T- 209

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

W.P.(C) NO. 14499 OF 2009. (Decided on 24.6.2010).

RAMESH CHANDRA SAMANTARAY …….. Petitioner.

.Vrs.

STATE OF ORISSA. …….. Opp.Parties.

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

Re-tender notification is permissible in law, in view of the right reserved by the tender inviting authority in the tender call notice.

In this case petitioner submitted his tender pursuant to tender call notice – Since the financial bid offered by the petitioner was unbalanced he was called upon to submit the price analysis – He did not submit his item wise price analysis as required by the Tender committee – His bid was cancelled and re-tender notification was issued – Order of cancellation of the bid was communicated to the petitioner – Petitioner did not challenge the same and the said order became final and fresh tender call notice was published – Held, the action of the Government can not be termed as arbitrary and unreasonable calling upon interference of this Court.

(Para 10,11,12)

For Petitioner - M/s. J.M.Mohanty & R.K.Parida, P.C.Maharana, M.Pani & R.K.Ray.

For Opp.Parties – Mr.R.K.Mohapatra, Govt. Advocate.

V.GOPALA GOWDA, CJ. This writ petition has been filed by the petitioner seeking for issuance of a writ of certiorari to quash the retendering notice vide Annexure-7 and further to issue a writ of mandamus to the opposite party No.2 i.e. Chief Construction Engineer, Kanpur Irrigation Project, Keonjhar direction him for issuance of a work order in his favour in respect of the work covered under Annexure-1 tender notice by accepting his bid offer urging various facts and legal contentions.

2. The brief facts, for the purpose of appreciating the rival legal contentions urged on behalf of the parties, are that opposite party No.2 published a tender notice both in website as well as in daily News Paper inviting on-line item rate tenders fixing the date and time for submitting the tender paper from 10.11.2008 to 26.11.2008. The petitioner after down-loading the tender call notice from the website, submitted his tender documents within the prescribed time. The estimated cost of the project was Rs.798.22 lakhs including excavation of Main Canal from R.D.1500 Mts. To 3120 Mts. In the tender paper, petitioner has quoted his tender bid of Rs.7.18.477.83 which

was 9.9% less than the estimated cost. There were three competitors including the petitioner for the said project work in question. It is the case of the petitioner that out of them, he was the lowest bidder. The said financial bid was opened after the technical bid which was held on 28.11.2008 and it was found that the petitioner's bid was the lowest one. As the validity of the bid for the aforesaid work has already expired on 23.2.2009, opposite party No.2 vide his letter dated 26.2.2009 requested the petitioner to extend the validity of the bid up to 30.06.2009 for processing of the financial bid with a further request to him to furnish the price analysis in support of the rate quoted by him at an early date, as per the documents under Annexure-2. In response to the said documents petitioner submitted his reply on 9.3.2009 (Annexure-3) stating that the total bid amount offered by him comes to less than 9.9% of the estimated cost, as a result of which his bid amount is not seriously unbalanced as per Clause 41 of the Detail Tender Call Notice (D.T.C.N.) of technical Bid document. As per the said clause additional performance security was required to be deposited by the successful bidder when the bid offered by him is seriously unbalanced than the estimated cost in the tender call notice to the extent of the differential cost of the bid amount and he had to submit 90% of the estimated cost in shape of post office Saving Bank Account or National Savings Certificates (NSC). It is further stated that there was no clause about the individual items and it indicated only the total bid amount, therefore, it was not required for him to furnish the price analysis.But despite of receipt of the same, opposite party again vide his letter dated 17.3.2009 made communication with the petitioner for furnishing the analysis of rates for all the items except Item Nos.9, 18, 24 and 25.

3. It is submitted that in view of the said reply dated 9.3.2009, further communication on 17.3.2009 was unwarranted, but in spite of the said fact petitioner submitted the price analysis on 24.3.2009 vide Annexure-5. It is the further case of the petitioner that he being the lowest tenderer as per the provision of law, he would have been awarded the work by entering into an agreement to start the project work. Despite the work order issued, no agreement was executed without assigning any reason and opposite parties are sitting over the matter even though the petitioner has already deposited the required EMD as specified in DTCN. Again the petitioner submitted reply to the notice dated 5.4.2009 in pursuance to the notice under Annexure-4 stating that in view of the reply letters under Annexures-3 and 5 no further analysis of rate is required to be furnished to the opposite parties. It is submitted that opposite parties with an ulterior motive are not executing the agreement in favour of the petitioner and it is learnt from reliable source that they want to give the work to a person for their choice by retendering the project work and it was found to be true when it was published in daily news paper 'Sambad' dated 22.9.2009 inviting tender under Annexure-7. After going through Annexures-1 and 7, it is clear that the execution of work in

both the tender call notices are same except excavation of Kanpur Main Canal from RD 3900 Mts. To 4890 Mts. including construction of cut and cover and from 6840 Mts to 7050 Mts including CD No.11 (at RD-6945 Mts) to Kanpur Irrigation Project with estimated cost of Rs.4225.16 lakhs.

4. It is further submitted that the action of the opposite party No.2 is mala fide for the reason that he had retendered the very same project work vide Annexure-7 by adding two to three items which is uncalled for, without indicating any reason as to why work order can not be issued to the petitioner though his tender offer was lowest among the three bidders. It clearly established the mala fide action on the part of the opposite parties, therefore, the re-tender notice under Annexure-7 is liable to be quashed.

5. The opposite parties have filed a detailed counter affidavit sworn to by one Rohita Kumar Sethi, Executive Engineer, Kanupur Canal Division, Jhumpura, in the district of Keonjhar, traversing all the averments of the petitioner and denying the allegation made in the writ petition contending that petitioner is not entitled for the relief as prayed for in the writ petition by assigning various reasons. It is admitted that the bid offer of the petitioner was lowest one, but the rates quoted by the petitioner in Item Nos. 3,7,13,14 & 27 were less by more than 10% and items 3, 7, 13 & 27 were less by more than 25% of the estimated rates, where as the rates in respect of item Nos. 1,2 4, 5, 10, 12, 15, 16, 19, 20 and 23 were excess by more than 25% over the estimated rates. The project Level Technical Committee analyzed the three major items, namely, item No.5 (Excavation of all kinds of soil (AKS), Item No.6 (Excavation of D.I.) and Item No.7 (Excavation of Hard Rock (HR) by blasting) with quoted rates of Rs.70/- -Cu.M., Rs.70/- Cu.M. & Rs.135/- Cu.M.respectively being 52.84% excess, 19.06% excess and 31.6% less than the estimated rates respectively and found that the analysis of item No.5 & Item No.7 are not based on reality on comparison of cost of excavation and transportation between AKS and Hard Rock. The tender Committee apprehended that since the quantity of Hard Rock coming under ground has been assessed tentatively basing on drill data, the quantity may vary during execution and if the quantity of hard rock decreases by 39,737 Cu.M. with corresponding increase or AKS and D.I. relative position of tender will change. Basing on the assessment of the PLTC, the members of the tender Committee meeting held on 25.06.2009 at Government level felt that since the estimate had not been

