay all the arrear maintenance dues, which was to be paid to the opposite party no.2 within fifteen days from the date of the said order in one instalment failing which the opposite party no.1 is at liberty to apply on behalf of her minor son to enforce such payment through the process of court.

4. Mr. Nanda, learned counsel for the petitioner drawing the attention of this Court to the proviso of section 125(3), Cr.P.C. vehemently urged that the learned court below has committed an illegality in directing payment of the arrear maintenance on an application filed by the opposite parties beyond the period prescribed and further the learned court below could not

have applied the provision of sections-6 and 8 of the Limitation Act to the facts of the present case. He, therefore, submitted that the order impugned is ex facie illegal and is liable to be set aside. He relied upon the decisions of this Court in the case of **Hagiri Dei and another v. Budhiram Behera, 1982 CRL. L. J. 491 and Bimala Dei v. Karna Mulia**, 1986 CRL. L. J. 521 in support of his contention. Further in support of his contention with regard to the interpretation of section 6 of the Limitation Act, he relied upon the decision in the case of **Kumari Subasini Panda & others v. State of Orissa & others**, 57 (1984) C.L.T. 262.

5. Mr. Tripathy, learned counsel appearing for the opposite parties, on the contrary, submitted that there is no error committed by the learned court below in directing payment of the entire arrear maintenance to the opposite party no. 2 as has been held by this Court in the case of **Jasolal Agrawalla alias Jaasolal Jain v. Smt. Pushpabati Agrawalla,** 2006 (Supplementary) Volume-I, OLR 223. He further submitted that as has been held by this Court, it must be borne in mind that section 125, Cr.P.C. is a measure of social legislation and it has to be construed without rhyme or reason for the welfare and benefit of the wife, as has been held by the Supreme Court in the case of **Shantha @ Usha Devi and another v. B.G. Shiva Nanjappa**, 2005 AIR SCW 2613. For proper appreciation of the rival contentions raised by the parties, it would be appropriate to refer to sections 125 (3) and 128, Cr.P.C., which read as follows:

"125. **Order for maintenance of wives, children and parents.-**

(1) xx xx xx

(2)xxx xxx xxx

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her,

and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

"128. **Enforcement of order of maintenance.-**A copy of the order of [maintenance or interim maintenance and expenses of proceeding, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses or proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identify of the parties and the non-payment of the [allowance, or as the case may be, expenses, due]".

Sections 6 and 8 of the Limitation Act read as follows:

"6. **Legal disability**.-(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before the disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from time so specified.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

(5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation-For the purposes of this section, 'minor' includes a child in the womb."

7. xx xx xx

8. **Special exceptions**.-Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application"

6. In the case of Hagiri Dei (Supra), this Court, while dealing with section 125 (3), Proviso-1, Cr.P.C. and considering the question of limitation for recovery of arrears of maintenance categorically held that the first proviso to Sub-section 3) of Section 125, Cr.P.C. is clear and unambiguous. Acquiescence of the opposite party cannot confer jurisdiction on the Magistrate to enlarge the same. In certain circumstances, an application can be made for a period beyond one year, i.e., where a pending application has been closed for statistical purposes and fresh application is filed for the period covered by the earlier application and the period subsequent thereto. This Court further held that the proviso has been enacted to prevent person in whose favour an order for maintenance has been made from being negligent and allowing the arrears to pile up, so that their recovery becomes a hardship so far as the person from whom recovery is to be made, is concerned. Holding thus in the facts of the said case, this Court ruled that a court does not enforce more than one year arrear and the application filed beyond the period of limitation was clearly not maintainable.

7. In the case of Bimala Dei (supra), it was held as follows:-

"…….The proviso to sub-sec.(3) of S.125 of the Code in clear and categorical terms puts an embargo on the power of the Magistrate to issue any warrant for recovery of the amount due unless the application is made to the Court within a period of one year from the date on which it became due. Therefore, the Magistrate has a duty to find out the date on which the amount became due……..."

In interpreting Sections - 6, 7 and 8 of the Limitation Act, 1963 in the case of Kumari Subasini Panda and others (supra), this Court laid down as follows:-

> "…….Section 6 is an enabling section which confers a personal privilege on the person under disability. Section 7 is proviso to section 6 and should go together. Section 6 of the Indian Limitation Act does not in terms extend the period of limitation prescribed for any legal action but merely enables a person under disability at his choice to have limitation reckoned against him either from the date of accrual of the cause of action or from the date of cessation of the disability. In case the person under disability chooses the prescribed period of limitation to be reckoned from the date of accrual of the cause of action, the whole period prescribed begins to run from the date of the cause of action. In the latter case, section 8 of the Indian Limitation Act steps in to cut short the period of three years from the date of cessation of the disability where the prescribed period exceeds three years. Section 7 of the Limitation Act prescribes that where several person are entitled to institute a suit or make an application and their legal relationship is such that one or some of them who is or are free from disability can give full discharge of the whole debt or claim without the concurrence of others who are under disability, time runs against all from the date of the cause of action irrespective of the disability of some of them and the persons under disability, time runs against all from the date of the cause of action irrespective of the disability of some of them and the persons under disability would not be entitled to the benefit under section 6 of the Limitation Act……"

8. In the case of Jasolal Agrawalla (supra), which is relied upon by the opposite party, the facts reveal that the order of maintenance passed by the learned Magistrate, inter alia, directing to pay the same with effect from 1st September, 1981 was challenged by the husband in a Criminal Revision before the learned Additional Sessions Judge and the Revisional Court confirmed the said order by dismissing the said revision. Thereupon, the husband invoking the inherent jurisdiction of this Court under section 482, Cr.P.C. filed a Criminal Misc. Case and this Court disposed of the said Criminal Misc. Case by order dated 30.09.1993 quashing the orders of both the courts below and remitting the matter back to the learned Magistrate for fresh disposal in accordance with law. Thereafter, the learned Magistrate passed an order on 26.03.1996 holding that the opposite party-wife was entitled to maintenance and granted payment of maintenance to her @ Rs.300/- per month from the date of filing of the petition, i.e., 21.08.1980. The husband again assailed the said order before this Court in a Criminal Revision and this Court on 12.08.1998 disposed of the same holding that the petition filed by the opposite party-wife under section 125, Cr.P.C. was maintainable and she was entitled to monthly maintenance. While holding

thus, this Court also held that the wife was not entitled to maintenance till the date on which the decree for dissolution of marriage was passed, i.e., 21.08.1981 and consequently, modified the order of the maintenance passed by the learned Magistrate as to the date from which the wife is entitled to the monthly maintenance. After disposal of the said Criminal Revision, the opposite party-wife filed two petitions before the learned Magistrate under section 125 (3) Cr.P.C. on 01.03.1998 and 23.03.2000 for realization of maintenance granted in her favour. The case did not end there and the husband filed a Special Leave Petition before the Supreme Court which was disposed of by the Hon'ble Supreme Court on 17.09.1999. The objection filed under section 125 (3) Cr.P.C. was resisted by the husband on the ground of limitation. The learned Magistrate after hearing the parties, by order passed on 25.04.2000, held that the petitions were not barred by limitation as the matter was subjudice and had not attained finality and that the husband was liable to pay the arrear maintenance to the wife as ordered. The said order was challenged by the husband in a Criminal Revision before the learned Additional Sessions Judge, which was dismissed. Again the husband persisted to challenge the said order in an application under section 482, Cr.P.C. circumventing the bar under section 397(3), Cr.P.C. This Court referring to the decisions in the case of Hagiri Dei (supra) and Bimal Dei (supra) and considering the long drawn litigation between the parties came to the conclusion that the order granting maintenance became final only after disposal of the criminal revision by this Court on 12.08.1998. In such circumstances this Court relying upon the observation of the Supreme Court made in the case of the Shantha @ Usha Devi and another (supra), wherein it was held that it is unreasonable to insist on filling of successive applications when the liability to pay the maintenance as per the order passed under section 125(1) Cr.P.C., though a continuing liability has not attained finality, dismissed the said Criminal Misc. Case filed under section 482, Cr.P.C. and directed the learned Magistrate to pass appropriate orders under section 125, Cr.P.C. in case the arrear maintenance amount is not paid within three months from the date of the said judgment.

9. In view of the peculiar facts of the above case, I am of the view that the ratio of the said decision is not applicable to the facts of the present case. Thus, it is imperative to conclude that as has been laid down by this Court in the case of Hagiri Dei (supra) and Bimala Dei (supra), the impugned order cannot be sustained since the learned court below has apparently erred in law in placing reliance on sections 6 and 8 of the Limitation Act, which were not applicable to the facts of the present case, where the opp. Party no. 2 is still a minor and his legal disability has not come to an end. Thus, the impugned order directing payment of the entire

arrear maintenance to the petitioner no.2 within fifteen (15) days is quashed and the order is modified to the extent that the petitioner shall pay the maintenance as awarded for 12 months preceding the date of application filed under section 128, Cr.P.C., i.e., for the months of June, 2007 to May, 2008 amounting to Rs.3,000/- (Rupees three thousand) within a period of three weeks from today to the opposite party no.2 through his mother guardian-opposite party no.1 failing which appropriate steps will be taken by the learned Judge, Family Court for enforcement of the same and in accordance with law. It is made clear that the petitioner shall continue to pay the current maintenance regularly.

10. The RPFAM is accordingly disposed of.

Application disposed of.

2010(I)ILR – CUT- 874

M.M.DAS, J.

CRLMC No.358 OF 2009 (Decided on 16 .03. 2010.)

TATHAGATA SATPATHY & ANR. ..... Petitioner

-V-

PRIYABRATA PATNAIK & ANR. ..... Opp.Parties

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

Quashing of complaint – Offence U/s.499, 500, 501, 502 & 34 I.P.C. for defamatory/libellous publications in the Oriya daity "The Dharitri" – News items related to a sensational murder of Judo Coach of the State Biranchi Das where Sandip Acharya @ Raja Acharya was an accused.

Prima facie the allegations appear to be defamatory – However presumption U/s.7 of the press and Registration of Books Act, 1867 can be drawn against petitioner No.1 as the Editor is the person who selects the maters to be published in the news paper and such presumption will not be available against petitioner No.2 who is the printer and publisher of the news paper – Held, order of cognizance quashed as against petitioner No.2 but the same is confirmed as against petitioner No.1. (Para 15,17)

Case laws Referred to:-

1.2008 CRI.L.J.845 : (Mammen Mathew -V- M.N.Radhakrishnan & Anr.)
2.2008 CRI.L.J. 4221 : (V.S.Achuthanandan -V- G.Kamalamma & Anr.).
3.(1992) 5 OCR 66 : (K.M.Mathew -V- State of Kerala & Anr.).
4.2005 CRI.L.J.1886 : (Vijay Jawaharlalji Darda & Ors.-V-Laxmikanth C.Gupta & Anr.)
5. 2003 (2) Crimes 157 : (Kalyanam -V- Ramesh).
6. 2008 CRI.L.J.2301 : (H.K.Dua -V- Chander Mohan, Deputy Chief Minister of Haryana).
7.2003 CRI.L.J.4058 : (Vivek Goenka -V- State of Maharashtra & Anr.).
8.1995 CRI.L.J.1922 : (Prabhu Chawla & Ors.-V- A.U.Sheriff).
9.AIR 1968 Calcutta 266 : (Sunilakhya Chowdhury -V- H.M.Jadwet & Anr.).
10.AIR 2003 Delhi 76 : (Voluntary Health Association of Tripura & Ors.-V- Press Council of India & Ors.).
11.AIR 1960 Orissa,126 : (Bnka Behari Singh -V- O.M.Thomas & Ors.).
12.AIR 1966 Punjab & Haryana 93 : (Ramesh Chander -V-The State).
13.AIR 2002 SC 2989 : (K.M.Mathew -V- K.A.Abraham & Ors.).
14.AIR 1971 SC 1389 : (Balraj Khanna & Ors.-V-Moti Ram).

For Petitioners – M/s.B.S.Mishra-1, M.Mishra, P.R.Mishra,

N.K.Rout & D.Pradhan
. For Opp.Parties – M/s. L.Pangari, A.K.Das & S.R.Pani
(For Opp.Party No.1)
Addl.Standing Counsel (For O.P.No.2)

M.M. DAS, J. The petitioners are the accused persons in I.C.C. Case No. 2710 of 2008 pending before the learned S.D.J.M., Bhubaneswar. The complaint petition was filed by the opp. party no. 1 herein, against the petitioners and other accused persons making allegation of commission of offence under sections 499/500/501/502/34 IPC . The petitioner no. 1 is the Editor of the daily Oriya newspaper, "The Dharitri" and the petitioner no. 2 is its Printer and Publisher. On the complaint petition being filed, the learned S.D.J.M. recorded the initial statement of the complainant and by order dated 26.6.2008, considering the initial deposition of the complainant and the documents available on record found that prima facie evidence of commission of offence under sections 500/501/502/34 IPC is revealed. Hence, he took cognizance of the said offences and directed issuance of process against the accused persons including the two petitioners fixing 21.7.2008 for appearance. The petitioners – accused persons as well as the accused "The Samajbadi Society" appeared through its council in response to summons issued and upon a memo being filed by the complainant, the name of accused no. 4 was deleted from the record. Petitions were filed by the petitioners under section 205 Cr.P.C. praying to dispense with their personal appearance which were heard and disposed of by the learned court below on 2.8.2008 allowing the said prayer. The petitioner no. 1 was also permitted by the learned S.D.J.M. to represent accused no. 3 - M/s. The Samajbadi Society, in the case. On 30.10.2008, the complainant produced one witness, namely, Jatindra Narayan Chhotray, when the accused persons prayed for time, which was allowed till 1.11.2008. On 1.11.2008, the said witness was examined in chief. The accused persons prayed for an adjournment which was rejected and it was recorded that the cross-examination of P.W. 1 is declined. On 6.12.2008, another two witnesses, namely, Debesh Das and Pratap Kumar Das were produced by the complainant, but as the court was busy in chamber duty, the case was adjourned to 15.12.2008. On 15.12.2008, new advocates appeared for the accused and even though one witness was present, the case was adjourned to 15.1.2009. Again 15.1.2009, the witness Debesh Das was examined as P.W. 2 in part and due to his sudden illness, his examination was deferred. The case was adjourned to 7.2.2009. On 24.1.2009, a petition under section 311 Cr.P.C. was filed on behalf of the accused persons for recalling P.W. 1 for cross-examination and another petition was filed for recalling the order of cognizance. The learned court below after hearing both the petitions allowed

the petition for recalling P.W. 1 for cross-examination and rejected the petition for recalling the order taking cognizance of offences on the ground that the said petition is not maintainable. On 7.2.2009 the accused persons cross-examined P.W.1 who was thereafter discharged. This Criminal Misc. Case has been filed under section 482 Cr.P.C. on 30.1.2009 with a prayer to quash the order taking cognizance of the offences, dated 26.6.2008.

2. It was contended by Mr. Mishra, learned counsel for the petitioner that there is absolutely no case made out under sections 500/501/502 of the I.P.C. inasmuch as it was open for the complainant to take recourse to section 14 of the Press Council Act, 1978 which envisages that if a complaint is raised by the Press Council of India and the Council has reasons to believe that a newspaper or news agency has offended against the standards of Journalistic ethics or public test or that an Editor or a working Journalist has committed any professional misconduct, the Council may after giving the newspaper, or news agency, the Editor or Journalist concerned an opportunity of being heard, hold an enquiry in such manner as may be provided by regulations made under the said Act and if it is satisfied that it is necessary so to do, it may for reasons to be recorded in writing, warn, admonish or censure, the newspaper, the news agency, the Editor, or the Journalist or disapprove, the conduct of the Editor or the Journalist as the case may be. It is, thus, submitted by the learned counsel that it would have been just and proper for the complainant, if at all he had any allegation, as stated in the complaint petition to have approached the Press Council of India under the Press Council Act, 1978 and the learned court below had absolutely no power to entertain the complaint petition and take cognizance of the offences which are not sustainable in law. It is further contended by Mr. Mishra that while taking cognizance the learned court below should have considered that the complainant has not specifically stated that the petitioners were in-charge of selecting the news items which are to be published in the newspaper and, more specifically, no where in the complaint petition, the complainant has stated that at the relevant time, the petitioners were occupying the position of news Editors and are in any way responsible for publication of the news in question which is alleged to have affected the reputation of the complainant. Hence, the learned court below should have desisted from taking cognizance of the offences as has been done and, thus, the order of taking cognizance being illegal, is liable to be quashed. Mr. Mishra further contended that the complainant has not whispered any word in the complaint petition that the petitioners were in inimical terms with him in any manner and the news items were nothing but vindictive action on the part of the petitioners and, thus, in the absence of such material, the learned court below should not have taken cognizance of the offences. As a matter of defence, it had been contended that the petitioners are responsible

persons holding a widely circulated Oriya daily and their duty is to bring the facts to the readers of the State and other parts of the country. Thus, while exercising their responsible jobs, the news items, which related to a sensational murder of a Judo Coach of the State, namely, Biranchi Das, were published in good faith and not with a deliberate intention to malice the reputation of any body. The petitioner no. 1 is stated to be a popular politician of the State and at present, the Member of Parliament from Dhenkanal Parliamentary Constituency. It is, therefore, stated that he seldom has time to select the news item to be published in his newspaper and, as a matter of fact, being the Editor, his duty is to control the administrative affairs of the newspaper concerned but not to select the news items which is the duty of the news Editors. The news item, according to the learned counsel for the petitioner, relates to facts existing and, therefore, cannot be termed to be malicious or published with the intention to defame the complainant. Mr. Mishra, in support of his contentions relied upon the decisions in the cases of ***Mammen Mathew v. M.N. Radhakrishnan and another***, 2008 CRI.L.J.845, ***V.S. Achuthanandan v. G.Kamalamma and another,*** 2008 CRI.L.J. 4221, ***K.M. Mathew v. State of Kerala and another***, (1992) 5 OCR 66, ***Vijay Jawaharlalji Darda and others v. Laxmikanth C. Gupta and another,*** 2005 CRI, L.J. 1886, ***Kalyanam v. Ramesh,*** 2003 (2) Crimes 157***, H.K.Dua v. Chander Mohan, Deputy Chief Minister of Haryana***, 2008 CRI. L.J.2301, ***Vivek Goenka v. State of Maharashtra and another,*** 2003 CRI. L.J. 4058 and ***Prabhu Chawla and others v. A.U. Sheriff, 1995*** CRI.L.J. 1922.

3. In the case of *Mammen Mathew (*supra), the Kerala High Court referring to the news items which were alleged to be defamatory by the complainant and relying upon the decision in the case of ***Sunilakhya Chowdhury v. H.M. Jadwet and another,*** AIR 1968 Calcutta 266 came to the conclusion that mere publication of an imputation by itself may not constitute the offence of defamation unless such imputation has been made with the intention, knowledge or belief that such imputation will harm the reputation of the person concerned and considering the publication involved in the said case, the said High Court held that by no stretch of imagination could it be said that Annexure-B news item was published with the intention of harming the reputation of the complainant. If it were so, then as soon as the complainant voiced his protest, the first accused would not have published Annexure-C news item faithfully conveying to the public what the complainant had represented to the Malayala Manorama daily. The High Court also raised its doubt as to whether a complaint of defamation would lie against the first accused Editor. In the said case, at the top of the relevant page of the daily newspaper, the names of associate Editor, Managing

Editor, Editor, Chief Editor etc. were mentioned and after the names of the last two functionaries, it was printed "responsible for selection of news item under the P.R.B. Act". Considering the facts involved in the said case, the Kerala High Court held that the complaint does not make out the alleged offence and it cannot be allowed to stand and, accordingly, quashed the same.