prepared properly by the petitioner and the quoted rates of the bidder were seriously unbalanced, irrational and speculative and tender should be rejected as per para 3, 5, 18 of the OPWD Code Vol.-I. Accordingly the Government in the Department of Water Resources vide its letter bearing No. IIT-KIP-1/2009-22468/WR, BBSR dated 25.08.2009 ordered to reject the bid and to invite fresh bid after preparing proper estimate and classifying the soil properly. It is stated that unless the said document is quashed the re-tender notice can not be quashed. As the e-procurement notice inviting Bid Identification No.CCE, KIP (KCD-01/2008-09 dt.31.10.2008 was cancelled on 07.09.2009 and intimated to all concerned vide the office Letter No. 4167/ WE dt.07.09.2009 and further it is stated that as there was a stipulation in the Tender Call notice that the authority reserves the right to reject any or all tenders without assigning any reason thereof as per Para 3,5,18 of the OPWD Code Vol-I and since the work value is more than Rs.7.00 crores and the Government is the approving authority as per amendment to Para 6,3,15 of OPWD Code Vol-I, question of issuing the work order in favour of the petitioner by the opposite party after executing contract does not arise.

6. It is further stated that if quantum of rock is less by 39,737 Cu.M. the petitioner will no more be the first lowest for which the detailed price analysis was asked for, from him, but he has failed to furnish the same despite repeated reminder letters issued to him. Since the petitioner did not furnish the price analysis of items in response to Annexure-IX, he was reminded again vide letter No.1370 dated 17.03.2009 by the Chief Construction Engineer, Kanupur Irrigation Project to furnish price analysis of all items which are more than 10% excess or more than 10% less except items 9,18,24 & 25 as he had submitted irrational rates in different items and the rate of excavation by means of excavator is also found to be excessive. The carriage change of rock should be more than that of soil charge. Therefore, the analysis was not based on reality and due to non-submission of the required price analysis by the petitioner despite repeated communication by the opposite party No.2, the bid offered by the petitioner was cancelled and opposite parties re-tendered the same. Further the State Government in the Department of Water Resources vide its letter dated 8.5.2009 instructed to ask the petitioner to clarify as to how he will execute the work when the rates quoted by him are seriously unbalanced along with the detailed analysis of rates in all items as recommended by the Tender Committee as per the proceedings of the Tender Committee under Annexure-P. Pursuant to the same, opposite party No.2 vide his letter dated 14.5.2009 intimated the petitioner to clarify the same as desired by the Tender Committee. Reminder was also issued to the petitioner, but despite the same the petitioner did not furnish price analysis as required by the Committee to examine as to whether he can execute the work by balancing both excess and less rates.

Since he did not furnish the price analysis, the State Government had no option but to cancel the same and ask the opposite party No.2 to re-tender the work, which has been challenged in this writ petition urging various contentions, which are wholly untenable in the eye of law and therefore, this writ petition is required to be dismissed. Further, the decision in cancelling the bid offered by the petitioner is taken by the State Government and thereafter the present re-tender notification has been issued.

7. This Court has passed the interim order dated 20.10.2009 stating that the tender process pursuant to Annexure-7 shall not be finalized without leave of this Court till the next date of listing of the case. Thereafter this case was listed on 11.5.2010 on the basis of a Miscellaneous Application filed by the opposite parties seeking vacation of stay order. However, on the request of the learned counsel for the parties matter was taken up for final hearing.

8. We have heard learned counsel for the parties and perused the records. After hearing the case on merit and considering the fact situation of the case, now the questions that would arise for our consideration are (1) whether the petitioner is entitled for issuance of a writ of certiorari quashing Annexure-7 without challenging the cancellation of the bid offered by the petitioner vide order dated 25.08.2009? ; (2) whether the petitioner has got right to question the re-tender notification in view of the right reserved in the tender call notice to reject the offer that the bids offered by the tenderer even if it is less than the estimated cost and lowest as compared to other tenderers are required to be accepted and execute the contract in his favour for execution of the project work; and (3) what order ?

9. In our considered view, all the aforesaid questions are required to be answered in favour of the opposite parties and against the petitioner for the following reasons.

10. It is an undisputed fact that the financial bid offered by the petitioner pursuant to Annexure-1 was examined by the Tender Committee and as it was found by it that the rates quoted by the petitioner in respect of most of the items were seriously unbalanced and estimate had not been prepared properly, he had been called upon to submit the price analysis with reference to his rates quoted keeping in view the nature of excavation of the rock and works to be executed. Despite repeated reminders and opportunities given to the petitioner, he did not submit his item wise price analysis as required by the Committee to justify his stand. Therefore, the State Government with reference to the relevant clause 3.5.18 of the OPWD Code Vol.-I has taken a decision to reject the bid offered by the petitioner and the same has been rightly communicated to the petitioner vide its letter dated 25.08.2009. But even after receiving the said cancellation order petitioner did not take any steps to challenge the same. Therefore, the said order has become final and as the said order has become final, after cancellation of the bid offered by the petitioner in respect of the project work notified in Annexure-1, the fresh tender call notice was rightly published as per Annexure-7 in the daily news

papers and the same cannot be quashed on the mere alolegation made by the petitioner that the opposite parties have some mala fide intention to award the contract in favour of the person of their own choice and this allegation of the petitioner cannot be accepted by this Court.

11. Having regard to the quantum of the work and the estimated cost to the tune of more than Rs.7.00 crores, the decision making power vests with the State Government as to whether the financial bid of the petitioner can be accepted or not. It is the State Government which has taken a decision after calling upon the opposite party No.2 to ask the petitioner to submit his price analysis as desired by the Tender Committee as it was found that the rates quoted by the petitioner in various works and items are unbalanced. But, the petitioner had failed to furnish the same as pointed out by the Tender Committee, his bid was cancelled and re-tender notice was issued. It is very much clear that after giving due opportunity to the petitioner for submitting price analysis, his bid was cancelled and re-tender notification was issued. Further, issuance of re-tender notification is permissible in law, in view of the right reserved by the tender inviting authority in the tender call notice. The State Government being the tender accepting authority having regard to the quantum of work and the estimated costs of the project work being to the tune of more than 7.00 crores has rightly taken a decision invoking the clause of OPWD Code. The said decision of the State Government, having regard to the facts and circumstances of the case, cannot be termed as arbitrary and unreasonable as contended by the petitioner.