4. In the case of V.S. Achuthanandan (supra), the Kerala High Court was in seisin of an application filed by different accused persons in a criminal case for quashing the proceeding. The facts of the said case related to a news item publishing the visit of the Member, Human Rights Commission (Kerala State) to a Government hospital. Referring to the news item and quoting allegations made in the complaint petition, the Court came to the conclusion that there is absolutely no positive allegation that the first accused is responsible for the selection of the news article and printing and publishing the same and for the above sole reason, it can be seen that the averments contained in Annexure-B complaint are not sufficient to constitute an essence of ingredients of section 499 IPC. The case of Mammen Mathew (supra) was also relied upon. The Court ultimately came to the conclusion that on a reading of the complaint, no offence under section 499 is disclosed against the petitioners therein who are the accused persons. In the case of K.M. Mathew (supra), the Supreme Court has held as follows:-

> "In the instant case, there is no averment against the Chief Editor except the motive attributed to him. Even the motive alleged is general and vague. The complainant seems to rely upon the presumption under section 7 of the Press and Registration of Books Act, 1867 ('the Act'). But section 7 of the Act has no applicability for a person who is simply named as "Chief Editor". The presumption under section 7 is only against the person whose name is printed as 'Editor' as required under section 5(1). There is a mandatory (though rebuttable) presumption that the person whose name is printed as 'Editor' is the Editor of every portion of that issue of the newspaper of which a copy is produced. Section 1 (1) of the Act defines 'Editor' to mean the person who controls the selection of the matter that is published in a newspaper. Section 7 raises the presumption in respect of a person who is named as the Editor and printed as such on every copy of the newspaper. The Act does not recognize the any other legal entity for raising the presumption. Even if the name of the Chief Editor is printed in the newspaper, there is no presumption against him under section 7 of the Act. (See State of Maharashtra v. Dr. R.B. Chowdhary and others: 1967 (3) SCR 257: D.P.Misra v. Kamal Narain Sharma and others, 1971 (3) SCR 257: Narasingh Charan Mohanty v. Surendra Mohanty, 1974

(2) SCR 39: and Haji C.H. Mohammad Koya v. T.K.S.M.A. Muthukoya, 1979 (3) SCR 664)."

In the case of Vijay Jawaharlalji Darda and others (supra), the Bombay High Court was considering a case where cognizance was taken against a Chief Editor of a paper and relying upon various apex Court judgments concluded that it is important for a Magistrate to take cognizance of the offence as against the Chief Editor only when there is positive averments in the complaint regarding knowledge of the objectionable character of the matter and the complaint in the said case did not contain any such allegation. The High Court also held that section 7 of Press and Registration of Books Act, 1867 (for short, 'the Act 1867') has no applicability for a person who is simply named as a Chief Editor and the presumption under section 7 of the Act, 1867 is available against the persons whose name is printed as "Editor" as required under section 5 (1) of the Act, 1867. There is a mandatory (though rebuttable) presumption that the person whose name is printed as 'Editor' is the Editor of every portion of that issue of the newspaper of which a copy is produced. Section 1 (1) of the Act, 1867 defines 'Editor' to mean the person who controls the selection of the matter, that is published in a newspaper and such presumption under section 7 raises the presumption in respect of a person, who is named as the Editor and printed as such on every copy of the newspaper. The Act, 1867 does not recognize any other legal entity for raising the presumption. From the decisions referred to by the learned counsel for the petitioners, it, therefore, appears that in each case, the question as to whether the publication amounts to an offence of defamation is to be examined in reference to the publication made and whether presumption under section 7 of the Act, 1867 can be raised against the Editor, whose name appears in each copy of the publication.

In the instant case, a detailed reference has been made in the complaint petition to the repeated publications publicized in the Oriya Daily, "The Dharitri" giving reference to the particular volume, issue numbers and the date of publication. The copies of the newspaper publications were also filed before the Court. The admitted case of the parties is that the name of the petitioner no. 1 appears in each copy of the publication as the 'Editor' and the name of the petitioner no. 2 appears in each copy of the publication as Printer and Publisher. The social standing of the complainant has been highlighted in the complaint petition. Specific allegation has been made as to how after the news items were published, the prestige of the complainant tarnished in the society when various enquiries were made by his friends, relatives and other persons with regard to the said news items.In volume 34 issue No. 145 dated 20.4.2008 (Sunday) of "The Dharitri" in the

front page a news item was published with the caption in bold letters, such as, “LUCHIJAICHI SCRAP KARABAR”. In the said news item, the

4. In volume 34, issue no. 148 dated 23.4.2008, of the said newspaper, another news item under the caption in bold letters, such as, “SUPARI
5. DEITHILE PRIYABRATA” was published, wherein the public were conveyed that the complainant is involved in the killing of the Judo coach Biranchi Das and that Sandip Acharya @ Raja Acharya was not involved in the crime. It was also conveyed to the public that the media has the evidence and proof of involvement of the complainant in the murder of Shri Biranchi Das.

Similarly, in volumn 34, issue no. 150 dated 25.4.2008, a news item under the caption letter “BADABADIANK PRABHAB CHAGALANKA BAYAN BADALAO” was published, where the complainant was portrayed as one of the persons involved in the killing of Judo coach Biranchi Das.

The news item published in volume 34, issue no. 151 dated 26.4.2008 under the caption “HATYAKARINKU DHARIBA NUHEN, LAKHYARE PAHANCHIBA” was also to the same effect. Another news item in a box in the front page of the newspaper was also published under the caption “RAJA MALE SAMASTE SURAKHITA” where it was indicated that the complainant was a party to a meeting along with other police officers wherein it was planned to kill Raja in an encounter. The other publications repeatedly made were also to similar effects involving the complainant.

6. This Court, therefore, finds that the publications made, which have been taken exception by the complainant cannot be equated with the publication, which were dealt with by the Kerala High Court or the Bombay High Court in the aforesaid decisions.

7. The next question involved in this case is as to whether the petitioners, who are admittedly the Editor and the Printer and Publisher of the newspaper, can be held responsible for publishing the above news items or selecting the said news items to be published. .

8. Mr. Sanjeet Mohanty, learned senior counsel appearing for the opp. party no. 1 – complainant, submitted that the petition under section 482 Cr.P.C. cannot be maintained at this belated stage, when the cognizance of the offences by the learned S.D.J.M. was taken on 26.6.2008, the accused persons appeared pursuant to the process issued and have taken part in the trial which has already commenced by cross-examining the P.W.1.

9. In reply to the contention of the petitioners that the complainant could have taken recourse to the Press Council Act, 1978, Mr. Mohanty submitted that such recourse was available to the complainant over and

above his legal remedy available to file a suit for damages or for defamation or a criminal proceeding under sections 499/500 IPC. For the above contention, he relied upon the decision in the case of ***Voluntary Health Association of Tripura and others v. Press Council of India and others***, AIR 2003 Delhi 76. The Delhi High Court in the said case held that the Press Council of India is a quasi judicial body constituted under the Press Council Act, 1978. The object of the council is to preserve the freedom of the press and to maintain and improve standard of the newspapers and news agencies in India. Section 14 of the Act empowers the Council to administer warning, admonition or censure to the newspapers/news agencies or to censure or disapprove the conduct of an editor or the concerned journalist, if the Council has reason to believe that the newspaper/news agency has acted in breach of journalistic ethics or the Editor/Journalist have committed any professional misconduct. Section 14(2) of the Act also enables the Council to require any newspaper to publish the correspondence or proceedings of any enquiry conducted by it or a decision taken requiring the publication to publish a reply. The newspaper or the publication has the duty to objectively verify the facts and ascertain the version of the person, who is likely to be affected by the publication or against whom imputations which are defamatory, are being published. In case, there has been a lapse in pre-verification of facts or the publication does not contain the view point of the person aggrieved, the Press Council Act prescribes for issuing a direction to the publication/newspaper to publish the reply/version of the aggrieved person. The above mechanism is available besides the legal remedy available to an aggrieved person of filing a suit for damages for defamation or a criminal complaint under sections 499/500 IPC.

(Emphasis supplied).

10. This Court in the case of ***Banka Behari Singh v. O.M. Thomas and others***, AIR 1960 Orissa, 126, while making a distinction in publication between a "books" and "newspapers" held as follows:-

> "……So far as news papers are concerned, section 7 of that Act says that a copy of a declaration made under section 6 shall be held (unless the contrary be proved) to be sufficient evidence as against the persons whose names shall be subscribed to such declaration, that the said person was the printer or publisher of every portion of the newspaper. There is no similar provision in the Act with regard to books……..".

11. In the case of ***Ramesh Chander v. The State,*** AIR 1966 Punjab and Haryana 93, Justice H.R. Khanna (as he then was) while dealing with an appeal of an accused convicted for an offence under section 500 IPC finding that the accused is admittedly the Printer and Publisher of the Hindu

Samachar, referring to section 7 of the Act , 1867 held that the said section, inter alia, provides that the production in any legal proceeding of an attested copy of such declaration shall be held (unless the contrary be proved) to be sufficient evidence as against the person whose name shall be subscribed to such declaration that the said person was the printer or publisher of every portion of the newspaper in question.

12. Again the Supreme in the case of ***K.M. Mathew v. K.A. Abraham and others***, AIR 2002 S.C. 2989 interpreting section 7 of the Act, 1867 held as follows:-

> "The Managing Editor, Resident Editor or Chief Editor of a newspaper are not immune from prosecution for libelous matter published in the newspaper. Under section 7 of the 1867 Act, there is a presumption that the Editor whose name is printed in the news paper as Editor shall be held to be the Editor in any civil or criminal proceedings in respect of that publication and the production of a copy of the newspaper containing his name printed thereon as Editor shall be deemed to be sufficient evidence to prove that fact, and as the 'Editor' has been defined as the person who controls the selection of the matter that is published in a newspaper, the presumption would go to the extent of holding that he was the person who controlled the selection of the matter that was published in the newspaper. But at the same time, this presumption contained in section 7 is a rebuttable presumption and it will be deemed as sufficient evidence unless the contrary is proved. That does not mean that there is statutory immunity against Managing Editor, Resident Editor or Chief Editor against any prosecution for the alleged publication of any matter in the newspaper over which these persons exercise control. Though a similar presumption cannot be drawn against the Chief Editor, Resident Editor or Managing Editor, nevertheless, the complainant can still allege and prove that they had knowledge and they were responsible for the publication of the defamatory news item. Even the presumption under section 7 is a rebuttable presumption and the same could be proved otherwise. That by itself indicates that somebody other than Editor can also be held responsible for selecting the matter for publication in a newspaper.
>
> State v. Chowdhary, AIR 1967 SC 110: Haji Mohd. Koya v. Muthukoya, AIR 1979 SC 154 and Mathew v. State, 1992 AIR SCW 2666. Disting. .

In the instant case, the complainant in each case has alleged that Managing Editor, Chief Editor or Resident Editor had knowledge and were responsible for publishing defamatory matter in their respective newspaper

publication. Moreover, in none of these cases, the 'Editor' had come forward and pleaded guilty to the effect that he was the person responsible for selecting the alleged defamatory matter published. It is a matter of evidence in each case. If the complaint is allowed to proceed only against the 'Editor' whose name is printed in the newspaper against whom there is a statutory presumption under section 7 of the Act, and in case such 'Editor' succeeds in proving that he was not the 'Editor' having control over the selection of the alleged libellous matter published in the newspaper, the complainant would be left without any remedy to redress his grievance against the real culprit. The quashing of complaint against the appellant is therefore improper".

13. With regard to the exception to section 499 IPC, in the case of ***Balraj Khanna and others v. Moti Ram,*** AIR 1971 SC 1389, the Supreme Court has laid down that the question of applicability of the exception to section 499 IPC as well as all other defences that may be available to the appellants, will have to be gone into during the trial of the complaint.

14. On analyzing the facts of the present case in the touchstone of law laid down by the Supreme Court and other High Courts in the aforesaid decisions relied upon by the respective parties, it would be appropriate to refer to section 7 of the Act, 1867 which runs as follows:-

> **"7. Office copy of declaration to be prima facie evidence. -** In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid attested by the seal of some Court empowered by this Act to have the custody of such declaration [or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor] shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, "[or printed on such newspaper, as the case may be] that the said person was printer or publisher, or printer and publisher (according as the words of the said declaration may be) of every portion of every [newspaper] whereof the title shall correspond with the title of the (newspaper) mentioned in the declaration [or the editor of every portion of that issue of the newspaper of which a copy is produced]".

15. Law is well settled that presumption under section 7 of the Act, 1867 is available to be drawn against the Editor of the publication, whose name appears in each of the issues of the publication. Admittedly, the petitioner no. 1's name is mentioned as the Editor of Dharitri and the petitioner no.2's name is mentioned as Printer and Publisher in each of the issues. Thus, the

petitioner no. 1 as per distinction of the word Editor given in section 1 (1) of the Act would be presumed to be in control of the selection of the matter that is published in the newspaper. Hence, the mandatory presumption under section 7 of the Act, 1867 can be drawn against the petitioner no.1.

16. As has been held by the Supreme Court , the petitioner no. 1 if claims to be coming under the exception under section 499 IPC, the same has to be proved during the trial of the case and cannot be adjudicated upon in this application under section 482 Cr.P.C.

17. Since the matters, which have been published in the newspaper "The Dharitri", which has been specifically averred in the complaint petition, prima facie, appears to be defamatory, the liability of the petitioner no. 1 as the Editor of the newspaper for publication of the same can be presumed by application of section 7 of the Act, 1867. However, such presumption will not be available as against the petitioner no. 2, who though has been mentioned as the Printer and Publisher of the newspaper, but no declaration is made that he is responsible for selection of the news items to be published in the newspaper. No specific allegation has also been made against him stating that the petitioner no. 2 was responsible for publication of the said news items. Hence, this Court finds that no prima facie case under sections 500/501/502/34 IPC is made out against the petitioner no.2. However, no error or illegality can be found in the order dated 26.6.2008 taking cognizance of the above offences against the petitioner no. 1 for the reasons stated above. Hence, the order of cognizance which is impugned in this petition stands quashed as against the petitioner no.2 – Sri Dandapani Mishra, but the same is confirmed as against the petitioner no.1 - Shri Tathagata Satpathy and the criminal case shall continue against the petitioner no.1.

The CRLMC is accordingly disposed of.

Application disposed of.

2010(I)ILR – CUT- 885

R.N.BISWAL, J.

W.P.(C) NO.11213 of 2009 (Decided on 16. 04. 2010

ZYDUS PHARMACEUTICALS LTD. …….. Petitioner

-V-

B. RAJA RAM PATRA …… Opp.Party

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – SEC.21 r/w ORDER 14, RULE 2(2)(a).

Jurisdiction of a Court – Whether a mixed question of facts and law ? – Held, the issue of jurisdiction is to be decided on point of law only. (Para 6)

Case laws Referred to:-

1.1986 (I) OLR 337 : (Orissa Stavedores (P) -V- Hindustan Fertilizer Corporation Ltd. & Ors.).

2.1988 (II) OLR 143 : (Shri Janaki Ballav Patnaik -V- Bennet Coleman & Co.Ltd. & Anr.).

For Petitioner – M/s. Subash Chandra Lal, S.Lal, & Sujata La.

For Opp.Party – M/s. K.K.Jena, A.K.Mohapatra & S.N.Das.

R.N.BISWAL, J. The petitioner has challenged the order dated 27.04.2009 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in C.S. No.127 of 2006, wherein he rejected the petition filed under Order-14, Rule-2 (2) (a) read with Section 21 of C.P.C., by the petitioner.

2. Opp. party as plaintiff filed the aforesaid suit against the defendant claiming Rs.70,86,338.54/- with interest. As per his case, he was dealing in electronic goods at Visakhapatnam. Cadila Health Care Ltd., a private company which was manufacturing and marketing pharmaceuticals, cosmetic and other products, appointed the plaintiff as their Clearing and Forwarding Agent for the state of Orissa by opening their office at Cuttack. An agreement was executed between the parties to that effect on 01.02.1999. Accordingly, the plaintiff started its establishment at Cuttack by taking a go-down-cum-office on rent and appointing two employees. Subsequently, the aforesaid company bifurcated its business by forming another sister concern company in the name and style of Zydus Pharmaceuticals Limited. Cadila HealthCare Ltd., dealt in manufacturing of the aforesaid products while Zydus Pharmaceuticals Ltd. (defendant) marketed the same.

3. Plaintiff invested a huge amount of money to fulfill the requirements of the defendant-company. He shifted his business from Visakhapatnam to

Cuttack, took a go-down-cum-office on rent, furnished the office with Computer, Printer, Air conditioner, Fax, Telephone line etc. to carry out the business as Clearing and Forwarding Agent. He invested more than a sum of Rs. 1,50,685.00/-. Besides the said investment, as per the requirement of the Cadila Health Care Limited, the plaintiff dispatched a demand draft of Rs.7,50,000.00/- in its favour towards security deposit which was subsequently refunded along with interest with direction to deposit a sum of Rs.7,86,813.00/- with Zydus Pharmaceuticals Limited. Accordingly, he deposited the said amount on 30.03.2001, but unfortunately, without any valid reason, and without canceling the agency of the plaintiff, the defendant company stopped supply of its product to the plaintiff with effect from 18.12.2002 and directed him to handover the entire stock available with him to one M/s. Essar Associates of Jaunliapati, Cuttack, a newly appointed Clearing and Forwarding Agent of the defendant. So, the plaintiff filed the aforesaid suit with prayer as mentioned earlier. On being noticed defendant appeared in the suit and filed written statement. It also filed a petition under Order-14, Rule-2 (2) (a) read with Section 21 of C.P.C., to hear on the point of jurisdiction as preliminary issue and pass necessary orders thereon.

As per the petition, in paragraph-4 of the plaint it is averred that:-

> "4. That as the business of the Plaintiff comes under the business of Zydus Pharmaceuticals Limited, without executing any agreement with the Plaintiff, Zydus Pharmaceuticals Limited continued its business with the Plaintiff on the footing of the agreement continuing with Cadila Healthcare Limited without renewing the agreement which was valid for one year only."

Such statement of the plaintiff clearly and unambiguously proved that although there was no agreement between the plaintiff and the defendant-company, yet the plaintiff continued the business with the defendant-company on the footing of the agreement with Cadila Healthcare Limited without renewing the same. In clause 8.2 of the agreement dated 1.2.1999, it has been provided as follows:-

"8.2-This agreement is concluded at Ahamadabad and courts at Ahamadabad alone shall have jurisdiction to try any dispute/difference arising or connected with this agreement".

As per this clause, the plaintiff ought to have filed the suit at Ahamadabad only and nowhere else.

4. After hearing the said petition, the trial court rejected it on the ground that jurisdiction of the court being a mixed question of law and fact, it can not be decided as preliminary issue. Being aggrieved with the said order, defendant (hereinafter called the petitioner) has filed the present writ petition.

5. Learned counsel appearing for the petitioner submitted that as found from paragraphs-4 of the plaint, opp. party admitted that he continued his business with the petitioner-company on the basis of the agreement dated 1.2.1999 executed between him and Cadila Healthcare Limited. As per the agreement, any dispute between the parties was to be decided by a competent court at Ahamadabad. Since the petitioner-company is a sister concern of the Cadila Healthcare Limited and the opposite party continued his business with the petitioner-company on the basis of agreement entered into between Cadila Health Care Limited and himself, the trial court should have allowed the petition under Order-14, Rule-2 (2) (a) read with Section 21 of C.P.C. It committed a gross error of law leading to miscarriage of justice in holding that the point of jurisdiction was a mixed question of law and fact.

6. On the contrary, learned counsel for the opposite party contended that since the agreement between the opposite party and Cadila Health Care Limited was valid for one year only, the agreement lost its force on 31.1.2000, and, as such, the opposite party is not bound by that agreement. So, the trial court rightly rejected the petition. He further submitted that opp. party was representing the petitioner-company before Sales Tax Authorities for sales tax assessment at Cuttack. The petitioner-company is carrying on its business at Cuttack. So, the learned Civil Judge (Senior Division), 1st Court Cuttack has jurisdiction to hear the suit. Opp. party would face much hardship and financial loss if he would be asked to file the suit at Ahamadabad. Because of this, the writ petition deserved to be quashed. In support of his submission, he relied on the decision, ***Orissa Stavedores (P) v. Hindustan Fertilizer Corporation Ltd. and others,*** 1986 (I) OLR-337, where this Court held that:

> "……even though the agreement between the parties choosing a particular Court out of the several Courts having jurisdiction operates as estoppel between the parties, it does not really oust the jurisdiction of the Court and cannot be construed to deprive a Court to exercise the jurisdiction which the law of the land has conferred upon it. Ordinarily the Court whose jurisdiction has been ousted by agreement between the parties would have due regard to the stipulation in the agreement. It can still exercise jurisdiction if it is satisfied that the said stipulation is oppressive, harsh, inequitable or unfair or that for the ends of justice, the Court in its discretion thinks it appropriate to exercise jurisdiction."

In the decision of ***Shri Janaki Ballav Patnaik v. Bennet Coleman and Co., Ltd., and others*** 1988 (II) OLR 143, this court held that if an issue relating to jurisdiction of a Court is an issue of law only, which can be decided on the admitted pleadings of the parties de hors fact, the issue can be decided as a

preliminary issue. In the present case, in his pleading, opposite party averred that it continued to work as Clearing and Forwarding Agent under Zydus Pharmaceuticals Limited on the basis of agreement dated 1.2.1999 entered into between himself and Cadila Healthcare Limited. Admittedly, the said agreement was valid for one year only. Whether the clause containing jurisdiction of court would amount to admission or not is to be decided. Evidence is not required to be led in this regard. The issue of jurisdiction is to be decided on point of law only. The finding of the trial court that the point of jurisdiction involves facts and law is not correct. However, the opp. party may raise the point that the stipulation in the agreement is oppressive, harsh, inequitable or unfair by citing the decision, Orissa Stavedores (supra) before the trial court.

7. In the result, the writ petition is allowed and the impugned order dated 27.04.2009 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in C.S. No.127 of 2006 is set aside and the trial court is directed to hear on the point of jurisdiction as preliminary issue. No cost.

Writ petition allowed.

2010(I)ILR – CUT-889

INDRAJIT MAHANTY , J.

CRLMC NO.937 of 2010 (Decided on 09. 04. 2010)

SRI PURUSOTTAM DAS SHARMA …….. Petitioner

-V-

SRI MANOJ KUMAR PATTNAIK,
INSPECTOR, CENTRAL EXCISE,
CUSTOMS & SERVICE TAX & ANR …… Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.482, 438.

Grant of Anticipatory bail – High Court directed arresting officer to release the petitioner on bail and impose conditions – Petitioner was asked to furnish bail bond of Rs.50,000/- along with surety of Rs.50,000/- and to appear before the Superintendent, Central Excise on all working days for three weeks and shall not leave office between 10.30 to 6 PM without permission – Petitioner seeks quashing of the conditions.

Fixing the amount of surety depends on the indivisual financial circumstances of an accused and the probability of his absconding – However the sureties should not be excessive – In this case since the company had remitted the requisite amount it may not cause mental or physical strain on the petitioner.

So far other conditions are concerned the arresting officer has confined the movement of the petitioner which tantamounts to passing an order of detention in the guise of terms and conditions of bail – Held, such conditions are set aside and the petitioner shall appear before the authorities as and when summons are issued to him.

(Para 9,15,18)

Case laws Referred to:-

1.AIR 1985 SC 1666 : (Keshab Narayan Banerjee & Anr.-V-The State of Bihar).
2.1995 CRI.L.J. 863 : (Anwar Hussain -V- State of Orissa).
3.86 (1998) CLT.53 : (A Kokan Rao -V- State of Orissa).
4.AIR 1979 SC 1360 : (Hussainara Khatoon -V- Home Secretary, State of Bihar).
5.AIR 1998 SC 696 : (Dukhishyam Benupani -V- Arun Kumar Bajoria)
6.AIR 1954 SC 300 : (M.P.Sharma & Ors.-V- Satish Chandra, District Magistrate, Delhi & Ors.).
7.AIR 1992 SC 1795 : (Poolpandi -V- Superintendent, Central Excise& Ors.)

8.AIR 1973 SC 1196 : (Ramanilal Bhogilal Shah & Anr.-V-D.K.Gua & Ors.)
9.AIR 1961 SC 1808 : (State of Bombay -V-Kathi Kalu Oghad).

For Petitioner – M/s. Laxmidhar Panigrahi, S.R.Pani & A.K.Das.
For Opp.Party – Mr. Prasant Kishore Ray, (Central Excise Department)

I.MAHANTY, J. In the present application under Section 482 of the Code of Criminal Procedure, 1973, prayer has been made by the petitioner to set aside certain conditions fixed by the Inspector (Preventive) Central Excise, Customs & Service Tax, Bhubaneswar-II (Opposite Party No.1) while granting bail to the petitioner pursuant to an order dated 11.3.2010 passed by this Court in BLAPL No.2887 of 2010, granting anticipatory bail to the petitioner.

2. Shorn of unnecessary details, it appears that the Central Excise authorities conducted search and seizure on the premises of M/s. Seeta Integrated Steel & Energy Ltd. on 4th November, 2009 and on the basis of such search and seizure, a proceeding for enquiry for violation of the provisions of Central Excise Act, 1944 has been initiated thereunder. From the pleadings in the present application, it appears that the petitioner pursuant to summons issued to him appeared before the Superintendent (Prev.), Commissionerate of Central Excise, Customs and Service Tax, Bhubaneswar (Opposite Party No.2) on 5.11.2009, 15.1.2010 and 28.1.2010 and also produced certain documents and also had his statements recorded.

3. It is stated that the petitioner had been issued with a further summon dated 19.2.2010 by which order, he was directed to produce some more documents mentioned in the schedule to such summons under Annexure-1. Apprehending arrest by the Central Excise Officers as well as apprehending that he may not be admitted on bail, an application under Section 438 Cr.P.C. for anticipatory bail was filed by the petitioner in BLAPL No.2887 of 2010, before this Court and the same came to be disposed of on 11.3.2010 with the following directions:

> "Considering the submission of learned counsel for the parties and keeping in view the nature and gravity of the offence alleged against the petitioner, it is directed that in the event of arrest of the Petitioner in Central Excise Proceeding No.C.No.IV(6) 15/CE/CPU/BBSR-II/2009, they shall be released on bail by the arresting officer on such terms an conditions as the arresting officer may deem just and proper. It is needless to say that in case of violation of any such terms and conditions, it is open or the authorities to proceed against the petitioner, in accordance with law.

The petitioner shall appear before the Superintendent (Prev.)- Opposite Party, on 25.3.2010 at 10.30 A.M.

The BLAPL is disposed of.

Issue urgent certified copy as per rules."

4. It is further stated that the petitioner appeared before Opposite Party No.2 on 25.3.2010 and at about 2.00 P.M. of the said date, Opposite Party No.1 arrested the petitioner and passed orders directing the petitioner to comply with the following conditions for being released on bail:

"(i) Sri Purusotam Das Sharma shall immediately furnish a Bail bond for Rs.50,000/- (Rupees Fifty Thousand) only, along with surety of equivalent amount, before the proper officer.

(ii) Sri Purusotam Das Sharma shall appear before the Superintendent (Prev.), Central Excise, Customes & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07, on all working days, for 3 weeks, starting from 26.3.2010 to give evidence and to submit records/documents called for, as being relevant to the enquiry.

(iii) Sri Purosottam Das Sharma shall not leave the office of the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07 on the aforesaid days, between 10.30 A.M. and 06.00 P.M. without the prior permission of the Superintendent/Inspector concerned.

(iv) Sri Surosottam Das Sharma shall not leave the country without the prior permission of the investigating officer.

(v) Sri Purosottam Das Sharma shall cooperate with the investigation in every possible manner.

Sd/-
(Manoj Kumar Pattanayak),
Inspector (Prev.),
Central Excise, Customs &
Service Tax, Bhubaneswar-II."

5. Mr.L.Pangari, learned counsel for the petitioner, at the out set, submitted that the challenge has been made by the petitioner to Condition Nos.(i), (ii) & (iii), contained in the order dated 25.3.2010 passed by the Arresting Officer (O.P. No.1) inter alia, on the ground that, the Opposite Party has imposed such Conditions which are absolutely perverse, inhuman, capricious, unreasonable and devoid of justice. He further r state that imposing the

aforesaid conditions were actuated by malafides and vindictive design of the Opposite Parties and was intended to completely nullify and frustrate the direction of this Hon'ble Court, by which order, the petitioner had been directed to be released on bail.

He also submitted that the directions to the petitioner to immediate furnish bail bond of Rs.50,000/- along with surety of Rs.50,000/- was imposed with the view that the petitioner would not be in a position to arrange the said amount and, therefore, would not avail the benefit of bail. It is stated that the petitioner was imposed with such conditions since the Central Excise Authorities considered the application under Section 438 Cr.P.C. for anticipatory bail as an audacious act on the part of the petitioner. It is stated that, it was with a great amount of difficulty, that the petitioner could arrange the necessary funds for the purpose of meeting such requirement as imposed in Condition No.(i).

6. In so far as challenge to Condition Nos.(ii) & (iii) are concerned, learned counsel for the petitioner submitted that the whole object of the directions requiring the petitioner to be present, on all working days for three weeks starting from 26.3.2010 and a further direction to the petitioner, not to leave the office of the Commissioner between 10.30 A.M. and 06.00 P.M. would itself clearly indicate that they are intended to frustrate the order of bail granted by the High Court and have been imposed to cause harassment and physical strain to the petitioner, who is the permanent resident of Rajgangpur in the district of Sundargarh and had to reside at Bhubaneswar, only to comply with the conditions under which he was released on bail by the Arresting Officer. Learned counsel for the petitioner, therefore, submitted that Condition Nos.(i), (ii) & (iii) may be quashed and such terms may be fixed in the interest of law and justice.

7. In this respect, learned counsel for the petitioner has placed reliance to the following judgments:

1. AIR 1985 SC 1666 **(Keshab Narayan Banerjee and another v. The State of Bihar)**
2. 1995 CRI.L.J. 863 **(Anwar Hussain v. State of Orissa)**
3. 86 (1998) C.L.T. 53 **(A Kokan Rao v. State of Orissa)**

The aforesaid judgments cited by the learned counsel for the petitioner was to substantiate the plea that a heavy amount should not be demanded as surety amount and the guiding principles on which an accused can be released on personal bond without sureties. The Hon'ble Supreme Court in the case of **Hussainara Khatoon v. Home Secretaqry, State of Bihar**, AIR 1979 SC 1360 held that, the decisions regarding the amount of the bond should be an individualized decision, depending on the individual financial

circumstances of the accused and the probability of his absconding and fixing the surety amount, condition should be taken of family ties and relationship, roots in the community, employment, status etc. and in appropriate cases, the Court ought to be released the accused on his personal bond. While the accused may be required to furnish cash security but such conditions of bail should not be harsh, oppressive and should not virtually result in denial of bail to an accused.

8. Mr. Ray, learned counsel for the Central Excise Department, on the other hand, opposed the prayer for modification of the conditions of bail granted to the petitioner and relied extensively on the averments made in the counter affidavit filed on behalf of Opposite Parties 1 and 2. He essentially contended that the Company, i.e. M/s. Seeta Integrated Steel & Energy Ltd. has clandestinely removed a huge amount of sponge iron produced at their plant, resulting in loss of more than Rs.94 lakhs of Central Excise duty. He contended that none of the condition imposed by the Arresting Officer-Opposite Party No.1 could be considered to amount to denying the petitioner the benefit granted to him by the order of this Court in BLAPL No.2887 of 2010. He further contended that white coller crime requires in depth investigation and putting a witness to continuous interrogation is very much required, in order to elicit the true facts in course of such enquiry.

9. In this respect, the learned counsel for the Central Excise Department placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Dukhishyam Benupani v. Arun Kumar Bajoria,** AIR 1998 SC 696. Sri P.K.Ray submitted that an Investigating Agency should be free to fix the venue, time and the manner of question to an accused persons involved in such crimes. Learned counsel also placed reliance on various documents appended to the counter affidavit and in particular, Annexure-D to the counter affidavit. This statement itself contains the details of the time at which the petitioner appeared before the Superintendent (Preventive), Commissionerate of Central Excise, Customs and Service Tax, Bhubaneswar-II (Opposite Party No.2). It is stated on behalf of the Opposite Parties that since the date when the order was passed, i.e. 25.3.2010, the petitioner has appeared before the authority concerned, only on five working days indicated therein. Apart from the same, my attention was drawn to the endorsement therein, i.e. in Annexure-D, that the Superintendent has been pleased to permit the petitioner to use the "waiting room" and bath room from 10.30 A.M. to 6.00 P.M. till closing of the enquiry and was also "granted lunch-break" from 1.30 to 2.30 P.M. on the dates he appeared and that the departmental canteen has also been instructed to provide him lunch, if so desired by him, on payment for the same. Learned Counsel for the Central Excise Department submitted that the authorities have been thoroughly considerate of all the needs of the petitioner. This, according to the learned

counsel, is indicative of the concern of the department for the well being of the petitioner.

Apart from the above, he contended that the allegation that the petitioner had faced untold difficulties in furnishing the bail bond of Rs.50,000/- and surety amount of Rs.50,000/- was baseless. Since the company had remitted the requisite amount to the Punjab National Bank, Bhubaneswar, on the same day on which, the Arresting Officer imposed such condition. Therefore, there existed no basis for the petitioner to contend that the imposition of the condition for providing bail bond of Rs.50,000/- and surety amount of Rs.50,000/- could not have in any manner caused any mental or physical strain on the petitioner.

10. In the light of the contentions raised by the learned counsel for both the parties, at the out set, the case of **Dukhishyam Benupani** (supra) relied upon by the learned counsel for the Excise Department requires to be dealt with the accused in the aforesaid case had sought for anticipatory bail before the Sessions Judge and the same had been granted by the learned Sessions Judge. The Hon'ble Calcutta High Court had modified, certain terms therein, by which order, specific directions had been issued by the Court fixing the dates on which the accused was to appear before the Foreign Exchange Regulatory Authorities. The Department had challenged the said order granting anticipatory bail before the Hon'ble Supreme Court and the Hon'ble Supreme Court had allowed the said challenge and had set aside both the orders passed by the learned Sessions Judge as well as the Calcutta High Court.

11. In the present case, while no challenge has been made by the Department to the order of anticipatory bail granted in favour of the petitioner dated 11.3.2010 in BLAPL No.2887 of 2010, even then the order of anticipatory bail granted by this Court, on the contrary, did not fix any term or condition and instead left it to the Arresting Officer to fix such terms and conditions on which the petitioner would be released on bail. The Arresting Officer upon arresting the petitioner imposed some conditions in his order dated 25.3.2010 under Annexure-3 to the present application, which is the subject matter of challenge.

Therefore, I am of the considered view that the judgment in the case of **Dukhishyam Benupani** (supra) has no application to the facts of the case.

12. The next issue relates to Condition No.(i), i.e. requirement of the petitioner to furnish bail bond of Rs.50,000/- and surety amount of Rs.50,000/-. In this respect, I have perused the judgments relied upon by the learned counsel for the petitioner. No doubt the said judgments indicate the relevant circumstances which require consideration before fixing the amount of surety.

In the case of **Keshab Narayan Banerjee** (supra), the bail amount of cash security of Rs.1 lakh with two sureties residing in the State of Bihar each for the like amount was held to be excessive and the Hon'ble Supreme Court modified the order directing bail bond of Rs.25,000/- with two sureties for the like amount.

In the case of **Anwar Hussain** (supra), the Orissa High Court placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Hussainara Khatoon** (supra), wherein the Hon'ble Supreme Court has stated that, the individual financial circumstances of an accused and the probability of his absconding need be taken into account and condition relates to the sureties should not be excessive as it would virtually amount to denial of bail. Similar was the view in the case of **Anwar Hussain** (supra), in which Orissa High Court fixed the bail amount of Rs.5000/- in place of Rs.10,000/- that had been fixed by the learned S.D.J.M. since the accused-petitioner therein is a an unemployed youth.

13. On consideration of the submissions made by the learned counsel for the petitioner and the Opposite Party, in so far as Condition No.(i) is concerned, it is a fact that the said condition was complied with by the petitioner on the very date in which the order of bail was passed, by furnishing fixed deposit by Punjab National Bank both towards the bail bond as well as the surety and as stated by the learned counsel for the opposite parties, the said money was provided by the Company, i.e. M/s. Seeta Integrated Steel & Energy Ltd.

I am of the considered view that fixation of such a condition was not excessive keeping in view the amount of revenue sought to have been evaded by the Company. Therefore, the contention of the learned counsel for the petitioner for quashing Condition No.(i) is not sustained and, therefore, fails.

14. In so far as challenge to Condition Nos.(ii) and (iii) are concerned, the same are quoted hereinbelow for convenience:

> "(ii) Sri Purusotam Das Sharma shall appear before the Superintendent (Prev.), Central Excise, Customes & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07, on all working days, for 3 weeks, starting from 26.3.2010 to give evidence and to submit records/documents called for, as being relevant to the enquiry.
>
> (iii) Sri Purosottam Das Sharma shall not leave the office of the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-II Commissionerate, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-07 on the aforesaid days, between 10.30 A.M. and 06.00 P.M. without the prior permission of the Superintendent/Inspector concerned."

Apart from the aforesaid conditions, it appears that some modification was made thereto by the Superintendent in Annexure-D to the counter affidavit which is quoted herein below:

> "Granted Bail as per the directions of the Hon'ble High Court of Orissa, vide Order No.3 dated 11.3.2010 against BLAPL No.2887 of 2010. You are requested to be present in the waiting area (room) from 10.30 A.M. to 6.00 P.M. tomorrow and on all working days for cross examination and production of records as directed, as the conditions imposed or till the conclusion of enquiry whichever is earlier. You will be granted lunch break from 1.30 P.M. to 2.30 P.M. on the days you appear. The department canteen has been requested to provide you lunch, if desired by you. You have to pay for the same. This is for your information."