12. For the reasons stated supra and considering the facts and circumstances of the case, we are of the view that the petitioner has not made out a case for our interference. On the other hand he has approached this Court, without challenging the cancellation order of the bid offer, questioning the correctness of the re-tender notice urgine various legal contentions which are untenable in law.

13. In view of the aforesaid facts, we do not find any cogent reason whatsoever to interfere with the action of the opposite parties in cancelling the bid offered by the petitioner pursuant to tender call notice under Annexure-1 and thereupon issuing re-tender notification under Annexure-7. Accordingly the petition is dismissed. The interim order dated 20.10.2009 stands vacated. It is open for the opposite parties to proceed with the tender process in accordance with law.

Writ petition dismissed.

2010 (II) ILR – CUT- 215

V.GOPALA GOWDA, CJ & I.MAHANTY, J.

W.P.(C) No. 5417 of 2010 (Decided on 26.7.2010).

JITENDRA JHA …….. Petitioner.

.Vrs.

STATE OF ORISSA ……. Opp.Parties.

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

Order of detention – Criminal cases against the detenu – Allegations do not make out a case of disturbance of public order – Order of detention was passed and has been approved by O.P.1 without application of mind – O.P.2 while passing the order of detention has not recorded his subjective satisfaction with regard to disturbance of public order – Out of six Criminal cases alleged against the petitioner only one case is pending against the petitioner that too at the stage of investigation – The reason assigned in the detention order that the petitioner is likely to be enlarged on bail can not be a ground for passing the order of detention U/s.3(2) of the Act – Held, the impugned order of detention is liable to be quashed. (Para 9)

Case law Relied on:-

2003(I) OLR 355 : (Sunil Rajgarhia -V- State of Orissa & Ors.).

Case laws Referred to:-

1.AIR 2009 SC 2256 : (Pooja Batra -V- Union of India & Ors.)
2.2002(3) SCC 754 : (Chowdarapu Raghunandan -V- State of Tamil Nadu & Ors.)
3.JT 2009 (1) SC.516 : (Kothari Filaments & Anr.-V- Commissioner of Customs (Port), Kolkata)
4.2003 (I) OLR 350 : (Tito @ Sayed Usdman Ali -V- State of Orissa & Ors.)
5. 1975(2)SCC 255 : (A.K.Roy -V- Union of India).
6.AIR 1982 SC 710 : (Smt. Shalini Soni & Ors.-V-Union of India & Ors.).
7.2004(1) OLR 164 : (Surya Narayan Polei -V-Secretary to Govt. of Orissa, Department of Home (Spcial Section).
8.AIR 1986 SC 207 : (State of U.P. -V- Mahant Singh).

For Petitioner - M/s. Umesh Chandra Pattnaik, J.K.Mohanty & S.Das.
For Opp.Parties – Govt. Advocate (for O.P.Nos.1 to 3)
Assistant Solicitor General (For O.P.No.4).

GOPALA GOWDA, C.J. The petitioner-detenu under the National Security Act, 1980 questions the correctness of the order of detention dated 9.3.2010

passed by the District Magistrate,Keonjhar-opposite party no.1 and the order

of approval of the said order of detention by the State Government in exercise of power under sub-section (4) of the National Security Act, 1980 produced at Annexures-1 and 7 respectively urging various facts and legal contentions and prays for quashing the same.

2. Necessary brief facts are stated for the purpose of appreciating the rival legal contentions with a view to find out if the petitioner is entitled for issuance of a writ of certiorari for quashing the order of detention and order of approval passed by the State Government directing the detaining authority to set him at liberty.

3. The petitioner is a law abiding citizen and is doing transport business and is also supplying labourers for loading and unloading of mineral ore at the railway siding at Barbil. He is also an income tax assessee. It is further stated by him that he was arrested by the Barbil police on 5/6.3.2010 at about 2 p.m. from his residential house. It is his case that on that day the police entered into his house by breaking open the window without any search warrant and thereafter he was apprehended. After arresting the petitioner, F.I.R. was written on a plain paper and the same was registered as Barbil P.S.Case No. 58 dated 6.3.2010 under sections 307/353/387 IPC read with sections 25/27 of the Arms Act. It is the further case of the petitioner that no revolver was recovered from his possession or from his house on the alleged day of arrest. It is the case of the petitioner that he was in custody in connection with Barbil P.S.Case No. 58 of 2010 and no bail application had been filed but the order of detention was served on him on 9.3.2010 vide Annexure-1 illegally and arbitrarily without recording that the petitioner was likely to be released on bail. It is submitted that not only the impugned order has been passed against the petitioner to detain him in the jail custody but also the police has foisted three other cases against him which has not been cited in the grounds of detention when it was served upon him and he has never committed such offences as alleged against him in the grounds of detention dated 12.3.2010 communicated to him after the order of detention was served upon him.

4. In pursuant to the order of detention and the grounds of detention he had submitted representation under section 8 of the National Security Act, 1980 (hereinafter referred to as 'the Act' in short) through the Superintendent of Jail to opposite party no.1 for consideration contending that the order of detention as approved by the State Government is void ab initio. Therefore, he has requested to release him from the illegal detention.

5. The grounds of attack of the order of detention are that the said order is illegal as the same is arbitrary, contrary to the provisions of Section 3 (2) of the Act as the allegations in the number of criminal cases against him do not

make out case of disturbance of public order, still the order of detention was passed and has been approved by opposite party no.1 without application of

mind. Therefore, the same is liable to be quashed. Opposite party no.2 while passing the order of detention has not recorded his subjective satisfaction with regard to disturbance of public order by the alleged criminal activities of the petitioner referred to in the grounds of detention dated 12.3.2010 which were prepared three days after the order of detention was passed. Therefore, the detention order is wholly unsustainable in law. The further ground of attack of the impugned order is that the order of detention and the grounds of detention are not forwarded to the State Government together forthwith. Therefore, the date on which the order of detention was passed, the grounds of detention on the basis of which the detention order was passed were not there. This aspect of the matter has not been taken into consideration by the State Government at the time of granting approval to the order of detention.