15. On a conjoint reading of the aforesaid conditions, I am of the considered view, that since the petitioner has not only been directed to be present on all working days for three weeks starting from 26.3.2010 and has also been debarred from leaving the office of the Commissioner during the period from 10.30 A.M. to 6.00 P.M. on every date and during the said period, he has been directed to sit in the waiting room from 10.30 A.M. to 6.00 P.M. and also has been provided lunch in the department canteen, this Court is of the considered view that while the Opposite Party-Central Excise authorities are statutorily vested with the power to carry out an enquiry for any infraction of the Central Excise Act and no interference at all by any court is called, yet on a conjoint reading of Condition Nos.(ii) and (iii) as well as in Annexure-D, it clearly indicates that the Arresting Officer has confined the movement of the petitioner for a period of three weeks starting from 26.3.2010 , I am of the considered view that the same is clearly not only excessive but also effectively tantamounts to passing an order of detention in the guise of terms and conditions of bail.

16. At the closure of hearing, the learned counsel for the Central Excise Department was directed to produce the file containing the inquiry being conducted and the statements made by the petitioner in course of the inquiry. The same was duly complied with.

On a perusal of the file produced by the Central Excise Authority, it appears therefrom that pursuant to the order of anticipatory bail dated 25.3.2010 passed by this Court in BLAPL No. 2887 of 2010, when the petitioner appeared before the Superintendent (Opposite Party No.2), on the self-same date, the petitioner was arrested by the Inspector (Opposite Party No.1) and the following has been noted in the "Grounds of Arrest" dated 25.3.2010:

> "5. In spite of repeated summons by the investigating officer, Sri Purusottam Das Sharma has failed to produce documents/records

necessary for furtherance of the investigation, without sufficient reason, thus have not cooperated with the investigation.

6. The above offence of clandestine removal of excisable goods without payment of Central Excise duties and non-cooperation with the investigation, is punishable under clauses (b), (bb) and (bbb) of Section 9(1) of the Central Excise Act, 1944. It is evident from the above that this offence has happened with the knowledge, concern and active involvement of Sri Sharma, the employee in-charge of the Central Excise matters of SISEL. Such acts and omissions are also punishable under Section 9AA of the Act ibid.

7. Taking into consideration the gravity of the offence and the fact that Sri Purusottam Das Sharma is the person in-charge of Central

Excise matters of SISEL, I have reasons to believe that Sri Purusottam Das Sharma was actively involved in the offence of clandestine removal as well as undervaluation of sponge iron, as discussed above, to evade payment of Central Excise, Customs and Service Tax, Bhubaneswar-II Commissionerate, Bhubaneswar, place Sri Purusottam Das Sharma, under arrest under Section-13 of Central Excise Act, 1944 at 14.00 hrs. on 25.3.2010."

From the aforesaid facts, it would be clear therefrom that the Excise Authorities after reaching a prima facie conclusion that the petitioner is responsible for the clandestine removal of excisable goods and such offence is with the knowledge/connivance of the petitioner (the employee in-charge of the Central Excise matters of the said Company) and is liable for punishment under Section 9AA of the Central Excise Act, 1944.

17. In this respect, it becomes extremely important to take note of Article-20(3) of the Constitution of India:

> "Art.20(3) - No person accused of any offence shall be compelled to be a witness against himself."

In this regard it has become relevant to note of the judgment of the Hon'ble Supreme Court in the case of **M.P.Sharma and others v. Satish Chandra, District Magistrate, Delhi and others**, AIR 1954 SC 300, in which Hon'ble Supreme Court came to hold that, if a person has been named by the officers who are competent to launch a prosecution against him, as having committed an offence, the accused comes within the meaning of Clause-3 of Article 20 of the Constitution of India.

The petitioner has been named by the Inspector of Central Excise (in the ground of his arrest), as a person who is liable for punishment under Section 9AA of the Central Excise Act and is therefore, clearly a person who is entitled to the protection guaranteed by the Constitution of India.

While, it is also a fact that in the judgment of the Hon'ble Supreme Court in the case of **Poolpandi v. Superintendent, Central Excise and others,** AIR 1992 SC 1795, the Hon'ble Supreme Court came to hold that the protection of Article 20(3) of the Constitution of India is not available to a person while being "interrogated during investigation", under the provisions of the Customs Act or the Foreign Exchange Regulation Act (FERA), since such a person is not an "accused of an offence" and is therefore, not entitled to the protection under Article 20(3), yet, in the facts of the present case, since the Arresting Officer (O.P. No.1) has already stated in the grounds of arrest that the petitioner was liable for punishment under Section 9AA of the Central Excise Act, the petitioner is entitled to the benefit of protection guaranteed by Article-20(3) of the Constitution of India.

It is also well settled by the Hon'ble Supreme Court that for the operation of Article-20 (3), no "formal" accusation by the issue of process of the Court is required and the immunity Article 20(3) of the Constitution of India would commence, from the moment the person has been named by the officers who are competent to launch the prosecution against him as having committed of an offence and from that moment, such a person become the "accused of an offence" within the meaning of Article 20(3) of the Constitution of India.

In the Case of **Ramanilal Bhogilal Shah and another v. D.K.Guha and others**, AIR 1973 SC 1196, a Five Judge Bench of the Hon'ble Supreme Court, has taken into consideration the fact that the petitioner in the said case had been served with the "grounds of arrest" under the Foreign Exchange Regulation Act, 1947 and on perusing the said ground of arrest, while placing reliance on an earlier judgment in the case of **M.P.Sharma and others** (supra), the Hon'ble Supreme Court came to hold that the petitioner therein was a person "accused of an offence" within the meaning of Article 20(3) of the Constitution of India and that the only protection in Article 20(3) gives to him is that he cannot be compelled to be a witness against himself. But, this does not mean that he need not given information regarding matters which do not tend to incriminate him. Having so concluded, the Hon'ble Supreme Court refused to set aside the summons challenged before it and directed the petitioner to appear before the Deputy Director and answer such questions, as do not tend to incriminate him as explained by the Hon'ble Supreme Court in the case of **State of Bombay v. Kathi Kalu Oghad**, AIR, 1961 SC 1808 is as follows:

"In order that a testimony by an accused person may be said to have been self-incriminatory the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing

so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."

18. Therefore, considering the facts of the present case and in particular, since the petitioner has been "arrested" and the "grounds of arrest" as has been noted in Paragraph-16 hereinabove, have been served on him the mandate of law as settled by the Hon'ble Supreme Court referred to above, Condition Nos.(ii) and (iii) imposed by the Arresting Officer (Opposite Party No.1) under Annexure-3 to the present application, are set aside and it is directed that the petitioner shall appear before the authorities concerned as and when summons are issued to him and answer all questions as do not tend to incriminate him, as explained by the Hon'ble Supreme Court in the case of **State of Bombay v. Kathi Kalu Oghad** (supra).

19. With the aforesaid modification to the terms and conditions of bail granted to the petitioner noted hereinabove, the Criminal Miscellaneous Case is disposed of.

Nothing stated in this order shall be deemed to be an expression of any opinion of this Court on the merits of the proceeding against the petitioner and the authorities are free to proceed against the petitioner and other accused persons, in accordance with law.

Application disposed of.

2010(I)ILR – CUT- 900

SANJU PANDA, J.

W.P.(C) NO.16717 OF 2007 (Decided on 05. 05. 2010)

DUSMANTA KU. SAHOO & ORS. …… Petitioner

-V-

RAJ KISHORE SAHOO & ORS. …….. Opp.parties

CONSTITUTION OF INDIA, 1950 – ART.227 r/w Order 39 Rule 4 C.P.C.

Suit for permanent/mandatory injunction – Petitioners filed application Under Order 39 Rule 1 & 2 to restrain Opp.Parties from making any construction over the suit land – Trial Court directed to maintain status quo – Plaintiffs filed petition Under Order 39 Rule 4 C.P.C. for necessary variation in the order of status quo for taking water connection through the disputed land – Trial Court rejected the application which was confirmed by the appellate Court – Hence this writ petition.

After going through the report of the Advocate Commissioner and since drinking water is a bare necessity for sustenance of life, this Court in exercise of jurisdiction Under Article 227 of the Constitution set aside the impugned order and allowed the petitioners to take water connection to their house but they will not claim any equity for the same if they fail in the suit. (Para 12)

Case law Referred to:-

88 (1999) CLT 297 : (Smt. Padmini Sekhar Deo & Ors.-V-Pankajini Thakur & Anr)

For Petitioners – M/s. Bibekananda Bhuyan, B.N.Das & B.N.Mishra.

For Opp.Parties – M/s. N.P.Parija, S.K.Rout & A.K.Mohanty.

SANJU PANDA, J. In this writ application, the petitioners have challenged the order dated 31.10.2007 passed by the learned Ad hoc Addl. District Judge, Fast Track Court No.I, Cuttack in F.A.O. No.98 of 2007 confirming the order dated 27.6.2007 passed by the learned Civil Judge (Junior Division), 1st Court, Cuttack in C.M.A. No.92 of 2007 (arising out of T.S. No.187 of 2001).

2. The facts as narrated in the writ application are as follows:

The petitioners as plaintiffs filed T.S. No.187 of 2007 before the learned Civil Judge (Junior Division), 1st Court, Cuttack seeking permanent injunction and mandatory injunction in respect of 'B' schedule property, its demarcation, declaration of their title by way of prescription in respect of 'C' schedule property and other consequential relief against the defendants-opposite parties. 'A' schedule property consists of Hal Plot No.844 measuring Ac.0.047 decs, Hal Plot No.842 measuring Ac.0.026 decs., Hal

Plot No.841 measuring Ac.0.020 decs. and Hal Plot No.911 measuring Ac.0.005 decs. in total measuring Ac.0.098 decs. under Hal Khata No.640 had been recorded in the name of the plaintiffs in the ROR published in the year 1991. Plot No.841 had been recorded as private road whereas other three plots were recorded as homestead of the plaintiffs out of 'A' schedule property. Plot No.841 measuring Ac.0.020 decs. Had been described in the schedule 'B' in respect of which the relief of permanent injunction and mandatory injunction were sought by the plaintiffs. The said plot corresponds to Sabik Plot No.207 (Part) belonging to the plaintiffs and an area measuring Ac.0.006.5 kadi out of Sabik Plot No.208 belonging to the defendants. The plaintiffs had been using the road from the time of their ancestors including the defendants and their neighbours continuously, openly and peacefully more than the statutory period with the knowledge of the defendants and acquired right of easement by prescription over the aforesaid Ac.0.006.5 kadi of land which was described in schedule 'C'. As such, the plaintiffs sought relief of declaration over the same. The dwelling house of the defendants situated over Hal Plot No.846 adjoins to Hal Plot No.841. The defendants having no title over Hal Plot No.841, tried to raise forcible construction by encroaching a portion. Therefore, the plaintiffs filed the suit for the aforesaid relief.

3. The defendants filed their written statement traversing the allegations made by the plaintiffs and stated that in the Hal Settlement, the recorded area of the plaintiffs had been enhanced by Ac.0.018 decs. However, the plaintiffs were only entitled to Ac.0.080 decs. as per Sabik R.O.R. The excess land belonged to the defendants and the same had been amalgamated in the suit plot of the plaintiffs and other plots for which the defendants preferred Revision Petition for correction of ROR in respect of the aforesaid Ac.0.018 decs. which was pending before the Commissioner, Settlement & Land Records, Cuttack. Therefore, they prayed for dismissal of the suit.

4. The petitioners filed Misc. Case No.148 of 2001 under Order 39, Rules 1 and 2 for temporary injunction against the opposite parties to restrain them from making any construction over the suit land, i.e., Hal Plot No.841 till disposal of the suit.

5. After hearing both the parties, on 12.8.2002 the learned Civil Judge (Senior Division) directed the parties to maintain status quo in respect of 'B' schedule property till disposal of the suit. Thereafter, being desirous of taking water connection to their house from public water connection, the plaintiffs filed CMA No.92 of 2007 under Order 39, Rule 4 read with Section 151, CPC for necessary variation in the order dated 12.8.2002. They specifically stated that the only approachable way to take water connection was through the disputed land, i.e., Hal Plot No.841. As they were facing difficulties in their

day-to-day life without water supply to their house and to save them from acute shortage of drinking water, they applied to the authority for water connection to their house. The authority sanctioned water supply from public water connection and also the Municipal Corporation granted permission to take the said connection by cutting the road.

6. On 23.6.2007, the petitioners filed a memo supported by an affidavit inter alia stating therein that they undertook to remove the water pipe connection from the suit land at their own cost and should not claim any equity over the same, if permission for such connection was accorded in their favour.

7. However, the defendants opposed the plea of the order of status quo. They also filed an application before the trial court alleging that the plaintiffs violated the status order by digging pit in the suit land to take water connection and electric connection. The said application was also pending.

8. After hearing the parties, on 27.6.2007 the trial court rejected C.M.A. No.92 of 2007. Being aggrieved by the said order, the petitioners preferred F.A.O. No.98 of 2007 before the learned District Judge, Cuttack which was transferred to the court of the learned Ad hoc Addl. District Judge, FTC-I, Cuttack. The appellate court on 31.10.2007 dismissed the appeal by confirming the order of the trial court on the ground that the appellants had moved the court below seeking interference of the court for a preventive order as to the change in the status of the suit land and any variation in the order by according permission even accepting the undertaking filed by the appellants would change the nature and status of the suit property.

8. Learned counsel for the petitioners submitted that in view of the undertaking given by the petitioners, the petitioners will not claim any equity if permission is accorded in their favour. The appellate court should not have recorded the above finding that it would change the nature and status of the suit property. In case the plaintiffs fail in the suit, they will not claim any equity and they will leave the water connection, if the court will permit them to proceed with the said purpose. He further submitted that while drinking water supply is a bare necessity in the Summer Season throughout the world, the plaintiffs are being deprived of taking pure and fresh drinking water and the courts below should have considered the same.

9. Learned counsel for the opposite parties supported the impugned order and submitted that since the nature and status of the suit property is going to be changed, the order of status quo needs no variation.

10. Considering the urgency and necessity of the matter, this Court on 21.8.2009 appointed Mr. Biswanath Rath, an Advocate of this Court as Advocate Commissioner to visit the spot and submit a report as to whether water connection can be taken by the petitioners to their house through any plot other than the disputed plot. A report along with a sketch map has been

submitted by the Mr. Rath on 2.9.2009 in presence of the learned counsel for both the parties. The said report reveals that water line is available in front of Hal Plot No.835. There is already a Municipal approach road and drain passes in between Hal Plot Nos.835 and 847 beyond Hal Plot No.842 and this is the only way through which the water line can pass till Plot No.842 including the plot of the plaintiffs and as all other plots except Hal Plot No.841 a road area already fully utilized, there is absolutely no other chance of drawing the water line connection. It goes without saying that Plot No.841 is a new plot created under Hal Khata carving out from Sabik Plot Nos.209/Hal Plot No.847, Sabik 208/Hal 846, Sabik 206 and 207 now under Hal Plot No.842 the drawal of water line connection will be in the interest of all the residents residing over Hal Plot Nos.847, 846, 842 and 843 and as it can run over Municipal drain already constructed it will not affect neither of the parties. In the report, he has also made it clear that there is no other way left for drawing water line to the plaintiffs Hal Plot No.842 and 844 except over Plot No.841 presently a road.

11. In view of the above report submitted by the Advocate Commissioner which was not objected by the parties, there is no doubt that water connection can be taken over Plot No.841. This Court in a decision reported in **88 (1999) CLT 297** (**Smt. Padmini Sekhar Deo & others** v. **Pankajini Thakur and another**) wherein this Court held as under:

> "The defendants shall give a written undertaking before the trial court that they will give vacant delivery of possession of the land or land along with the structure to the plaintiffs in the event of eventual success of the plaintiffs in the suit as per the wishes of the plaintiffs without claiming any equity. If such an undertaking is given within a period of three weeks from today, the respondents would be permitted to complete the structure on the disputed land thereafter and till such undertaking is given the order of injunction passed by this Court shall continue."

12. Therefore, taking into consideration the above decision, the submission made by the parties and the fact that drinking water is a bare necessity for sustenance of life, this Court in exercise of its jurisdiction under Article 227 of the Constitution of India, sets aside the impugned order passed by the appellate court. As the trial court had passed the impugned order mechanically without any application of mind, this Court also sets aside the trial court's order and allows the petitioners to take water connection to their house, but they will not claim any equity for the same if they fail in the suit.

The writ application is allowed. No costs.

. Writ petition allowed.

.2010(I)ILR – CUT-904

B.P.RAY, J.

CRL A . NO.277 OF 2007. (Decided on 09. 04. 2010)

SARANGADHAR MOHANTY …… Appellant

-V-

STATE OF ORISSA ……. Respondent

CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF 1974) – SEC.350.

Punishment for non-attendance by a witness in obedience to summons – Appellant did not appear for recording of his evidence on different dates – Subsequently he appeared and his evidence was recorded – However learned Court below issued notice to him to show cause for his non-appearance in course of the Court hour i.e. within 4 P.M. – He filed show cause stating that he has not intentionally avoided to appear in the Court and he may be excused – He was convicted and was imposed punishment – Hence this appeal.

Held, Section 350 provides summary trial for the above offence, so the time afforded to the appellant to submit his reply to the show cause notice is absolutely unreasonable – Impugned order convicting the appellant is set aside. (Para 4)

For Appellant – Mr. S.R. Mohapatra.
For Respondent – Govt. Advocate.

B.P. RAY, J. This appeal is directed against the order dated 3.5.2007 passed by learned Ad hoc Addl. Sessions Judge (FTC), Athgarh in Criminal Misc. Case No. 1 of 2007 wherein the appellant has been found guilty of the offence U/s. 350 of the Code of Criminal Procedure (in short, "the Cr.P.C.") and on being convicted was sentenced to pay a fine of Rs.100/- in default to undergo S.I. for 10 days.

2. The appellant was the Investigating Officer in Gurudijhatia P.S. Case No. 166 of 2003 corresponding to G.R. Case No. 440 of 2003 in the file of S.D.J.M., Athgarh. This case was registered for the offence U/s. 376, I.P.C. The case being one triable by the court of Sessions was committed to the court of Sessions and was registered as S.T. No. 119 of 2006 in the file of the learned Ad hoc Addl. Sessions Judge (FTC), Athgarh. It appears from the impugned order that the appellant who was the Investigating Officer in the case did not appear for recording his evidence despite the fact that wireless messages were sent on different dates including the messages dated 30.11.2006, 20.12.2006, 6.1.2007, 11.1.2007 and 25.1.2007. It further appears from the impugned order, the appellant appeared before the

court on 13.3.2007 and his evidence were recorded. Since the appellant did not appear despite repeated wireless messages and letters for which, the learned court below initiated a proceeding U/s. 350, Cr.P.C. and took cognizance of the offence and that proceeding was registered as Criminal Misc. Case No. 1 of 2007. The learned court below by order dated 13.3.2007 issued notice to the appellant requiring him to show cause during the course of the court hour i.e. within 4.00 P.M. as to why he should not be punished U/s. 350, Cr.P.C. It appears, the appellant filed his show cause stating that he has not intentionally avoided to appear in the court for recording his evidence and he may be excused.

3. Considering the show cause filed by the appellant, the learned Ad hoc Addl. Sessions Judge (FTC) convicted the appellant u/s.350, Cr.P.C. and imposed punishment as aforesaid. Hence, the appellant has filed the present appeal.

4. Section 350 Cr.P.C. no doubt provides a summary procedure for punishment for non-attendance by a witness in obedience to summons. But sub-section (2) thereof states that in such case court shall follow procedure prescribed for summary trial. In the present case though the accused was served the notices requiring him to show cause, but the time given for the purpose was 4.00 P.M. of that day by which the appellant was required to submit the reply to show cause notice. Though a summary procedure is provided for trial of such proceeding, yet the time afforded to the appellant to submit his reply to the show cause notice, in my considered view is absolutely unreasonable. In other words, the appellant was not provided a reasonable opportunity of hearing. In such view of the matter, I have no hesitation to set aside the impugned order.

5. In the result, the impugned order convicting the appellant is hereby set aside and the appeal is allowed.

Appeal allowed.

2010(I)ILR – CUT-906

B.K.PATEL, J.

CRLA. NO.99 OF 1999 (Decided on 29. 01. 2010)

DURYODHAN PATRA …… . Appellant

-V-

STATE OF ORISSA ……. Respondent

(A)PREVENTION OF CORRUPTION ACT, 1947 (ACT NO. 2 OF 1947) – SEC.6.

Question of validity of sanction though not raised in the trial Court can be raised in appeal for the first time as it strikes at the root of the case and is a condition precedent for valid prosecution.

(Para 7)

(B) CRIMINAL LAW AMENDMENT ACT, 1952 (ACT NO. 46 OF 1952) – SEC.7(3) r/w Sec.5(1)(c) & 5(2) of the P.C.Act,1947.

If the special Judge has no jurisdiction to try an offence U/s.5(2) of the P.C.Act for want of valid sanction he lacks jurisdiction to take cognizance of allied offences and to try the same.

(Para 9)

(C) PREVENTION OF CORRUPTION Act, 1947 (ACT NO. 2 OF 1947) – SEC.6.

Validity of sanction – Sanctioning authority in Cross-examination admitted that he has not examined documents while according sanction – Sanction was accorded in a casual manner and there was non-application of mind – Held, order of sanction is not valid in the eye of law. (Para 8)

Case laws Referred to:-

1.(1984) 1 OLR 497 : (B.K.Kutty -V- State).
2.AIR 1979 SC 677 : (Mohammed Iqbal Ahmed -V- State of Andhra Pradesh).
3.(1988) 1 OLR 457 : (B.A.Kameswar Rao -V- State of Orissa).

For Appellant – M/s. S.R.Mahapatra, D.Dash, A.Das, R.K.Lenka, S.C.Mishra, G.P.Panda, A.K.Kar, B.R.Mohanty, S.K.Das, P.K.Nayak, B.r.Samal, G.Pattanayak & Miss. M.Sahoo.

For Respondent – Mr.D.K.Mohapatra, Standing Counsel (Vigilance).

B.K.PATEL, J. Calling in question the correctness of the common judgment and order dated 31.03.1999 passed by the learned Special Judge (Vigilance), Sambalpur in T.R. Case Nos.26, 27, 28, 29, 30 and 31 of 1988, this appeal has been preferred by the appellant, who has been convicted for commission of offences punishable under Section 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act, 1947 (for short 'the P.C. Act') as well as under Section 409 and 468 of the Indian Penal Code (for short 'the I.P.C.'), in the trial on consolidation of aforenoted T.R. Cases. The appellant has been sentenced to undergo R.I. for one year and to pay a fine of Rs.1,000/- in default to undergo R.I. for one month under Section 5(1)(c) read with Section 5(2) of the P.C. Act, R.I. for two years and to pay a fine of Rs.1,000/- in default to undergo R.I. for one month under Section 409 of the I.P.C. and R.I. for one year and to pay a fine of Rs.500/- in default to undergo R.I. for six months under Section 468 of the I.P.C., while directing all the sentences to run concurrently.

2. The prosecution case, in brief, is as follows;

The appellant, being a primary school teacher was nominated as attached teacher to the S.I. of Schools under Lakhanpur Block during the period from 11.06.1979 to September, 1984. During his incumbency as such, the appellant was dealing with matters relating to Teachers Provident Fund Accounts (for short TPF accounts) of primary school teachers of the Block. In course thereof, the appellant inflated the amounts in withdrawal memos and paid less to the concerned teachers while misappropriating the differential amounts. In other cases, though the concerned teachers never applied for withdrawal of advance from their TPF accounts nor was there any sanction order of the Block Development Officer (B.D.O.), the appellant forging the signatures of the teachers in withdrawal memos, withdrew a sum of Rs.13,700/- by using the TPF pass books of eleven teachers and misappropriated the entire amount. Suspicion against the aforesaid conduct of the appellant led the B.D.O., Lakhanpur to conduct an enquiry in course of which the appellant confessed to have withdrawn Rs.45,000/- from the TPF accounts and misappropriated the same. The appellant thereafter deposited Rs.37,000/- by installments and balance amount of Rs.8,000/- remained unrecovered. Accordingly, on the basis of FIR (Ext.72) lodged by the Inspector (Vigilance), Jharsuguda, Sambalpur Vigilance P.S. Case No.28/84 was registered against the appellant and two S.I. of Schools of the Block. The alleged misappropriation of TPF advance being related to the period from 1979 to 1984, upon completion of investigation, in total six charge sheets i.e., one charge sheet for each year were submitted only against the appellant.

3. The appellant took the plea of complete denial.

4. In order to substantiate the charges, the prosecution examined as many as thirty-nine witnesses and relied upon the documentary evidence vide Exts. 1 to 73 and material objects vide M.O. I to IV. The appellant, on the other hand, examined the Senior Clerk in the office of C.I. of Schools, Sambalpur as the only witness in his defence. The learned trial judge, on appreciation of the oral and documentary evidence brought on record by the prosecution, held that all the charges were established against the appellant beyond reasonable doubt.

5. The learned counsel appearing on behalf of the appellant has assailed the judgment of the trial court on the following grounds;

(i) The sanction order passed by the D.I. of Schools is invalid being passed without application of mind. So, the entire proceeding stood vitiated for want of valid sanction.

(ii) Prosecution has failed to establish fact of valid entrustment and fact of misappropriation or conversion to own use, as the evidence led to that effect is untrustworthy being replete with material contradictions and in absence of proof of material documents like acquittance roll, treasury challan thereby raising adverse presumption under Section 114 (g) of Evidence Act.

(iii) Evidence of Handwriting Expert (P.W.38) is not reliable nor conclusive so as to prove alleged forgery for want of corroborative evidence.

6. The learned standing counsel appearing on behalf of the State while supporting the impugned judgment submitted that prosecution allegations were amply established by evidence of P.Ws.5 to 32, 35 and 37 coupled with the confession made by the appellant before the B.D.O. Besides, P.W.38 has proved the allegation of forgery of withdrawal memos and TPF applications. Moreover, challenge of the appellant on the point of sanction merits rejection since same was not raised before the trial court. Accordingly, the criminal appeal is liable to be dismissed and impugned order of conviction and sentence deserves to be confirmed.

7. To start with, let me first address to the legal question raised with regard to validity of sanction. Grant of sanction in terms of Section 6 of the P.C. Act is the sine qua non for a valid prosecution for offences under Section 5(1)(c) read with Section 5(2) of the P.C. Act. As it appears from the impugned judgment, this question was not raised by the defence before the trial court. Nonetheless, as has been held by this Court in the case of ***B.K. Kutty –vrs.- State*** : (1984) 1 OLR 497, the question of validity of sanction though not raised in the trial court, can be raised in appeal for the first time, as it strikes at the root of the case and is a condition precedent for valid prosecution. Accordingly to this effect, the contention of the learned standing counsel does not hold good.

8. In proof of factum of sanction, evidence of P.W. 36, the D.I. of Schools reveals that on receipt of requisition from S.P. Vigilance, Sambalpur and on placement of relevant papers including the F.I.R., Case Diary, consolidated report by the I.O., he perused the same and being satisfied about existence of prima facie case against the appellant, accorded sanction vide Ext. 21 for his prosecution. In this context, it would be worthwhile to advert to the observations of their Lordships of the Supreme Court in the case of ***Mohammed Iqbal Ahmed –vrs.- State of Andhra Pradesh*** : (AIR 1979 SC 677) as hereunder :

> "It is incumbent upon the prosecution to prove that a valid sanction has been granted by the sanctioning authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways either (1) by producing the original sanction which itself contains the facts constituting the offence and grounds of satisfaction and (2) by adducing evidence to show that the facts placed before the sanctioning authority and the satisfaction arrived at by it. It is well settled that, any case instituted without proper sanction must fail, because this being a manifest defect in the prosecution, the entire proceedings are rendered void ab initio."

Having examined Ext. 21 read with lone testimony of P.W.36 in the light of aforesaid propositions of law, it is found that the same does not stand to legal scrutiny. Though the I.O. was dead by the time of trial, P.W.39, D.S.P. Vigilance did not whisper in his evidence even with reference to Case Diary, what documents were produced by I.O. before P.W. 36. Added to it, contents of alleged consolidated report of I.O. and grounds of satisfaction are not spelt out from the evidence of P.W.36, and Ext. 21 as well. Admission of P.W.36 in cross-examination that he has not examined the documents in detail while according sanction, is suggestive of the fact of his non-application of mind and according of sanction Ext.21 in a casual manner. Accordingly, it is found that the sanction order vide Ext. 21 is not valid in the eye of law. Resultantly, the learned Special Judge having no jurisdiction to take cognizance of offence under Section 5(1)(c) read with Section 5(2) of the P.C. Act for want of legal and valid sanction in terms of Section 6 of the P.C. Act, the trial of the appellant for the said offence stood vitiated. Therefore, the conviction of the appellant thereunder cannot be sustained and is liable to be aside.

9. On the face of aforesaid conclusion, the next question would arise with regard to validity of trial of the appellant before the Special Judge in respect of charge under Sections 409 and 468 of the I.P.C. In this context, it is relevant to note that Sub-section (3) of Section 7 of the Criminal Law

Amendment Act, 1952 is an enabling provision conferring jurisdiction on the Special Judge to try offences which arise in course of the same transaction allied with the principal offences as specified in Section 6 thereof. In view of the principle laid down by this Court in the case of ***B.K. Kutty –vrs.- State*** (supra) and ***B. A. Kameswar Rao –vrs.- State of Orissa*** : (1988) 1 OLR 457, if the Special Judge has no jurisdiction to try an offence under Section 5(2) of the P.C. Act for want of valid sanction, he lacks jurisdiction to take cognizance of allied offences and to try the same, in view of the specific powers on a Special Judge with limitations specified in Section 7(3) of the Amendment Act. On application of aforesaid principle to the instant case, the conclusion becomes inevitable that, the orders of conviction recorded against the appellant in respect of the charges under Sections 409 and 468 of the I.P.C. and the sentences passed against him thereunder cannot be sustained and thus, are liable to be set aside.

10. Assuming for a while that the sanction had been duly accorded for prosecution of the appellant under the P.C. Act and the learned Special Judge had, therefore, jurisdiction to take cognizance and to try him for all the charges, on reappraisal of the evidence on record, it would appear, for the reasons to follow, that the factual findings recorded by the learned Special Judge against the appellant holding him guilty of the offences under Sections 409 and 468 of the I.P.C., are not well founded on the evidence on record and thus, cannot be sustained in law.

11. Factum of entrustment being the essential ingredient of the offence under Section 409 of the I.P.C. it was incumbent upon the prosecution to establish in the first place the factum of withdrawal of Rs.45,000/- by the appellant from the TPF accounts of affected teachers during the alleged period, i.e., from 18.06.1979 to 07.03.1984, the reason being, factum of withdrawal would tantamount to entrustment of the amount withdrawn by the appellant or his dominion over the same. On scanning the evidence of affected teachers P.Ws. 5 to 23 and 25 to 32, on which reliance was placed by the learned court below, it is observed that their evidence inspires little confidence and is not worthy of trust. The withdrawal memos which were admittedly signed by some of the teachers have not been proved by them. Their evidence does not indicate their respective TPF account numbers with date and amount allegedly withdrawn by the appellant. Evidence of P.W.38, the handwriting expert regarding proof of alleged applications and withdrawal memos of affected teachers is not acceptable for want of his competency to prove the same and in absence of evidence showing how and by whom such documents came to his possession, inasmuch as fact of seizure thereof from the Sub-Post Master by the I.O. is not evinced by P.Ws.34 and 39. Even if the evidence of P.Ws. 5 to 23 and 25 to 32 would be accepted on their face value, withdrawal of amount of Rs.45,000/- by the appellant during the

alleged period was not established by their evidence. Besides, their evidence is contradicted by their previous police statements.

12. According to the prosecution eleven teachers had never applied for TPF advance nor B.D.O. had accorded sanction for withdrawal but the appellant having forged their signatures in the application and withdrawal forms withdrew Rs.13,700/- from their TPF accounts and misappropriated the same. Out of said teachers, only six teachers were examined namely, P.W.10, 15, 17, 18, 23 and 28. Of them, P.W.18 did not support the prosecution though the appellant was alleged to have withdrawn Rs.1,000/- from his TPF account. P.Ws. 10, 15 and 17 claimed that they had applied for TPF advance. The evidence of said witnesses is not worth acceptance, the same being contrary to the prosecution story and contradictory to Ext.72 with regard to the amount applied for and, amount allegedly withdrawn and amount allegedly misappropriated by the appellant.

13. To add to it, misappropriation of alleged amount of Rs.13,700/- by appellant in the above manner is not explicit from the charge nor does the charge disclose if the amount of Rs.45,000/- figured therein is inclusive of Rs.13,700/-. Also, this fact is not borne out from evidence of any of the witnesses. Non-examination of the other five affected teachers without any explanation by the prosecution leads to an adverse presumption as per Section 114 (g) of the Evidence Act that had they been examined their evidence would have been unfavourable to the prosecution.

14. It is not alleged by the prosecution that the appellant had forged also the sanction order of the B.D.O. One copy of sanction order is sent to the teacher concerned and two copies to the concerned Sub-Post Office, as testified by the B.D.O. P.W.37. Thus, withdrawal of an amount in excess of the sanctioned amount, by inflating the amount in withdrawal memo, was normally not possible, as the postal authorities would not have allowed such excess withdrawal by the appellant on the face of sanction order available with them.

15. Out of the P.Ws examined, except P.Ws.25 and 28 others did not allege that the appellant inflated the amount in withdrawal forms while withdrawing from their TPF accounts. According to P.W. 25, he had applied for an advance of Rs.600/- under Ext.19. But the amount was inflated to Rs.1,600/- and same was withdrawn and misappropriated by the appellant. As per the version of P.W.28 he had applied for Rs.900/- but the appellant withdrew Rs.1,900/- from his TPF account having inflated the amount in withdrawal form and did not pay the amount to him. Evidence of P.Ws.25 and 26 cannot be believed, because version of P.W.25 is self contradictory in view of his admission in cross-examination that, during enquiry by B.D.O. the appellant paid him Rs.1,000/- and prior to that he had paid Rs.600/-

whereas, version of P.W.28 is contrary to prosecution case to the effect that the appellant had withdrawn an amount of Rs.900/- only from his TPF account.

16. According to P.Ws.32 and 22, they had applied for Rs.2,000/- and Rs.1,200/- but after sanction they received Rs.1,800/- and Rs.900/- respectively and accordingly they signed the Acquinttance Roll. Nonetheless, it was alleged by them that the appellant had drawn an amount of Rs.2,100/- and Rs.1,200/- from their TPF accounts as sanctioned by B.D.O. To test the veracity of evidence of the aforesaid witnesses, proof of sanction order of B.D.O., TPF Pass Book, Acquittance Roll and TPF ledger maintained in the Post Office by the prosecution was highly essential particularly in view of the evidence of P.W.33 that the amount withdrawn from TPF accounts of teachers are debited in their Pass Books and reflected in the ledger of the Post Office. Undoubtedly, those documents are material documents, so as to throw light on the veracity of alleged withdrawal of TPF advance of teachers by the appellant and consequential misappropriation. But, evidently the prosecution has failed to produce, muchless prove, said material documents. Hence, presumption in terms of Section 114 of the Evidence Act is to be drawn that had those vital documents been proved, the prosecution case would have been falsified. So also, in the circumstances, reasonable doubt would arise if the appellant, in fact, had drawn the alleged amount from the TPF accounts of teachers and if so, whether he misappropriated or converted the same to his own use instead of making payment to the concerned teachers. The benefit of said reasonable doubt has to be extended to the appellant, as per settled position of law.

17. Furthermore, conduct of the P.Ws. 5 to 23 and 25 to 32 in remaining silent for a long period after submitting TPF applications without making enquiry about sanction and withdrawal followed by their inaction in making complaint before the B.D.O. or S.I. of Schools, being contrary to normal human behaviour, renders the veracity of their testimony dubious and unworthy of credit. Another circumstance which throws doubt on the factum of withdrawal from TPF accounts by the appellant emerges from the admitted factual position that no deduction was made from the monthly salary of the aforesaid witnesses subsequent to the alleged withdrawals.

18. Much reliance was placed by the prosecution on the alleged extrajudicial confession made by the appellant before P.W.37 during enquiry conducted by him with regard to withdrawal of Rs.45,000/- from the TPF accounts of teachers and misappropriation thereof as well as the factum of making deposit of Rs.37,000/- by appellant towards recovery of misappropriated amount subsequently. According to P.W. 37, the appellant gave recovery of Rs.37,000/- through treasury challan under intimation to

him. Said treasury challan has not been seized by the I.O. nor proved by the prosecution. Factum of deposit of money could have been proved by documentary evidence. Since prosecution has withheld the treasury challan, oral evidence of P.W.37 is of little assistance to the prosecution. Accordingly, factum of giving recovery of Rs.37,000/- by the appellant subsequent to alleged misappropriation is not acceptable in the absence of evidence to indicate when deposit was made and under which GPF account of which teacher, as admittedly after 1984 the TPF accounts were converted into GPF account.

Evidence of P.W.37 reveals that he conducted enquiry from the month of March to August , 1984. Apparently that was an administrative enquiry against the appellant who was then under the administrative control of the B.D.O. Such enquiry, if any, was supposed to be followed by a report and proceedings of the enquiry must be in black and white. Strangely enough, the I.O. has not seized any such enquiry report or proceedings of the enquiry, nor prosecution has led documentary proof thereof in the trial court.

P.W.37 deposed in his cross-examination that appellant did not admit to have misappropriated in writing. Evidence of P.W.37 is that the appellant submitted 42 applications vide Exts. 22/3 to 22/41 to him admitting therein to have misappropriated the TPF amount of primary school teachers. As it transpires from his cross-examination, said applications were given during investigation of this case. Moreover, the appellant wrote some applications in his presence. In the circumstances, I am of considered judgment that the alleged confession made by the appellant before his superior authority was not voluntary. Rather the same appears to have been obtained by inducement or promise of favour or false hope. Accordingly, the alleged extrajudicial confession made by the appellant before P.W.37 is not admissible in evidence being hit by Section 24 of the Evidence Act. This apart, evidence of P.W.30 reveals the presence of Inspector of Vigilance during enquiry conducted by B.D.O. when allegedly the appellant made confession. So assuming for a while that the appellant confessed his guilt before P.W.37 during enquiry, the same would be inadmissible in evidence in terms of Section 25 of Evidence Act. It thus follows from the aforesaid that charge under Section 409 of the I.P.C., has not been established beyond all reasonable doubt against the appellant. So, the order of conviction recorded against him thereunder has to be set aside.