6. Learned counsel for the petitioner places strong reliance upon the decision of the Supreme Court in Pooja Batra v. Union of India and others reported in AIR 2009 SC 2256, wherein the apex Court while examining the preventive detention order passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with reference to the relevant provisions, namely, Sections 2(39), 111 and 113 of the Customs Act after referring to its earlier decisions in the case of Chowdarapu Raghunandan v. State of Tamil Nadu and others, 2002 (3) SCC 754 and Kothari Filaments and another v. Commissioner of Customs (Port), Kolkata, JT 2009 (1) S.C. 516 wherein the apex Court held that, if any enquiry is inconclusive pending consideration the same cannot be the basis for passing an order against the person concerned, held that use of incomplete material which is either pending or inconclusive cannot be a basis for detention order. With reference to the criminal cases referred to in the grounds of detention, it is submitted that the detaining authority has not considered the relevant factual position, namely, out of the six cases referred to in the grounds of detention in Barbil P.S.Case No. 187 of 2005 the petitioner was acquitted on 25.5.2007. In Barbil P.S.Case No. 228 of 2007 for the offences under sections 147/148/323/149 IPC, the petitioner is not named in the FIR. In Barbil P.S.Case No.100 of 2008 for the offences under sections 147/148/452/341/302/149 IPC the petitioner is not named in the FIR. Barbil P.S.Case No. 5 of 2010 for the alleged offence under sections 341/323/5-6/34 IPC has been compromised. In Barbil P.S.S.D.E. No. 60 of 2010 no offence is alleged and no FIR is lodged either by police or public. Barbil P.S.Case No.58 of 2010 for the alleged offences under section 353/307/387 IPC read with Sections 25/27 of the Arms Act has

been registered on plain paper F.I.R. drawn by the police and the police seized cash, gold ornaments from the house of the petitioner. That case is still pending investigation and therefore the same cannot be a ground

for passing the order of detention on the allegation that there was disturbance of public order. Therefore, the grounds of detention are totally irrelevant. Further placing reliance upon the Division Bench judgment of this Court in Tito alias Sayed Usdman Ali v. State of Orissa and others, 2003 (I) OLR 350, learned counsel for the petitioner submitted that the order of detention passed under section 3(2) of the Act by the detaining authority against the petitioner, on the assumption that there is likelihood of the petitioner being enlarged on bail without there being any cogent material for such assumption cannot be said to be the subjective satisfaction of the detaining authority.

7. Shri Mohapatra, learned Government Advocate placed strong reliance upon the following decisions of the Supreme Court, namely, 1975 (2) SCC 255, A.K.Roy v. Union of India, AIR 1982 SC 710, Smt.Shalini Soni and others v. Union of India and others, (1980) 4 S.C.C. 544 and a Division Bench decision of this Court reported in 1988 Crl.LJ 32 para 11 in support of his contention that the grounds of detention need not be sent to the detenu along with the order of detention and on this ground the order of approval of detention order cannot be quashed. Learned counsel has placed reliance upon the Division Bench judgment of this Court in the case of Surya Narayan Polei v. Secretary to Government of Orissa, Department of Home (Special Section) reported in 2004 (1) OLR 164 and also on Section 10 of the Act regarding representation of the petitioner. The same was placed before the Board. Therefore, no prejudice is caused to the petitioner. In support of his submission he placed reliance on the decision reported in AIR 1986 SC 207 State of U.P. v. Mahant Singh. As the order of detention was placed before the Advisory Board within the time stipulated and the representation of the petitioner was forwarded to the Board and the same was considered and examined by the Board, it is submitted that the procedural safeguards before passing the order of detention are complied with.

8. With reference to the above said rival legal contentions, the question that would arise for consideration is whether the order of detention and approval of the same are liable to be quashed. What order ?

9. The aforesaid points are required to be answered in favour of the petitioner for the following reasons. The order of detention is dated 9.3.2010. As could be seen from the original file made available for our perusal, no doubt the grounds on which the order of detention is passed to detain the petitioner in the jail is on the alleged violation of public order but there are no reference to the cases referred to in the grounds of detention prepared in

the order-sheet of the original file and the said order is not the grounds of detention communicated and served upon the petitioner, along with the detention order and the same is not the grounds of detention in support of the detention order sent together with the detention order to the State

Government for its approval. The order of detention is liable to be quashed for the reason that the grounds mentioned in the original file the details of the grounds against the petitioner are not forthcoming, but the details are stated in the grounds of detention dated 12.3.2010 which was communicated and served upon the detenu. Therefore, there was absolutely no application of mind in the subjective satisfaction of the State Government at the time of approval of the detention order. Another important undisputed fact is that out of six cases alleged against the petitioner, which are adverted to in the grounds of detention to reach the subjective satisfaction to detain the petitioner, only one case is pending against the petitioner that too at the stage of investigation. In that case, the petitioner was arrested and sent to judicial custody. The reason assigned in the detention order that the petitioner is likely to be enlarged on bail cannot be a ground for passing the order of detention under section 3 (2) of the Act. This conclusion of ours is supported by the Division Bench decision of this Court in the case of Sunil Rajgarhia Vs. State of Orissa & Ors., reported in 2003((I) OLR 355. Therefore, the detention is contrary to the decision of the Supreme Court in the case of Pooja Batra (supra) as the grounds on which the detention order is passed is totally irrelevant and non-existing fact as the criminal case in Barbil P.S.Case No. 5 of 2010 is still at the investigation stage. Therefore, on this ground also the order of detention and the order of approval passed by the State Government are liable to be quashed. The learned counsel for the petitioner has rightly placed reliance on the aforesaid decision of the Supreme Court in the case of Pooja Batra in which case the Supreme Court has referred to Chowdarapu Raghunandan v. State of Tamil Nadu (supra) where the apex Court has held that inconclusive state of investigation cannot legitimately help the authority to pass the order of detention against the detenu on perfunctory and inchoate material relied upon. The said decision is aptly applicable to the fact situation. Therefore, the impugned order is liable to be quashed.

10. In view of the aforesaid reasons, the justification sought for by the learned Government Advocate Mr.Mohapatra placing reliance upon the various judgments of the Supreme Court adverted to in his submission referred to in the earlier paragraph of this judgment are wholly misplaced and untenable in law and therefore the observations made in the aforesaid decisions are wholly inapplicable to the fact situation as the facts of this case as referred to supra are undisputed. Therefore, the decisions on which reliance is placed by the learned Government Advocate are not of any

assistance in justification of the order of detention and the approval of the same passed by the State Government respectively.

11. For the aforesaid reasons, the petition must succeed. Accordingly the writ petition is allowed and the impugned order of detention is quashed and

the Jail Authorities are directed to release the petitioner forthwith unless his detention is warranted in connection with any other case which is pending against him.

Writ petition allowed.

2010 (II) ILR – CUT- 221

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

O.J.C. Nos.6156 of 2002 (with batch case) (Decided on 21.6.2010)

UNION OF INDIA & ANR. …… Petitioners.

.Vrs.

CENTRAL ADMINISTRATIVE TRIBUNAL & ANR. ……. Opp.Parties.

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

Sambalpur-Talcher Rail Link Project – Large patches of land acquired – Policy framed to provide one job to one family of the land oustees – When cases of land oustees considered along with outside Candidates they filed O.A. – CAT held the procedure adopted by Railways being contrary to the policy, can not be sustained – Hence, the writ.

The selection process adopted by the Railways for filing up 511 vacancies of Group-D posts was confined to outsiders without giving any appointment to land oustees – Action reveals that the Railways did not act in accordance with the provisions of the policy – Policy required that jobs on preferential treatment should be offered to one member of the displaced family – The word "offered" has not at all been considered by the Railways – Tribunal rightly held that the action of the Railways can not be sustained – Held, order passed by the Tribunal needs no interference. (Para 8 & 13)

Case laws Referred to:-

1.(1999) 4 SCC 521 : (Union of India & Ors.-V- Himmat Singh Chahar).
2.(1998) 3 SCC 341 : (Sena Drego -V- Lalchand Soni & Ors.).
3.AIR 1953 SC 58 : (D.N.Banerji -V- P.R.Mukherjee).
4.(1999) 6 SCC 82 : (Ajaib Singh -V- Sirhind Co-operative Marketing Cum Processing Service Society Ltd.).

For Petitioners - M/s. B.Pal & Associates
For Opp.Parties - M/s. I.C.Dash & Associates.
For Petitioners - B.Pal & Associates
For Opp.Parties - A.Mishra & Associates
For Petitioner - B.Pal & Associates
For Opp.Parties - B.P.Das & Associates.

For Petitioners - M/s. B.Pal & Associates
For Opp.Parties -M/s.I.C.Dash & Associates.
For Petitioners - B.Pal & Associates
For Opp.parties - M/s. H.S.Mishra & Associates.

A.S.NAIDU,J. Union of India, represented by the General Manager, S.E. Railways and two others have filed these writ applications, inter alia, praying to quash the common judgment dated 20.2.2002 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No. 74 of 2001 and 14 other cases. The subject matter of controversy as well as the point of law involved in all these writ applications being one and the same, as requested by learned counsel for both the parties, they are heard together and disposed of by this common judgment.

Bereft of unnecessary details, the short facts, which are necessary for effectual adjudication are as follows :

For execution of Sambalpur-Talcher Rail Link Project, large patches of land were acquired during the period 1984-85 to 1992-93. Consequent upon such acquisition, number of persons and families were deprived of their ancestral properties and lost all their landed property which affected their livelihood. While the matter stood thus, the petitioner-Railways needed lot of man power for successful completion of the project in question. Consequently, steps were taken for recruitment.

3. In order to mitigate the inconvenience and harassment caused to the persons/ families, whose properties were acquired and consequently they had became landless, it was decided that steps would be taken for providing employment to the families of displaced persons. Following the said principle, guidelines (Annexure-1) were framed. Clause-2 of the said guideline stipulated that Zonal Railways and productions Units and also project authorities may consider the applications received from persons displaced on account of large-scale acquisition of land for projects on the Railways for employment in Group-C or Group-IV posts in their organization including engagement of casual labour and give them preferential treatment for such employment, subject to certain conditions. Some of the important clauses are quoted here-in-below:

(I) The individual concerned should have been displaced himself or he should be the son/ daughter/ ward/ wife of a person displaced from land on account of acquisition of the land by the railways for the Project.

(II) Only one job on such preferential treatment should be offered to one family."

In accordance with the policy, recruitment process commenced and advertisements were issued inviting applications for filling up the posts in

question. The applicants before the Tribunal applied for the posts, but then giving a goby to the principles settled under Annexure-1, their cases were considered along with other outside candidates. Being aggrieved by the said action, the applicants approached the Tribunal alleging that the action taken

by the petitioner-Railways was not just and proper and that it has not followed the principles formulated in the policy.

4. After receiving notice, a counter affidavit was filed by the Railways before the Tribunal taking the stand that the policy did not stipulate that a member of the displaced family would be given appointment. On the other hand, it stipulated that their applications shall be treated on preferential basis. In other words, if all other conditions are same between a direct recruitee and the son/ daughter of a land oustee, preference shall be given to the latter.

5. The Tribunal after discussing the facts and circumstances, by a well discussed judgment came to the conclusion that the Railways have not acted fairly and without following the terms of the policy stipulated under Annexure-1, acted illegally and with material irregularity in directing the applicants before the Tribunal to compete along with outsiders. Such action it was held was not justified. The Tribunal further held that the procedure adopted by the Railways being contrary to the policy, the same cannot be sustained and allowed all the Original Applications. While doing so, the Tribunal framed a guideline as to how preference should be extended to the land oustees, so far as appointing them in different posts which are lying vacant.

6. The said common judgment (Annexure-2), is assailed in these writ applications mainly on the ground that the Tribunal misdirected itself and illegally held that the persons displaced are entitled to be appointed in several vacant posts, whereas that was not the intention of the policy, Annexure-1. It is stated that the policy only stipulated that preference should be given to the land oustees. The said clause does not mean that they will be appointed irrespective of their capability. It is stated that in consonance with the policy, preference was given to the applicants, i.e. the land oustees, to take part in the interview and as and when the land oustees and outside candidates are placed in similar position, preference was given to the land oustees and he/she was selected. It is further averred that the Tribunal acted illegally and with material irregularity in framing the guideline for selection

and appointment. It is stated that it is the prerogative of the employer to lay down the criteria and the Tribunal should not have done so.

7. We have heard Mr.Pal, learned counsel for the petitioner and Mr.Dash, learned counsel appearing for opposite party no.2 diligently. We have also perused the pleadings meticulously as well as the documents annexed thereto.