19. Conviction of the appellant under Section 468 of the I.P.C. appears to have been founded on the sole testimony of P.W.38, the Handwriting Expert and his report vide Ext.70. As per settled position of law, it may be hazardous to base a conviction solely on the opinion of a handwriting expert, because the science of identification of handwriting is not so perfect. Moreover, all human judgment is fallible and an expert may go wrong

because of some defect of observation, some errors of premises or honest mistake of conclusion. So, in appropriate cases, corroboration may be sought.

20. On scrutiny of evidence of P.W.38 read with Ext.70, it is found that basing on the specimen and admitted writings of the appellant marked as S-1 to S-182, P.W.38 examined and compared the same with the disputed signatures in documents marked as Q-1 to Q-56, i.e., postal withdrawal forms and applications received from the I.O. under his requisition vide Ext.23. Accordingly, he concluded that the standard writings and signatures marked S-1 to S-182 and the disputed signatures marked Q-7 to Q-10, Q-12, Q-13, Q-17, Q-18, Q-24 to Q-32, Q-35, Q-36 and Q-48 to Q-51 are in the handwriting of one person i.e. the appellant. However, disputed signatures marked Q-3, Q-6, Q-39, Q-52 and Q-53 are not in the handwriting of the appellant. This apart, he could not opine if the disputed signatures marked Q-1, Q-2, Q-4, Q-11, Q-14 to Q-16, Q-19 to Q-23, Q-33, Q-34, Q-37, Q-38, Q-40 to Q-44, Q-46, Q-47 and Q-54 to Q-56 are in the handwriting of the appellant. Thus, all the disputed writings and signatures are not proved to be in the handwriting of the appellant. In any event it is difficult to attach credence to the testimony of P.W.38 and probative value of his report vide Ext.70 gets belittled as there is nothing on record to indicate how, when and by whom the specimen and admitted writings marked S-1 to S-182 came to the possession/custody of P.W.38. Seizure of admitted writings of appellant has not been proved by the prosecution and admittedly the I.O. has not obtained the specimen writings of appellant under the authority of the court and with the assistance of any competent Magistrate. The appellant has disowned authorship in respect thereof. P.W.38 is not competent to prove the same as he testified that those writings of appellant were not collected in his presence. Ext.23, under which he claimed to have received some documents, does not find mention in the list of documents nor does it disclose which documents were disputed and which documents were to be examined with reference to which documents. In such circumstances, when P.W.38 made the comparison of disputed signatures with the alleged specimen and admitted writings of the appellant marked S-1 to S-182, taking the same as the standard set, the conclusions reached by him would be fallacious definitely thereby making his final opinion vulnerable. Accordingly, his evidence and report are not found to be a safe basis to sustain the charge under Section 468 of the I.P.C. against the appellant. In this view of the matter, order of conviction of the appellant under Section 468 of the I.P.C. cannot be sustained.

21. In view of the above discussions, the orders of conviction and sentences passed against the appellant are set aside and the appellant is acquitted of all the charges. Criminal appeal is, accordingly, allowed.

2010(I)ILR – CUT-915

B.K.PATEL, J.

RPFAM NO.44 OF 2009 (Decided on 02.03.2010.)

ARUN KUMAR NAYAK ……. Petitioner

-V-

URMILA JENA @ URMILA NAYAK ……. Opp.Party

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

Maintenance pleaded for the minor son in the body of the application – He was neither made a party in the cause title nor any prayer made in the prayer portion – Held, Learned trial Court is justified in awarding maintenance for him. (Para 6,7)

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

Grant of maintenance – From when – Ordinarily maintenance is allowed from the date of application – However where some interim maintenance is paid, subsequently the Court may direct that maintenance as decided in the final order may be paid from the date of the final order – Similarly where the case is unnecessarily lingered due to latches of the wife the Court may direct that payment of maintenance should be made from the date of order and not from the date of application.

In the present case since interim maintenance had been granted learned trial Court directed payment of maintenance from the date of application. (Para 8)

Case laws Referred to:-

1.2005(4) SBR 91 : (Savitaben Somabhai Bhatiya -V-State of Gujurat & Ors.).
2.(1991) 4 OCR 11 : (Tankadhar nath -V-Pravabati Nath).
3.1988 CRI.L.J. 793 : (Smt.Yamunabai Anantrao Adhav-V-AnantraoShivram Adhav & Anr.).
4.1993(1) Crimes 16 Gujurat : (Arunabehn T. Ramanuj -V- Vasudev P.Nimavat).
5.54(1982) CLT 566 : (Raibari Behera -V- Mangaraj Behera).
6.1997 (4) Crimes 154 : (Mohd. Ismail -V- Smt. Bilquees Bano).
7.1990 (3) Crimes 206 : (Dharmendra Kumar Gupta -V- Mrs.Chandra Prabha Devi).

8.1993 (2) Crimes 623 Allahabad : (Harpal -V- Smt. Meena Devi).
9.1997(II) OLR (SC) 379 : (Smt.Jasbir Kaur Sehgal -V- The District Judge, Dehradun & Ors.)
10.2007 (II) OLR (SC) 773 : (Iqbal Bano - V- State of U.P. & Anr.).
11.AIR 1999 SC 3348 : (Dwarika Prasad Satpathy -V- Bidyut Prava Dixit & Anr.)
12.90 (2000) CLT 707 : (Kanhu Charan Jena -V- Smt. Nirmala Jena).

For Petitioner – M/s. B.K.nanda, P.Nanda & S.panda.
For Opp.Party - M/s. L.Mishra, A.K.Jena, B.R.Sahu, T.K.Praharaj, K.K.Jena & S.M.Dhal.

B.K.PATEL, J. This revision is directed against order dated 10.8.2009 passed by the learned Judge, Family Court, Cuttack in Criminal Proceeding No.812 of 2002 directing the petitioner under Section 125 of the Cr.P.C. to pay to the opposite party Rs.1,000/- and her son Rs.500/- towards maintenance from the date of application subject to adjustment of interim maintenance already paid alongwith litigation cost of Rs.2,000/-.

2. Asserting her to be the petitioner's wife, opposite party filed application for award of maintenance at the rate of Rs.2,000/- for herself and Rs.1,000/- for her minor son per month and Rs.2,000/- towards litigation expenses. According to opposite party, her marriage with the petitioner was solemnized on 12.3.1993 in accordance with Hindu rites and customs. In response to petitioner's demand, opposite party's father paid sum of Rs.40,000/- alongwith gold ornaments and other household articles at the time of marriage. Out of their wedlock a male child was born on 19.5.1994 after which the petitioner took them to his to Bhubaneswar where he was working. While living in Bhubaneswar the petitioner subjected the opposite party to physical and mental torture in connection with his demand for Rs.40,000/- as dowry in order to purchase a car. Opposite party's father could manage to pay to the petitioner Rs.20,000/- only which was utilized by the petitioner for purchasing household articles. Also, petitioner remained absent for a period of five to six days in a month on the pretext of undertaking official tours. On 15.9.2001 the petitioner came to his house with one Lovabati Mallik (O.P.W. 2) and on being asked he stated that she was working in his office. Petitioner also stated that O.P.W.2 would reside with them in the house as petitioner's mistress as he had married her. On enquiry she could learn that the petitioner had illicit relationship with O.P.W.2 prior to her marriage. During the stay of O.P.W.2 in their house, petitioner physically assaulted opposite party on many occasions at the instance of O.P.W.2. Finding no other way opposite party sent information regarding the situation to her father's house. On intervention of some persons including opposite party's cousin brother,

the matter was compromised and it was decided that the petitioner would not have any relationship with O.P.W.2 and she would not be allowed to live in their house. However, on the very day, after departure of persons on whose intervention compromise had been effected, petitioner and O.P.W.2 tied opposite party's hands and legs and assaulted her by means of a lathi. When she shouted they gagged her by a piece of cloth. When opposite party's son started shouting, petitioner and O.P.W.2 left the house and resided together in another house. Opposite party apprehending danger to her life came to her father's house with her son. Opposite party's father and other relations tried to meet the petitioner but he avoided them. In such circumstances, opposite party lodged F.I.R. on the basis of which Khandagiri P.S. Case No.289 of 2001 was registered and in course of investigation petitioner and O.P.W.2 were arrested. Petitioner having no source of income to maintain herself and her son who was reading in Class-III whereas the petitioner's had income of Rs.7,000/- per month from salary and Rs.50,000/- per annum from agricultural land, application for maintenance was filed.

3. In his written statement petitioner admitted that he was an employee in the office of Executive Engineer, Central Ground Water Board, Bhubaneswar but he denied the allegations made by the opposite party. However, it was averred that his salary was around Rs.2,200/- per month. He also denied to have received Rs.40,000/- alongwith gold ornaments as well as other household articles towards dowry. It was asserted in the written statement that opposite party lodged F.I.R. against him and O.P.W.2 on false allegations. It was categorically averred in the written statement that paternity of opposite party's son is questionable.

4. In order to substantiate their respective assertions, opposite party examined three witnesses including herself as P.W. 1 and relied upon documents marked Exts. 1 to 7 whereas petitioner examined two witnesses including himself as O.P.W.1 and relied upon documents marked Exts. 'A' to 'D'.

5. In assailing the impugned order the following contentions were raised by the learned counsel for the petitioner:

(i) as opposite party's son did not figure as one of the petitioners in the application under Section 125 of the Cr.P.C., he is not entitled to maintenance;

(ii) in the absence of any reason assigned by the learned Judge, Family Court, Cuttack, direction to pay maintenance amount from the date of application is not sustainable; and

(iv) learned Judge, Family Court, Cuttack committed illegality in holding that opposite party is legally married wife of petitioner inasmuch as petitioner adduced cogent evidence to establish that

petitioner had married O.P.W.2 and their marriage was subsisting when petitioner took opposite party as his wife.

In support of his contentions learned counsel for the petitioner relied upon the decisions in ***Savitaben Somabhai Bhatiya –vrs.- State of Gujarat & Ors.*** : 2005 (4) SBR 91, ***Tankadhar Nath –vrs.- Pravabati Nath*** : (1991) 4 OCR 11, ***Smt. Yamunabai Anantrao Adhav –vrs.- Anantrao Shivram Adhav and another*** : 1988 CRI.L.J. 793, ***Arunabehn T. Ramanuj –vrs.- Vasudev P. Nimavat*** : 1993 (1) Crimes 16 Gujurat, ***Raibari Behera –vrs.- Mangaraj Behera*** : 54 (1982) C.L.T. 566, ***Mohd. Ismail –vrs.- Smt. Bilquees Bano*** : 1997 (4) Crimes 154, ***Dharmendra Kumar Gupta –vrs.- Mrs. Chandra Prabha Devi*** : 1990 (3) Crimes 206 Allahabad and ***Harpal – vrs.- Smt. Meena Devi*** : 1993 (2) Crimes 623 Allahabad.

6. In reply, it was submitted by the learned counsel for the opposite party that in the body of the application opposite party had pleaded that she needed maintenance of Rs.2,000/- per month for her and Rs.1,000/- per month for her minor son. Therefore, even in the absence of portrayal of her minor son as one of the petitioners in the cause title and in the absence of specific mention in the prayer portion of the application for grant of maintenance to her minor son, learned trial court was perfectly justified in awarding maintenance to the minor son also. As learned trial court had granted interim maintenance during the pendency of the proceeding, upon considering the facts and circumstances of the case, no further reason was required to be assigned for grant of maintenance from the date of application. It was further contended that in his written statement the petitioner neither denied his marriage with opposite party nor pleaded that at the time of his marriage with opposite party, his marriage with O.P.W.2 was subsisting. There is no whisper in the written statement regarding marriage between the petitioner and O.P.W.2. In such circumstances, learned Judge, Family Court, Cuttack rightly ignored petitioner's assertions in this regard. Learned counsel for the opposite party relied upon the decisions in ***Smt. Jasbir Kaur Sehgal –vrs.- The District Judge, Dehradun and others*** : 1997 (II) OLR (SC) 379, ***Iqbal Bano –vrs.- State of U.P. and another*** : 2007 (II) OLR (SC) 773, ***Dwarika Prasad Satpathy –vrs.- Bidyut Prava Dixit and another*** : AIR 1999 SC 3348 and ***Kanhu Charan Jena –vrs.- Smt. Nirmala Jena*** : 90 (2000) C.L.T. 707 in support of his contentions.

7. The first contention raised on behalf of the petitioner objecting to award of maintenance in favour of opposite party's minor son desires mention to be rejected only. In paragraphs 11 and 12 of the maintenance application, the opposite party has pleaded :

> "11. That the petitioner has no income of her own and she is leading a miserable life alongwith her son who is now reading in Class-III at Jojangi Abulpura U.G.M.E. School. The opp. Party who is earning

> Rs.7,000/- per month from service and Rs.50,000/- per annum out of agricultural land did not provide any maintenance to the petitioner.
>
> 12. that under the aforesaid fact and circumstances the petitioner needs Rs.2000/- per month for her maintenance and Rs.1000/- per month for her minor children's maintenance, clothing and education, unless the opp. party will be directed to prove the same the petitioner will die out of starvation." (*sic)*

In the body of the application also it has been categorically pleaded that a male child was born out of opposite party's wedlock with the petitioner and, therefore, there is absolutely no merit in the contention that the petitioner did not make application for award of maintenance to the minor child also. In ***Smt. Jasbir Kaur Sehgal –vrs.- The District Judge, Dehradun and others*** (supra), arising out of proceeding under Section 24 of the Hindu Marriage Act, 1955, it has been laid down by the Hon'ble Supreme Court that if the wife has no independent income or support and for litigation expenses and also maintaining her daughter, her right to claim maintenance includes the right to claim maintenance of unmarried daughter.

8. Relying upon the decisions of the Allahabad High Court in ***Mohd. Ismail –vrs.- Smt. Bilquees Bano*** (supra), ***Dharmendra Kumar Gupta –vrs.- Mrs. Chandra Prabha Devi*** (supra) and ***Harpal –vrs.- Smt. Meena Devi*** (supra), it was contended by the learned counsel for the petitioner that in absence of any special reason assigned by the learned Judge, Family Court, Cuttack, direction to pay maintenance from the date of application is not sustainable in law. However, in ***Kanhu Charan Jena –vrs.- Smt. Nirmala Jena*** (supra) relied upon by the learned counsel for the opposite party, it has been held by this Court:-

> "xx xx Ordinarily, if maintenance is granted, direction is usually given for payment of maintenance from the date of the application. Where, however, some interim maintenance is paid, subsequently the Court may direct that maintenance as decided in the final order may be paid from the date of the final order. Similarly, where the case is unnecessarily lingered due to laches of the wife, the Court may for justifiable reason direct that payment of maintenance should be from the date of order and not from the date of application. No hard and fast rule can be laid down on this aspect and the matter is essentially one of discretion of the Court. In the present case, the Magistrate had not given any reason as to why maintenance is to be paid from the date of the order and not from the date of application. The revisional Court has considered this aspect and has directed that maintenance should be paid from the date of application. While exercising jurisdiction under section 482, Code of Criminal

Procedure, there is hardly any scope for interference with such discretionary order of the revisional Court."

Moreover, in the present case, considering the facts and circumstances, interim maintenance had been granted. Therefore, the learned trial court required to assign no further reason in support of the direction that the opposite party and her son were entitled to maintenance since the date of application.

9. The third and most vital contention raised on behalf of the petitioner is with regard to opposite party's claim to be his legally married wife. This contention is based on the assertion that the petitioner had married O.P.W.2 prior to his marriage, if any, with the opposite party, it is argued that the term 'wife' refers only to legally married wife. If either party has a spouse living at the time of marriage, marriage is invalid and void under the Hindu Marriage Act. Marriage of a woman with a man already having spouse living as per Hindu rites is a complete nullity. In this context decisions in ***Savitaben Somabhai Bhatiya –vrs.- State of Gujarat & Ors.*** (supra), ***Tankadhar Nath –vrs.- Pravabati Nath*** (supra) and ***Smt. Yamunabai Anantrao Adhav –vrs.- Anantrao Shivram Adhav and another*** (supra) were pressed into service. There is no dispute to the proposition of law that a wife claiming maintenance under Section 125 of the Cr.P.C. has to be a legally married wife and that the Hindu Marriage Act does not recognize a second marriage during subsistence of previous marriage. However, in the present case, it is observed that the petitioner in his written statement did not deny status of the opposite party as his wife as claimed by her in the application under Section 125 of the Cr.P.C. The written statement filed by the petitioner is also altogether silent regarding his marriage, if any, with O.P.W. 2. Opposite party laid cogent evidence regarding solemnization of her marriage with the petitioner by examining herself as well as two other witnesses. Out of whom P.W.2 took photographs of the marriage ceremony. She also filed voter identity cards depicting her as wife of the petitioner. It was only in course of cross-examination of the opposite party it was suggested on behalf of the petitioner that she was not married to him and that O.P.W.2 is his married wife. No independent witness was examined on behalf of the petitioner to prove solemnization of his marriage with O.P.W.2. In course of his cross-examination, petitioner, in spite of categorically denying his relationship with the opposite party and her minor son, deposed; "I do not know if I have a son through the petitioner Urmila and if that son is now residing with petitioner. I do not know if video recording of my marriage with Urmila Nayak, petitioner is filed in this case in a C.D."

10. Learned counsel for the petitioner made an attempt to come over the obstacle of non-pleading of material facts upon reliance to the decisions in

Arunabehn T. Ramanuj –vrs.- Vasudev P. Nimavat (supra) and ***Raibari Behera –vrs.- Mangaraj Behera*** (supra). Neither of the decisions relied upon by the learned counsel for the petitioner supports the plea that even in the absence of pleading in the written statement filed in a proceeding under Section 125 of the Cr.P.C., evidence adduced in support of an objection can be accepted. In the aforesaid decisions it has simply been held that the law of pleading for civil cases is more strict and loose pleading in an application under Section 125 of the Cr.P.C. would not be fatal to the applicant. As has been reiterated by the Hon'ble Supreme Court in ***Iqbal Bano –vrs.- State of U.P. and another*** (supra), proceedings under Section 125 of the Cr.P.C. are civil in nature. In ***Dwarika Prasad Satpathy –vrs.- Bidyut Prava Dixit and another*** (supra), it has also been laid down that in proceedings under Section 125 of the Cr.P.C., which are summary in nature, strict proof of performance of essential rites is not required. In the present case, opposite party categorically pleaded, and also laid evidence to substantiate the pleading, that her marriage with the petitioner was solemnized as per Hindu rites and customs. In his written statement, the petitioner did not deny such averments made in the application. He also did not plead regarding his marriage with O.P.W.2. Therefore, this is not even a case of loose pleading on the part of petitioner. In the absence of pleading, denial of factum of marriage at a belated stage on the ground of subsistence of previous marriage, has to be ignored. There is no merit in the third contention also.

11. In view of the above discussion, there is no merit in the revision application. Therefore, the revision is dismissed.

Revision dismissed.

2010(I)ILR – CUT-922

B.K.NAYAK ,J.

LAA NO. 17 OF 2007. (Decided on 11.05. 2010.)

COLLECTOR, LAND ACQUISITION, KALAHANDI. …… Appellant

-V-

GOUTAM DHARUA & ORS. …… Respondents

LAND ACQUSITION ACT, 1894 (ACT NO.1 OF 1894) – SEC.23.

Compensation – Determination of – For Acquisition of similar nature of land having similar advantage under the very same notification compensation assessed at the rate of Rs.64,000/- per acre has already been accepted by the State Government and payment has already been made to the claimants – So the compensation in the present case should also be fixed at Rs.64,000/-.