8. Admittedly, the lands belonging to the applicants (before the Tribunal) or their family were acquired by the Railways for the purpose of the project. As a result of such acquisition, the land owners lost their valuable properties, which they were enjoying for generations. They also lost their livelihood. The land oustees are invariably poor persons belonging to lower strata of the society. In order to protect their rights and mitigate their helpless condition, the Railways rightly framed a policy for giving appointment to the land oustees on preferential basis. Annexure-1, the policy clearly stipulates that one job on preferential treatment should be offered to one family. This condition of the policy was not kept in mind by the Railways while taking steps for filling up of the vacant posts. Perusal of the records further reveals that out of 511 vacancies, 508 were filled up by outsiders, i.e., other than the land oustees and only three posts were filled up by the land outstees. The said action reveals that the Railways did not act in accordance with the provisions of the policy. As has been stated earlier, the policy required that jobs on preferential treatment should be offered to one member of the family. The word 'offered' has not at all been considered by the Railways.

9. In the case in hand, in fact no job was offered to any of the family members of the land oustees as per the scheme. The selection process adopted by the petitioner-Railways for filling up 511 vacancies of Group-D posts was only confined to outsiders and without giving any appointment to the applicants before the Tribunal the posts were sought to be filled up. The Tribunal has discussed the materials available on record in extenso and has arrived at a cogent finding that the action of the Railways cannot be sustained. After going through the records, this Court is satisfied that the order does not suffer from any infirmity. Learned counsel for the petitioner also failed to bring to our notice any error apparent on the face of the record. Law is well settled that while exercising power of certiorari, this Court do not act as an Court of appeal, but exercises the power of superintendence. Thus, it should not alter the conclusions reached by the competent Tribunal if the same are not found to be unreasonable. (See: **Union of India and others v. Himmat Singh Chahar, (1999) 4 SCC 521**).

10. It is also well settled that power under Article 227 being that of judicial superintendence should not be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. (See: **Sena Drego v. Lalchand Soni and others, (1998) 3 SCC 341**).

11. The Supreme Court in the case of **D.N.Banerji v. P.R.Mukherjee, AIR 1953 SC 58,** held that the High Court cannot assume unlimited

12. prerogative to correct all species of hardship or wrong decision. It is also held that for interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal etc. has resulted in grave injustice.

13. In the case of **Ajaib Singh Vs. Sirhind Co-operative Marketing cum Processing Service Society ltd.,** (1999) 6 SCC 82, the Supreme Court held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

14. Analysing the facts and circumstances of the case in hand, in the light of the aforesaid settled authoritative pronouncement, this Court finds that the Tribunal has not committed any error and it is a case where the order passed by the Tribunal needs no interference in exercise of the extraordinary jurisdiction.

15. The writ applications are accordingly dismissed. No costs.

Writ petition dismissed.

2010 (II) ILR – CUT- 226

V.GOPALA GOWDA, CJ & INDRAJIT MAHANTY,J.

W.P.(C) NO.2037 OF 2009. (02.07.2010).

M/S. JAI JAGANNATH MARBLE …… Petitioner.

.Vrs.

THE COMMISSIONER OF COMMERCIAL TAXES CUTTACK & ORS. ……..... Opp.Parties.

(A) ORISSA VAT ACT, 2004 (ACT NO.4 OF 2004) – SEC.74 (5), 101.

Vehicle carrying marble of excess quantity – Petitioner had suppressed and failed to disclose the actual quantity – Invoice and way-bills indicated that the vehicle was carrying nearly 4265 square feet marble – On physical verification and subsequent re-measurement it was confirmed that the vehicle was carrying 12623 square feet marble – Documents submitted on behalf of the petitioner at the entry gate were false – Held, it attracts applicability of Section 74 of the OVAT ACT, 2004 but not section 101 of the said Act. (Para 5)

(B) ORISSA VAT ACT, 2004 (ACT NO. 4 OF 2004) – SEC.74(5).

Penalty U/s.74(5) – Sales Tax officer has no discretion vis-à-vis levy of penalty, once he is satisfied that the circumstances as contemplated U/s.74(5) of the OVAT Act are satisfied. (Para 9)

(C) "Local Selling Price" – Meaning of – At the entry check gate "Local Selling Price" can not be taken as value of the goods, but price on which the dealer had purchased the goods. (Para 10)

Case laws Referred to: -

1.(2008) 231 ELT 3 (SC) : (Union of India -V-Dharamendra Textile Processors)

2.(2010) 1 GSTR 66 (SC) : (Union of India -V.Rajasthan Spinning & Weaving Mills.).

For Petitioner - M/s. Subash Chandra Lal, Sumit Lal & Sujit Lal.

For Opp.Parties – Mr. R.P.Kar,
Addl. Standing Counsel (C.T.)

I.MAHANTY, J. This writ application has been filed by the petitioner-M/s. Jai Jagannath Marble seeking to challenge an order dated 6.2.2009, passed by the learned Additional Commissioner of Commercial Taxes, Northern Zone, Orissa, Sambalpur (Opposite Party No.2), confirming the order passed by the Sales Tax Officer (Vigilance), Sambalpur (Opposite Party No.3) in

which, while coming to a finding that, the dealer had been found to be carrying excess stock of marble and the same was detected at the Konoktora Check Gate on 22.2.2009 and levied tax and penalty both under the OVAT Act as well as the Entry Tax Act.

2. Learned Senior Counsel appearing for the petitioner, inter alia, assails the aforesaid impugned orders on the ground that, since the petitioner was found to have made "under valued" the transaction of marbles purchased by it, no proceeding under Section 74(5) of the OVAT Act could have been initiated against him and that, the appropriate provision in the present circumstances ought to have Section 101 of the OVAT Act and had a proceeding been initiated against the petitioner under Section 101 of the OVAT Act, no penalty could have been levied in the present case.

3. On perusal of the impugned order and the facts that emanate in the present case, it is clear therefrom that, the petitioner had purchased certain amount of marble in the State of Rajasthan and engaged the service of a transporter to transport such marble to the State of Orissa. At the point of entry into Orissa, the invoice, way bill and other documents evidencing payment of freight charges were produced and the Sales Tax Officer (Vigilance), Sambalpur (Opposite Party No.3) issued notice to the petitioner under Section 74(5) of the OVAT Act, 2004, inter alia, on the ground that while the documents pertaining to the goods indicated transportation of 396.40 square meters of marbles, apart from other marbles, handicrafts, the total quantum of marble being transported was determined to be 1173.14 square meters, (i.e. nearly three times the declared quantum). The petitioner responded to such show cause notice and in consideration of the same, the Asst. Commissioner of Commercial Taxes (Vigilance), Sambalpur by order dated 27.1.2009 under Annexure-4 came to conclude that, the total quantity of marble measured 12623 square feet, whereas the quantity of marble disclosed in the bill measuring 4265 square feet. Therefore, he determined that the vehicle in question was carrying excess quantity of 8358 square feet of marble and determined the value of such excess goods at the rate of

Rs.40/- per square feet and determined the value of such excess amount at Rs.3,34,320.00.