Held, compensation of Rs.80.000/- per acre as has been awarded by the learned trial Court is reduced to Rs.64,000/- per acre.

(Para 7 & 8)

Case laws Referred to:-

1.AIR 1996 S.C. 106 : (State of Haryana -V- Gurcharan Singh & Anr.)
2.AIR 2002 SC 1423 : (Airports Authority of India - V- Satya Gopal Roy & Ors.)
3.2006 (II) OLR 329 : (State of Orissa -V- Giridhari Nayak).

For Petitioner – M/s. Additional Standing Counsel.
For Opp.Party – Mr. D.Mund, Advocate.

B.K.NAYAK, J. This appeal has been directed against the judgment dated 27.03.2004 passed by the learned Civil Judge (Senior Division), Dharmagarh in MJC No.32 of 2001 which was initiated on the basis of the petition filed by the present respondents claiming higher compensation u/s.18 of the Land Acquisition Act.

2. The brief facts of the case are that the Government of Orissa by virtue of a Notification dated 12.03.1999 acquired Ac.3.40 dec. or land of the respondents for construction of Chahaka Minor Irrigation Projects for which a compensation of Rs.93,681/- was awarded in favour of the claimants, which they received on protest alleging that the compensation was assessed without considering the potentiality and the market value of the acquired land. They, therefore, claimed higher compensation. A reference under Section 18 was made for which the present MJC was registered before the learned Civil Judge (Senior Division), Dharmagarh. The appellant, who was the opposite party before the learned Court below denying the allegations made by the claimants contended that the market value of the land in

question was assessed properly by taking into account the sale transactions made in nearby village, Nuagaon for the year 1997. On consideration of the evidence on record, the learned trial Court came to the conclusion that the land in question was agricultural land on which cotton crops was being grown, the average yield from which towards profit cannot be less than Rs.4000 to Rs.5000/- per acre. Thus applying 16 years multiplier the learned Court below fixed the value of the land at Rs.80,000/- per acre and directed the same to be paid to the claimant-respondents along with solatium, interest and other statutory benefits as provided under the Land Acquisition Act.

3. It is contended by the learned Additional Standing Counsel appearing on behalf of the appellant that the annual yield and income determined by the learned Civil Judge, though may not be improper, yet the fixation of valuation of the land by applying 16 multiplier is legally unsustainable in view of the decision of the Apex Court in the case of State of Haryana-vrs. Gurcharan Singh reported in AIR 1996 SC 106. It is his further submission that as found by the learned trial Court, the similar land of another adjacent land owner which was acquired under the vary same Notification for the very same purpose was valued at Rs.64,000/- per acre by the learned trial Court vide judgment (Ext.2) passed in MJC No.31 of 2001 and therefore, the learned Court below should not have assessed the value at Rs.80,000/- per acre in the present case.

4. The learned counsel for the respondents on the other hand submits that the impugned judgment does not warrant interference either on facts or on law.

5. It is seen from paragraph-7 of the trial Court judgment that the learned Court below has taken note of the fact that similar nature of land where cotton crop was also being grown, was acquired under the very same notification and in the MJC No.31 of 2001, the learned Court directed to give compensation, fixing the value of land at Rs.64,000/- per acre. However, having come to the conclusion that the annual income of the respondents out of their acquired land was about Rs.5000/- per acre, it assessed the value at Rs.80,000/- per acre by applying 16 years multiplier.

6. There is no dispute that the land in question was un-irrigated agriculture land. In this context, the principle laid down in the case of ***State of Haryana-v-Gurcharan Singh and another etc. AIR 1996 Supreme Court, 106*** rules the field. In that case,d after indicating the mode of determination of compensation for agricultural land and for land having fruit bearing trees on the basis of yield thereof, the Apex Court observed as follows :

"…… Under no circumstances, the multiplier should be more than 8 years multiplier as sit is settled law of this Court in catena of decisions that when the market value is determined on the basis of the yield from the trees or plantation, 8 years multiplier shall be appropriate

multiplier. For agricultural land 12 years multiplier shall be suitable multiplier"

The aforesaid ratio land down in ***Gurcharan Singh*** case (supra) was also approved by a larger Bench of the Apex Court, in the case of ***Airports Authority of India -v- Satya Gopal Roy and others : AIR 2002 SC 1423*** wherein it was observed as follows:

> "Hence, in our view, there was no reason for the High Court not to follow the decision rendered by this Court in Gurcharan Singh's case (supra) and determine the compensation payable to the respondents on the basis of the yield from the trees by applying 8 years' multiplier. In this view of the matter, in our view, the High Court committed error apparent in awarding compensation adopting the multiplier of 18."

The ratio laid down in ***Gurcharan Singh's*** case and in the ***Airports Authority of India's*** case (supra) has also been followed by this Court in the case of ***State of Orissa –v- Giridhari Nayak 2006(II) OLR 329*** where in for acquisition of Agricultural land, this Court adopted 12 multiplier instead of 16 for the assessment of compensation.

7. In the light of the principles decided in the aforesaid case, the amount of compensation in the instant case should be assessed by applying the 12 multiplier which would come to Rs.5000/- X 12=Rs.60,000/-. However, having regard to the fact that for acquisition of similar nature of land having similar advantage under the very same notification the assessment of compensation at the rate of Rs.64,000/- per acre has already been accepted by the State Government and payment has already been made to the claimants, I am of the view that the compensation in the present case should also be fixed at Rs.64,000/- per acre.

8. Accordingly, the compensation of Rs.80,000/- per acre as has been awarded by the learned trial Court is reduced to Rs.64,000/- per acre.

The appeal is thus, allowed in part, but in the circumstance of the case without order for costs.

Appeal allowed in part.

2010(I)ILR – CUT-925

S.K.MISHRA, J.

W.P. (C). NO.2342 OF 2009. (Decided on 18.05. 2010.)

SASMITA SAHOO ……. Petitioner

-V-

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

(A) CONSTITUTION OF INDIA, 1950 –ART.226.
Anganwadi worker – As per the revised guidelines applicants should be a resident of the service area of the Anganwadi Centre – Guidelines challenged – Held, State has the authority to impose condition of nativity with regard to Anganwadi workers.

(Para10)

(B) CONSTITUTION OF INDIA, 1950 – ART.226.
Anganwadi worker – Appointment of – Petitioner's name reflected in the short list – Finally her Candidature was rejected as she does not reside in the service area of the Anganwadi Centre – Order challenged.

In this case petitioner's house has been deliberately excluded from the service area by pick and choose method – Held, order rejecting her Candidature was quashed so also the selection process – Direction issued to the Opp.Parties to start the process afresh from the stage of defining service area of the aforesaid Anganwadi Centre. (Para 10)

Case laws Referred to:-

1.2007(II) OLR 577 : (Chandramani Jena & Ors.-V- State of Orissa & Ors.).

2.(2007) 11 S.C.C. 681 : (State of Karnataka & Ors.-V- Ameerbi & Ors.).

For Petitioner – M/s.Pradeep Kumar Das & T.K.Mishra.
For Opp.Parties – Addl.Govt. Advocate.
(for Opp.Party No.1 to 3)
Mr. Bhaskar Chandra Panda, Sangeeta Mishra, Biswanath Das, J.Panda & L.Das.
(for Opp.Party No.4)

S.K.MISHRA, J. Petitioner in this case assails the order passed by the Collector, Bhadrak on dated 12.12.2008 in pursuance of the directions given by this Court in W.P.(C) No.9420 of 2008.

2. Petitioner was an applicant for being engaged as Anganwadi Worker with respect to Kaupur, Belagadia Anganwadi Centre, district: Bhadrak. Her application was accepted and in the short list her name was reflected, but

finally her candidature was rejected on the ground that she does not reside in the service area of the aforesaid Anganwadi Centre. Thereafter, she preferred a writ application before this Court, which was disposed of directing the Collector, Bhadrak to enquire into the matter and to decide, if irregularity, as alleged, has been committed and to pass necessary orders strictly in accordance with law and the guidelines.

Further case of the petitioner is that she has obtained the maximum marks in the HSC Examination among the applicants, and therefore, she is most eligible to be selected as Anganwadi Worker for the aforesaid Anganwadi Centre. It is further contended that though the Anganwadi Centre area has been notified, it has been done with material irregularities by keeping and choosing only to exclude her from zone of consideration. The petitioner also challenges the legality of imposing condition of nativity within the service area of the Anganwadi Centre. So, two essential questions arise in this case, namely, whether the condition of nativity is bad being ultra vires of Article 16 of the Constitution of India, and secondly, whether the authorities were correct in preparing the service area of this particular Anganwadi Centre.

3. This Court in ***Chandramani Jena and others Vs. State of Orissa*** *and others*, 2007(II) OLR 577 has held that the State has no right to make law restricting appointment on the ground of residence. The aforesaid decision of this Court relates to selection of Swechhasevi Sikshya Sahayak. In the advertisement it was stipulated that applicants should be the resident of the block in question. The Division Bench ruled that the State has no right to make a law restricting the appointment on the ground of residence. The Court further ruled that in policy matters Court has to be slow and circumspect before interfering with the same but the Governments right to frame a policy is always subject to constitutional mandate. If the complaint is that the mandate is flouted, then only the Court, which can examine the same and the Court is duty bound to do so. Observing thus the Division Bench of this Court has held that stipulation of residence of the block area as criteria for applying as Swechhasevi Sikshya Sahayak is bad as it is barred under Articles 16(2) of the Constitution of India, 1949.

4. It is observed here that an Anganwadi Worker is not a Civil Post but rather is a volunteer. The Supreme Court in ***State of Karnataka and Others Vs. Ameerbi and others***, (2007) 11 Supreme Court Cases 681, has held that the post of Anganwadi Workers are not statutory posts. They have been created in terms of the scheme. It is one thing to say that there exists a relationship between employer and employee and between the State and the Anganwadi Workers. But it is another thing to say that they are holders of civil posts. The Supreme Court took note of the fact that the presence of the Anganwadi Worker in their respective villages is extremely important.

They are supported to make significant contribution to the society. They are required to carry out a large number of activities, primary and being welfare of the children. Further, it is noted that Anganwadi Workers do not carry any functions of the State. They do not hold post under any statute. Their posts are not created. The Supreme Court further held that the recruitment rules ordinarily applicable to the employees of the State are not applicable in their case. The State is not required to comply with the Constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India. No process of selection for the purpose of their appointment within the constitutional scheme existed.

5. In the aforesaid case, the Supreme Court further held that the rules framed under the proviso to Articles 309 of the Constitution of India are not attracted in the case of Anganwadi Worker. They are appointed under the under the scheme which is not a permanent nature although it might have continued for a long time. Appointments made under the Scheme and recruitment process being carried out through a committee would not render the incumbents thereof holders of civil posts. There is no rule or regulation governing the mode of recruitment recognizing a distinction between a post created by the Central Government or the State Governments in exercise of their power under Articles 77 or 162 of the Constitution of India or under a Statute vis-à-vis cases of this nature which are sui generies. The Supreme Court further held that the protection available under Article 311 of the Constitution of India also is not attracted in case of the Anganwadi Workers and thus, the Supreme Court held that the Anganwadi Workers are not holders of civil posts.

6. In view of the aforesaid backdrop the guidelines issued by the Government of Orissa in the Women and Child Welfare Development Department has to be considered. It is seen that the revised guidelines for selection of Anganwadi Worker were issued on 02.05.2007. The revised guidelines provide that the applications for selection of volunteers to work as Anganwadi Workers will be invited for each village/Anganwadi Centre area from women residing in the said village/Anganwadi Centre area. Among other stipulation it is seen that the Anganwadi Worker is a volunteer who gets an honorarium for the service rendered by her to the less privileged persons of her own community. She is not a government servant with any fixed or graduated pay scale. The provisions of ORV Act, 1975 and Employment Exchange (compulsory Notification of vacancies) Act, 1959 are not applicable to such selection.

7. The condition that the applicants should be from each village/Anganwadi Centre area has created the confusion but thereafter the State Government has brought out further clarification in the Government of Orissa, Women and Child Development Department letter dated 18.12.2007

wherein it has been clarified that in case in a village more than one Anganwadi Centre are opened the candidate should specify Anganwadi Centre area in which she is a resident and should specify in an affidavit that she belongs to the Anganwadi Centre area of the said village. If that is found incorrect/false she should be disengaged forthwith and suitable criminal action should be taken against her. Thus, from this clarification it is clear that the State Government intended that the applications should be invited from the residents of the service area of the particular Anganwadi Centre for which an advertisement has been issued for selection of Anganwadi Worker. In case no suitable candidate is available from the said area, then applications from the village in which the Anganwadi Centre area situates may be accepted even though the applicant is not a resident of the service area.

8. This policy of the Government has a rationale behind it. It is noted earlier that the Anganwadi Worker is not a civil servant rather is a volunteer. She is expected to render a very important function of providing pre-natal and post-natal early childhood care service of her community. Her continuing presence in the community is essential for that reason. If a person is not a resident in the community which is target area of the Anganwadi Centre, then it may not be always possible for the volunteer to attend to the needs of the expectant mothers and children. Secondly, it is noted that Anganwadi Worker is always paid a paltry sum as honorarium. It is not possible to her to take a house on rent in the service area of the Anganwadi Centre to reside there. Thus, on these two grounds, the Court is of the opinion that the policy decision taken by the State Government is correct. As already pointed out, the selection of Anganwadi Worker cannot be challenged for violating Articles 14 and 16 of the Constitution of India. This Court comes to the finding that there is no justifying reason to hold that the conditions stipulated in the revised guidelines by the State Government to the effect that the applicants should be a resident of the service area of the Anganwadi Centre requires any interference.

9. Learned Collector, Bhadrak after perusing the records has reflected in his order as follows:

> "It is revealed from the report of CDPO that the Anganwadi Centre has been constituted by taking house hold no.1 to 24, 35 and 50 in ward no.13 and house hold no.18 to 21, no.25 to 49, no.51 to 53 and no.63 in ward no.14. No houses of ward no.8 where the petitioner resides, has been included in the AWC area. It is clearly evident from the report that the AWC area has not been well defined. All the houses of the ward shown in the voter list have not been included in AWC area. No reasons have been ascribed for omission of houses and constituting AWC taking houses by pick and choose method. In

> all fairness, it will be proper to constitute AWC in a systematic and chronological order incorporating there in the houses of ward wise voter list. It appears that the CDPO has accepted the application of the petitioner and included her name in the evaluation sheet showing the merit of the candidates. The petitioner has secured highest marks as per the entries in evaluation sheet. But she has not been finally selected on the ground that she does not belong to the AWC area. If it is so, her application should have been rejected at the preliminary stage. The CDPO and other members have committed a gross mistake by including the name of the petitioner in the evaluation sheet and there after rejecting her case giving scope for entertaining doubt on fairness and transparency of selection process. The CDPO should take proper care in future not to commit such gross mistake and create any embarrassing situation. Due care should be taken to make the selection process free, fair and transparent without any procedural irregularities."

10. Thus, the findings of the Collector, Bhadrak firstly defining the service area of the Anganwadi Centre is not proper and houses have been included by pick and choose method. Secondly, the acceptance of the application of the petitioner and reflecting the same in the merit list and thereafter rejecting the said application on the ground that nativity has cast a doubt on the whole selection process. It is one thing to say that the State has the authority to impose the condition of nativity with regard to houses of Anganwadi Worker, but it is another thing to say that the petitioner has been deliberately excluded by pick and choose method. Therefore, in this case, the Court finds that the second question should be answered in favour of the petitioner. The order passed by the learned Collector, Bhadrak as at Annexure-3 should be quashed so also the selection process and the process of delineating service area of the aforesaid Anganwadi Centre. It is needless to say that the selection of opposite party no.5 as Anganwadi Worker is therefore bad. The opposite parties are directed to start the process afresh from the stage of defining service area of the aforesaid Anganwadi Centre all over again in accordance with the guidelines prescribed by the State Government. This order be communicated to the opposite parties.

Writ petition is accordingly disposed. Petitioner is directed to file requisites within three days.No Costs.

Writ petition disposed of.

2010(I)ILR – CUT-930

S.K.MISHRA, J.

CRLREV. NO.45 OF 2008. (Decided on 12.01. 2010.)

MAHESWAR MISHRA ……. Petitioner

-V-

STATE OF ORISSA & ANR …….. 0pp.Parties

NEGOTIABLE INSTRUMENTS ACT, 1881 (ACT NO. 26 OF 1881) – SEC.138.

Cheque dishonoured for "Payment counter manding by the drawer" and "drawer's signature differs" – Cognizance of the offence U/s.138 N.I.Act was taken against the petitioner – Order of cognizance challenged – Held, Order of cognizance is not bad on the ground of counter manding of the cheque. (Para 4 & 5)

Case law Referred to:-

(2004)27 OCR (SC) 476 : (Goa Plast (P) Ltd.-V- Chico Ursulu D"Souza).

For Petitioner – M/s.D.Nayak, B.Rout, R.K.Pradhan & S.K.Balabantaray.

For Opp.Parties – Addl. Standing Counsel (for O.P.No.1)
M/s. R.K.Prusty, B.C.Majhi & D.Das (for O.P.No.2).

The petitioner assails the order of the learned S.D.J.M.(Sadar), Cuttack in 1CC No.127 of 2007 dated 09.02.2007 taking cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as the 'Act' for brevity) and issuing processes against him.

2. The opposite party, i.e. the complainant before the learned lower court, is the Proprietor/Owner of M/s M.S. Fabricator and Coach Builder, Link Road, Cuttack. It is alleged that the accused is the owner of the Buses named and styled, "Laxmi", bearing Registration No.0R-05-H-5265, and "Great India" bearing Registration No.0R-02-J-6336 as well as the Proprietor of Bharati Construction. The accused, the present petitioner, allegedly requested the complainant to repair the body of the aforementioned buses, for an estimated cost of Rs. 4,99,611/-. The accused has paid Rs.4,35,000/- prior to final settlement of the cost of the repair. As such, the accused had to pay a sum of Rs. 59,611/-. On 31.12.2006, the accused after acknowledging the outstanding dues with him allegedly issued the Cheque of Indian Overseas Bank, Rourkela bearing No.116976 for Rs.50,000/- in favour of the

complainant. But subsequently when the complainant presented the same for encashment, it was dishonoured. Hence, he issued notice to the accused demanding payment of the money. Since the accused did not pay the money, he initiated a complaint case for the offence under Section 138 of the Act. The learned Magistrate after taking initial statement and perusing the documents filed by the complainant took cognizance of the offence and issued summons against the present petitioner. Such order of cognizance and issuance of process has been challenged in this revision.

3. In course of hearing of the revision, the learned counsel for the petitioner mainly based his argument on two grounds, viz., (i) that since the Cheque was dishonoured due to countermanding and difference in signature of the drawer, a case under Section 138 of the Act is not made out; and (ii) certain documents were executed by one Nirod Chandra Maharana on 16.11.2006 and 17.11.2006 indicating that the Cheque Bearing No.116976 for a sum of Rs.50,000/- was issued by the accused Maheswar Mishra in the name of the complainant towards security for arranging money for repairing the vehicle with a promise and assurance that the Cheque will be returned to the said Maheswar Mishra. Hence, it is submitted that a case under Section 138 of the Act is not made out.

4. Learned counsel for the opposite parties, on the other hand, submitted the findings recorded by the learned trial court and prayed to dismiss the revision application. At the outset, it is seen that the documents filed by the complainant show that the Cheque has been dishonoured for “payment countermanding by the drawer” and “drawer’s signature differs”. There is no dispute that the said Cheque was issued by said Maheswar Mishra. The difference in signature appearing on the impugned Cheque is of no consequence at this stage. The only point to be considered in this case is whether, when the payment against the Cheque was countermanded by the drawer and the Bank dishonours the Cheque, a prima facie offence under Section 138 of the Act is made out or not. This question came for consideration before the Hon’ble Apex Court in ***Goa Plast (P) Ltd., Vs. Chico Ursulu D’’Souza***, (2004) 27 OCR (SC)-476, wherein the Apex Court has held that a party should not be allowed to get way from the penal provision of Section 138 of the Act on the ground that he has given instructions to the Bank to stop payment of Cheque after issuing the same against a debt or liability.

5. Once the Cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action of Section 138 of the Act by the drawee or the holder of the Cheque in due course. A contrary view will render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations

undertaken by them through their own acts, which in other words, can be said to be taking advantages of one's own wrong. Thus, it is held that the order of cognizance is not bad on the ground of countermanding of the Cheque.

6. Coming to the second contention raised by the learned counsel for the petitioner, it is observed that at the stage of taking cognizance it is duty of the court to look into the materials placed before it by the complainant to find out whether there is reasonable ground for proceeding against the accused. At the stage of taking cognizance, the accused has no locus-standi. It is not necessary for the court taking cognizance to view the case in the light of defence case suggested. Thus, the contention raised by learned counsel for the petitioner that the Cheque was issued at the instance of the brother of the complainant as a security for arranging money for repairing the vehicle, which was not to be negotiated, shall be considered at the time of the trial of the case. It is needless to say that the petitioner is at liberty to raise any such points before the trial court in course of trial of the offence. That being the case, this Court finds no reason to interfere with the order of the learned trial court, wherein he has taken cognizance of offence under Section 138 of the Act.

8. The parties are directed to appear before the learned Magistrate within three weeks. The learned S.D.J.M.(Sadar), Cuttack or any Magistrate, to whose court, the case is transferred shall do well to dispose of the case, as expeditiously as possible, preferably by the end of April, 2010.

The CRLREV is accordingly disposed of. Send back the L.C.R. immediately. Stay order passed in Misc. Case No.79 of 2008 stands vacated.

Revision disposed of.

2010(I)ILR – CUT- 933

S.K.MISHRA, J.

MACA. NO.823 OF 2008. (Decided on 31.03. 2010.)

D.M., ORIENTAL INSURANCE COMPANY LTD. …… Appellant

-V-

TUSHAR RANJAN DASH & ORS. …… Respondents

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF1988) – SEC.146, 147, 149.

Cheque deposited towards premium – Policy issued – Cheque dishonoured – Insurance Policy Canceled – Offending vehicle met with an accident – Contract of Insurance in respect of the Motor vehicle has to be construed U/s.146(1), 147(5) and 149(1) of the Act and the Insurance Company became liable to indemnify third parties, despite the bar created U/s.2 of the Indian Contract Act 1972 and Section 64-VB of the Insurance Act, 1938 for non-payment of premium.

Held, claimants are entitled to be indemnified by the Insurance Company and the Insurance Company is entitled to recover the compensation amount from the owner of the offending vehicle.

(Para 8 & 12)

Case laws Referred to:-

1.(2000) 3 SCC 195 : (New India Assurance Co.Ltd.-V-Rula & Ors.)

2.(1998) 1 SCC 371 : (Oriental Insurance Co.Ltd. -V-Inderjit Kaur & Ors.).

3.AIR 2007 Chhatisgarh 138 : (National Insurance Co.Ltd.-V-Rajendra Mourya & Ors.).

For Appellant – M/s. S.K.Swain , U.S.Sahoo-2, & B.Rout.

For Respondents – M/s. Pradip Kumar Mishra, P.Mishra & S.K.Rout.

S.K. MISHRA, J. The simple question that arises for determination in this appeal preferred by the Insurance Company is whether, in spite of cancellation of the Insurance Policy prior to the date of accident because of dishonour of the cheque deposited towards premium by the insured, the legal heirs of a third party who died in an accident of that vehicle shall have the right of claiming compensation from the Insurance Company.

2. It is undisputed that on 16.07.2004 at about 11 A.M., while the deceased was standing in front of his house at village Bandha, the offending Dumper bearing Regn. No. MP-20G/4694 belonging to the opposite party

no.1 came in a rash and negligent manner and dashed against the deceased, as a result of which, he died at the spot.

The claimant pleaded that the deceased was working as a Carpenter and was earning a sum of Rs.3,500/- per month, but the learned Ist Motor Accident Claims Tribunal, Keonjhar (hereinafter referred to as the "Tribunal" for brevity) did not accept such plea and held that the deceased was earning a sum ofRs.1,300/- per month. In view of the fact that he was 32 years old at the time of death, learned Tribunal adopted 17 as multiplier and fixed the compensation at Rs.1,76,800/-. The learned Tribunal further added a sum of Rs.7,000/- towards various other losses and awarded a total sum of Rs.1,83,800/- with interest @ 9% per annum from the date of accident. The learned Tribunal directed the Insurance company to pay the compensation to the claimants.

3. The owner of the vehicle was set ex parte. Opposite party no.2, i.e. the present appellant-Insurance Company resisted the claim of the petitioner, inter alia, alleging that the Insurance Policy No.1077 of 2005 relating to the offending vehicle was issued in favour of the opposite party no.1, but the cheque, which was deposited by the insured towards premium was dishonoured, on 13.07.2004, due to insufficient funds. Hence, the opposite party cancelled the above policy. Therefore, the opposite party claimed that the Insurance Company is not liable to compensate the claimants for the death of the deceased.

4. In course of hearing of the appeal, learned counsel for the Insurance Company by drawing attention of the Court to the provisions of Section 2 of the Indian Contracts Act, 1972 (Act 9 of 1972), (hereinafter referred to as "Contract Act" for brevity) and Section 64-VB of the Insurance Act, 1938 (Act 4 of 1938) (hereinafter referred to as "Insurance Act" for brevity), contended that when the premium has not been paid, there is no contract of Insurance between the Insured and the Insurer and therefore, the legal heirs of the deceased cannot claim any compensation from the Insurance Company.

Learned counsel for the opposite parties 2 to 9, on the other hand, submitted that even if there is no subsisting contract of Insurance between the appellant and the owner of the vehicle, still by virtue of operation of Sections 147 and 149 of the Motor Vehicles Act, 1988 (hereinafter referred to as the "Act" for brevity), the Insurance Company is liable to indemnify the claimants for the loss they have suffered.

5. Section 2 of the Contract Act provides for various definitions. Clause (d) of the said Section provides as follows:-

> "(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such

act or abstinence or promise is called a consideration for the promise."

Similarly, Clause (e), (f) and (g) reads as under

"(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;

(g) An agreement not enforceable by law is said to be void;"

6. A contract of Insurance like any other form of contract is concluded by offer of acceptance. So in ordinary course, any liability under the Contract of Insurance would arise only after payment of premium, if such payment has been made in a continuous process to the Insurance Policy taking effect. Section 64 VB of the Insurance Act reads as under:

"**64-VB. No risk to be assumed unless premium is received in advance**- (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amounts may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation- Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured,

and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirements of sub-section (1) in respect of particular categories insurance policies.

(6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt of premium by the insurer.

Rel ying on such provision, the Insurer claimed that the cheque covering the premium was dishonoured and in absence of payment of the premium, the terms of the policy became ineffective. It is further contended that as there is no policy which obliged it to pay the compensation, the Insurance Company is not liable to indemnify the claimants. Learned counsel for the appellant drew attention of the Court to the recital of Ext. A, i.e. the Certificate-cum-Policy Schedule, which contains a clause which reads "Warranted that in case of dishonour of premium cheque(s), the said document stands automatically cancelled ab initio (from inception)".

Though the argument advanced by the learned counsel for the appellant appears very attractive, on close scrutiny it is not acceptable.

7. These are the general rules for guiding a principle of insurance, but in order to understand the effect of a contract of insurance especially with its ramifications from the third parties' point of view, the provision under the Act especially Chapter II has to be looked into. Chapter XI of the Act provides for the Insurance of the Motor Vehicle against Third party risk. A duty is cast under section 146. inasmuch as, it provides that no person shall use or cause or allow any other person to use a motor vehicle in a public place, unless there is in force relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of the Chapter. Section 147 sets out the requirements of the policy and the limits of liability. Sub-Section (5) to Section 147 provides that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this Section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that

person or those classes of persons.

Section 149 refers to the duty of the insurers to satisfy judgments and awards against persons insured in respect of third party risks. Sub-Section (1) of Section 149 reads as follows:

> "**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks-** (1) if, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) or Sub-Section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this Section pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments". *(Emphasis supplied)*

8. Notwithstanding the bar created under Section 64 VB of the Insurance Act or the provisions relating to a valid contract in the Contract Act, the Contract of insurance in respect of the motor vehicles has to be construed in the light of Section 146(1), 147(5) and 149 (1) of the Act. The manifest object of Section 146 (1) contends a prohibition on use of the motor vehicle without an Insurance Policy having been taken in accordance with Chapter **XI** of the Act is to ensure that the third party, who suffers injuries due to the use of the motor vehicle, may be able to get damages from the owner of the vehicle and recoverability of the damages may not depend on the financial condition or solvency of the driver of the vehicle who had caused the injuries. Thus, a contract of insurance contemplates a third party who is not a signatory or a party to the contract of insurance, but is, nevertheless, protected by such contract. Therefore, the third party is not concerned and does not come into the picture at all in the matter of payment of premium. Whether the premium has been paid or not is not the concern of the third party, who is concerned with the fact that there was a policy issued in respect of the vehicle involved in the accident and it is on the basis of this policy that the claim can be maintained by the third party against the insurer. (***New India Assurance Co. Ltd. V. Rula and others, (2000) 3 SCC 195 relied on).***

9. Similar view had also been taken by the Hon'ble Supreme Court in **Oriental Insurance Co. Ltd. V. Inderjit Kaur and others,** (1998) 1 SCC 371. Despite the bar created by Section 64-VB of the Insurance Act, the appellant issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Sections 147(5) and 149(1) of the Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon has been dishonoured.

10. In the case of **Oriental Insurance Co. Ltd. V. Inderjit Kaur** (supra), the insurance policy was issued by the appellant on 30.11.1989. The premium was paid by a cheque. The cheque was dishonoured. A letter stating that it has been dishonoured was sent by the appellant to the insured on 23.01.1990. It was intimated that since the premium of the policy has not been received, the appellant's risk was not covered. The premium was paid on 02.05.1999 in the shape of cash. In the meantime, on 19.4.1990, the accident took place out of which the claim application arose.

11. The facts of the aforesaid case are similar to the facts of this case. In this case also, before the accident, there has been a communication to the insurer by the appellant that the Insurance Policy has been cancelled, as a result of dishonor of the cheque, but such fact by itself will not absolve the insurance company of the liability to indemnify the legal heirs of the deceased in view of the aforesaid discussions. Similar view has also been taken by the Hon'ble High Court of Chhatisgarh in **National Insurance Company Ltd. V. Rajendra Mourya and others,** AIR 2007 Chhatisgarh 138.

12. Though this Court is of the opinion that the claimants i.e. Legal heirs of the deceased are entitled to be indemnified by the Insurance Company, it is also of the considered opinion that the Insurance Company is entitled to recover the compensation amount from the insured. Though by virtue of section 146, 147 and 149 of the Act, the insurer is liable to the third parties such liability cannot be saddled on it as far as the owner of the vehicle is concerned. For example, if in such a case of cancellation of the insurance policy, the vehicle itself is damaged, the owner cannot claim compensation for the damage suffered by himself. Section 149 of the Act is a benevolent provision. It has been enacted only with an intention to protect the innocent pedestrians, who uses the public road against the risk of rash and negligent use of the Motor vehicles. Such benevolent provision cannot be stressed to cover the liability of the owner. Hence, this court is of the considered opinion that the Insurance company is entitled to recover the amount of

compensation it pays to the claimants from the owner of the offending vehicle.

13. Further is it seen that the learned Tribunal has ordered that the claimants are entitled to receive interest @ 9% per annum. This Court is of the opinion that the interest should be payable @ 6% per annum on the entire compensation amount from the date of accident.

15. In the result, the Appeal is allowed in part. While affirming the amount of compensation and direction to the appellant to pay the compensation amount of Rs.1,83,800/- along with interest @ 6% per annum from the date of accident, this Court further orders that the Insurance Company may, if so advised, recover the amount paid to the claimants by filing appropriate application before the learned Tribunal.

Appeal allowed in part.

2010(I)ILR – CUT-940

C.R.DASH, J.

BLAPL NO.12834 OF 2009. (Decided on 27.01. 2010.)

DHANI @ SANJIBA BEHERA ……. Petitioner

-V-

STATE OF ORISSA ……. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.439.

Bail – While rejecting earlier bail application this Court directed the trial Court to complete trial within four months – Order could not be communicated to the trial Court – Trial not completed – Petitioner moved fresh bail petition for non disposal of trial in time.

When this Court refused to exercise discretion to release the petitioner on bail target for completion of the trial has been fixed at the behest of the petitioner – So it was the duty of the petitioner to bring to the notice of the learned trial Court about the target fixed – Held, failure on the part of the Registry alone may not be a good ground to release the petitioner on bail. (Para 9)

For Petitioner -M/S. Bijan Ray
For Opp.Party - Addl.Govt.Advocate

1. Heard.

2. The petitioner has been implicated in the offence punishable under Sections 20(b) (ii) (c) and 25 of the N.D.P.S. Act, on the basis of allegation that he along with some other co-accused persons were found in possession of 23 Kgs. Of ganja, which is of commercial quantity according to the Notification issued by the appropriate Government.

3. The present petitioner has earlier moved this Court for bail. While rejecting the prayer for bail, this Court had directed the trial court to complete the trial expeditiously within four months, as submitted by Mr.Bijan Ray, learned senior counsel appearing for the petitioner. That order was passed on 07.07.2009 and, according to Mr.Ray, trial in the case has not yet been completed.

4. A report, therefore, was called for from the Trial Court. Learned Trial Court has reported that the order dated 07.07.2009 passed in BLAPL. No.591 of 2009 having not been communicated, the trial could not be taken up and completed as per the direction.

5. Mr. Bijan Ray, learned senior counsel makes the motion to release the petitioner on bail on the following grounds-

(i) Assuming aurgendo the petitioner to be a passenger in the car, from which the aforesaid quantity of ganja was seized, the petitioner can not prima facie be held liable for possession of the entire quantity of ganja, which is of commercial quantity, because there was other co-accused persons in the car and if the quantity of ganja seized from the car is apportioned among all the accused persons, the petitioner can be held to have been in possession of ganja, which is lesser than the commercial quantity;

(ii) Even if the Magistrate was present, confessional statement of the petitioner has not been recorded in presence of the said Magistrate, and despite motion by the Investigating Officer for recording the confession of the petitioner under Section 164, Cr.P.C., as he wanted to plead his guilt, his statement under Section 164, Cr.P.C. has not been recorded.

(iii) As it was earlier directed by this Court to complete the trial within four months, the trial should have been completed within the time stipulated and the justification by the trial court in the report called for to the effect that the aforesaid order of this Court was not communicated and none of the parties filed a copy of the order so as to bring to the knowledge of the trial court about the target fixed, should not be taken lightly to penalize the petitioner; and

(iv) There is nothing on record to connect the present petitioner with the offence alleged.

6. Learned Addl. Govt. Advocate on the other hand takes me through the statement of one Durga Prasad Mishra, recorded under Section 161 Cr.P.C., which clearly shows that the petitioner was apprehended by the police officials while he was fleeing from the car, from which the ganja was recovered, after the car was stopped on being signalled by the police officials. Further, it is found from the statement that the seized ganja was kept in the space near the back seat of the car. The aforesaid facts make it prima facie clear that the petitioner had full knowledge about transit of ganja in the car, and with such knowledge he was travelling in the car, and thus he can be prima facie held to be in possession of the ganja seized.

7. Coming to the question of apportionment of the quantity of ganja seized from the car, the contention raised by Mr.Ray, learned senior counsel, does not commend to me inasmuch as all the persons in the car had knowledge about transit of ganja in the car and the liability of conjoint complicity can prima facie be fastened against all of them.

8. So far as non-recording of statement of the petitioner under Section 164 Cr.P.C. is concerned, it is found from the copy of the letter of the Investigating Officer produced by Mr.Ray, learned senior advocate, that the

I.O. had moved the Court for recording of the statement of the petitioner under Section 164, Cr.P.C. , as he wanted to plead guilty. Except the aforesaid letter there is nothing on record as to whether the Court has been moved to record the confession of the petitioner under Section 164, Cr.P.C., as to which Court was moved for such purpose, as to under what ground such statement was not recorded, if at all any Court was moved. It is well settled in law that Section 164, Cr.P.C. gives a wide discretion to the Magistrate to record or not to record confessional statement under Section 164, Cr.P.C., but such discretion should be exercised judiciously. This proceeding in absence of all the aforesaid materials can not be a proper proceeding to question or to probe into the legality or otherwise of the action of the Court in non-recording of the confessional statement of the present petitioner (as alleged by Mr.Ray, learned senior counsel). Further, non-recording of plea of guilty of the petitioner purported to have been sponsored by the I.O.may not entitle the petitioner for release on bail.

9. So far as non-disposal of the case by the target fixed by this Court vide order dated 07.07.2009 passed in BLAPL NO.591 of 2009 is concerned, learned Court below has reported that the copy of the order was not filed before it to bring to its knowledge about the target fixed. Mr. Ray, learned senior counsel, with all the vehemence submits that the petitioner should not suffer for the fault on the part of the Registry of this Court, which has failed to communicate the order to the trial court so as to complete the trial within the period targeted. Fact remains that when this Court has refused to exercise discretion to release the petitioner on bail, target for completion of the trial in BLAPL No.591 of 2009 has been fixed at the behest of the present petitioner. It was therefore, the duty of the present petitioner to bring to the knowledge/notice of the learned trial court about the target fixed by filing a copy of the order passed in the aforesaid bail application. I do not deny the responsibility of the Registry of the Court, but failure on the part of the Registry alone may not be a good ground to release the petitioner on bail, especially in view of the nature of offence alleged against the petitioner. Non-recording of confessional statement of the petitioner by the Magistrate present at the time of detection is pressed as a ground to release the petitioner on bail; but such latches/lapses do not have the potency to vitiate the trial.

10. Taking into consideration all the aforesaid facts, I am not inclined to exercise my discretion in favour of the petitioner under Section 439, Cr.P.C., at this stage, especially in view of the bar under Section 37 of the N.D.P.S. Act. But, as this Court had fixed the target for completion of the trial within four months vide order passed in BLAPL No.591 of 2009, I reiterate the same observation and direct the learned Trial Court to complete the trial of

the case within a period of four months from the date of receipt of a copy of this order, by splitting up the case so far as the present petitioner and other apprehened accused persons are concerned. I make it clear that it is the duty of the petitioner to file a copy of this order in the trial court if he is desirous of availing the benefit of this order. The Registry of this Court also shall take steps to communicate this order to the trial court so that this order can be complied. It is made clear that if the trial is not completed within four months as directed, then the petitioner may renew his prayer for bail.

The BLAPL is accordingly disposed of.

Application disposed of.