Consequently, the Orissa Entry Tax determined as @ 2% amounting to Rs.6,686.00 and penalty thereon (twice the tax due) Rs.13,372.00 was imposed under the Orissa Entry Tax Act. Insofar as the OVAT Act is concerned, tax @ 12.5% was imposed on the excess quantity sought to be transported and determined at Rs.41,790.00 and penalty under Section 74(5) of the OVAT Act was levied i.e. five times of the tax due i.e. Rs.2,08,950.00. Therefore, it raised total demand and penalty in both the Entry Tax Act and OVAT Act as Rs.2,70,798.00.

Challenge had been made to this order by the assessee-petitioner, by way of a Revision Case No.296/2008-09 before the Additional Commissioner of Commercial Taxes, Northen Zone, Orissa, Sambalpur which came to be disposed of vide order dated 6.2.2009 rejecting the revision filed by the petitioner confirming the order passed by the Asst. Commissioner of Commercial Taxes (Vigilance), Sambalpur.

Insofar as the contention raised by the learned counsel for the petitioner is concerned, vis-à-vis the applicability of Section 101 of the OVAT Act, and inapplicability of Section 74(5) of the OVAT Act, it became necessary to quote the said provisions hereunder:

> "**101. Special provision relating to under invoicing –** (1) Where the Commissioner has, for the purpose of any proceeding under this Act, reasons to believe that any goods kept in stock or being carried by a dealer or any person on behalf of a dealer are undervalued or underpriced in any document relating to such goods produced before him, he may, after causing such inquiry as he considers necessary in the circumstances, intimate such dealer or person, by a notice in the prescribed form, the prevailing market price of such goods and direct such dealer or person to pay tax under this Act on the basis of the prevailing market price.
>
> (2) Where the goods referred to in Sub-section (1) are being carried, the officer-in-charge of the check-gate or barrier or an officer authorized under Sub-Sec.(3) of Section 74, as the case may be, may detain the vehicle carrying such goods until the tax demanded under Sub-Sec.(1) is paid.
>
> (3) Where the goods referred to in Sub-Sec.(1) are found in stock and the dealer or the person on behalf of the dealer, on whom the notice under that sub-section was served, fails to pay the tax in terms of such notice, or where the tax demanded is not paid under Sub-Sec.(2), the Commissioner may offer to purchase such goods at a price at ten per centum above the purchase value or the value

disclosed by the principal or agent in the case of goods received in consignment basis plus actual transportation charges and entrust such goods to the Orissa State Civil Supplies Corporation Ltd. or any Co-operative Society as may be notified for sale or sell it through public auction in the prescribed manner.

(4) The dealer or the person on being directed under Sub-Sec.(3) shall be found to sell the goods to the Commissioner and if he refuses, fails or does not deliver the goods within the time mentioned in the notice offering to purchase goods he shall be liable to penalty, which shall be equal to twenty per centum of the value of the goods at the prevailing market price.

(5) No penalty under Sub-Sec.(4) shall be imposed without allowing such dealer or person, as the case may be, an opportunity of being heard.

(6) If, in pursuant to the notice issued under Sub-sec.(4), the dealer or the person delivers the goods to the Commissioner he shall be paid the price of such goods as determined under Sub-Sec.(3) alongwith the cost of transportation within fifteen days of the delivery of the goods.

(7) Any person aggrieved by the order or notice, as the case may be, under Sub-sec.(3) or under Sub-sec.(4) may file an application for revision before the prescribed authority within thirty days from the date of receipt by him of the decision, in such form and in such manner as may be prescribed.

Provided that the said prescribed authority may admit an application made after the expiry of the period of thirty days, if he is satisfied that the applicant had sufficient cause for not making the application within the said period."

"**74. Establishment of check-posts and inspection of goods while in transit** –(5) The officer-in-charge of the check-post or barrier or the officer authorized under Sub-section (3), after giving the driver or person in charge of the goods a reasonable opportunity of being heard and holding such enquiry as he may deem fit, may impose, for possession or movement of goods (in transit), whether seized or not, in violation of the provisions of Clause (a) of Sub-section (2) or for submission of false or forged documents or way bill either covering the entire goods or a part of the goods carried, a penalty equal to five times of the tax leviable on such goods, or twenty per centum of the value of goods, whichever is higher, in such manner as may be prescribed."

4. On perusal of the facts in the present case as would be evident from the documents appended thereto, we are of the considered view that Section

101 of the OVAT Act has no application to the facts of the present case as it is clear from the documents appended to the writ application that, the petitioner had suppressed and/or failed to disclose the actual quantity of marbles that he was seeking to bring into the State of Orissa. Although some issues regarding the actual quantum of marble was raised, the same no longer remains indispute, since by way of an interim order dated 11.2.2009, the vehicle of the petitioner had been permitted to be released in his favour and in compliance of certain terms and conditions as noted in the order dated 11.2.2009 passed in Misc. Case No.1624 of 2009 and more importantly, directions were also issued to the concerned Sales Tax Officer to ensure re-measurement of the stock of marble in the presence of

representative of the petitioner at the earliest. It is the admitted case of the parties that the petitioner, in fact, complied with the interim orders by making the necessary deposit and re-measurement by the Sales Tax Officer had, in fact, taken place in the presence of the representative of the petitioner. The result of re-measurement was that the measurement made earlier by the Sales Tax Officer (Vigilance) at the check gate was correct and stood confirmed.

5. In view of the aforesaid fact, it becomes clear that while in the invoice, as well as the way-bills in question, the documents indicated that the vehicle was carrying nearly 4265 square feet of marble. But, in fact, on physical verification and subsequent re-measurement, it was re-confirmed that the vehicle was carrying 12623 square feet of marble. This fact itself clearly satisfies the requirement of Section 74(5) of the OVAT Act. We are of the considered view that the documents submitted on behalf of the petitioner at the entry gate regarded were false and, therefore, clearly attract the applicability of Section 74 of the OVAT Act, 2004.

6. Learned Senior Counsel for the petitioner next contended that since this Court has been pleased to allow the vehicle in question to enter into the State of Orissa and to unload the cargo and since the petitioner also deposited the additional tax amount both under the OVAT Act and OET Act amounting to Rs.48,476.00 as well as 25% of the penalty amount before the Sales Tax Offier (Vigilance), Sambalpur (O.P. No.3), the Court may favourably consider these facts and quash the direction imposing any further penalty on the petitioner beyond the amount already deposited.

7. In the aforesaid regard, Mr. Kar, learned counsel for the Revenue supported the revisional order impugned before us and stated that it became rampant practice in certain specific trades such as “marble”, that the quantum of goods actually brought into the State of Orissa is under-declared and consequently, leading to a huge loss of State Revenue, due to such activities on the part of certain traders and submits that the penalty imposed is in terms of Section 74(5) of the OVAT Act. Since the Legislature had

mandated the levy of penalty at five times of tax amount in order to prevent unscrupulous dealers from avoiding of lawful obligations. In this respect, he submits that the Revenue have no discretion in this matter and if a person is found to have presented false documents pertaining to the goods sought to brought into the State of Orissa, apart from the tax leviable therefrom, he is also liable to pay penalty @ five times the tax imposed and in this respect the Assessing Officer has no discretion in the matter regarding levy of penalty and, therefore, prays dismissal of the writ application.

8. In this respect, reliance was placed by the revenue on the decision of the Hon'ble Supreme Court in the case of **Union of India v. Dharamendra Textile Processors,** (2008) 231 ELT 3 (SC) wherein the Hon'ble Supreme

Court while considering Section 11AC of the Central Excise Act, 1944 (Levy of penalty) determined that the application of the aforesaid section would depend upon the existence or otherwise of all the conditions stated in the Section. Once the Section is found to be applicable in a case, the concerned authority would have, no discretion in quantifying the amount and penalty must be imposed as stipulated under Sub-Section (2) of Section 11A of the Central Excise Act. This view has been re-affirmed by the Hon'ble Supreme Court in the case of **Union of India v. Rajasthan Spinning & Weaving Mills,** (2010) 1 GSTR 66 (SC).

9. In view of the aforesaid authoritative pronouncement by the Hon'ble Supreme Court, we are of the considered view that the Sales Tax Officer has no discretion vis-à-vis levy of penalty, once he is satisfied that the circumstances as contemplated under Sub-Section (5) of Section 74 of the OVAT Act are satisfied. This penalty as mandated by the State Legislature has to be imposed and the Sales Tax Officer has no discretion in the said regard. Therefore, we are afraid that the second contention of the petitioner also cannot be accepted and the same stands rejected.

10. Further contention was raised by the learned counsel for the petitioner that the imposition of tax and penalty had been made by adopting a sum of Rs.40/- per square feet as the "local sale price" of marble whereas the petitioner had in fact, purchased the marble @ of Rs.38.45 per square feet. In so far as this contention is concerned, we are in agreement that the contention of the petitioner that the Sales Tax Officer (Vigilance) ought not to have taken the "local selling price" as the value of the goods, but the price on which the petitioner had "purchase price", i.e. Rs.38.45 per square feet.

11. Therefore, in view of the conclusion arrived at, as noted hereinabove, the writ petition succeeds only to the limited extent of remitting the matter back to the Sales Tax Officer (Vigilance), Sambalpur to re-compute the tax and penalty both under the Orissa Sales Tax Act, 1947 and Orissa Entry Tax Act, 1999 by taking the price of the marble at the check gate i.e. @ Rs.38.45

per square feet and re-compute the tax and penalty leviable thereon and by issuing fresh demand on the petitioner after adjusting therefrom the tax and penalty already deposited by the petitioner pursuant to the interim direction passed in the writ application, while directing interim release of the Vehicle/goods.

12. The writ application stands disposed of in terms of the aforesaid direction.

Writ petition disposed of.

2010 (II) ILR – CUT- 232

V.GOPALA GOWDA, CJ & I.MAHANTY, J.

W.P.(C) NO.10953 OF 2010 (Decided on 14.07.2010).

BASANTA KUMAR SAHU ……..Petitioner

.Vrs.

STATE …… Opp.Party

MINES & MINERALS (DEVELOPMENT & REGULATION) ACT, 1957 – SEC.23-A r/w Rule 16 of the Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007.

Petitioner is the owner of a Tipper (Truck) – His vehicle involved in theft of iron ore and seized by the Mining Officer – Petitioner filed petition for compounding the offence – Deputy Director proposed to compound the offence on payment of Rs.1,00,000/- and send his proposal for approval of the Director of Mines – Director of Mines while approving the recommendation enhanced the compounding fee from Rs.1,00,000/- to Rs.2,00,000/- - Hence the writ petition.

Deputy Director of Mines is vested with authority to compound the offence under Rule 16 and the Director of Mines having approved the recommendation of the Deputy Director of Mines had no authority in law to enhance the compounding fee from Rs.1,00,000/- to Rs.2,00,000/-

Held, the impugned order passed by the Director of Mines enhancing the compounding fee is wholly without jurisdiction, hence quashed and the order of the Deputy Director Joda levying Rs.1,00,000/- as compounding fee is confirmed – Vehicle in question be released on payment of the above fee. (Para 6,7)

For Petitioner- M/S. P.K. Rath
For Opp.Parties –M/S.D. Panda, Addl.Govt.Advocate.

Heard Mr. P.K. Rath, learned counsel for the petitioner and Mr. D. Panda, learned Additional Government Advocate on behalf of the State.

2. Learned Additional Government Advocate submits that the direction issued by this Court dated 30.6.2010, could not be complied with by the State since the Director of Mines who has issued the impugned order under Annexure-7 dated 11.2.2010 has retired in the meantime.

3. In view of the aforementioned fact we are of the view that while an opportunity was afforded to the State to correct the mistake made in the

impugned order under Annexure-7, has not been availed and hence, it is necessary to give the following directions:

4. The case of the petitioner is that he is the owner of a Tipper (Truck) bearing registration No.OR09G-7154 and had given the said truck under higher purchase agreement to one Md. Hussain. It appears that the vehicle in question was involved in theft of iron ore and the same was seized by the Mining Officer, Joda on 25.12.2009. The petitioner upon being noticed appeared before the Deputy Director of Mines and filed a petition for compounding the offence as provided under Rule 16 of the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation Rules, 2007 (in short "the rules, 2007). The same is quoted herein below for convenience:

> "**16. Compounding of Offences**:
> (1) On receipt of written application from the accused person, the Competent Authority may, in exercise of its powers conferred under sub-section (1) of Section 23A of the Act, compound the offence either before or after the institution of prosecution, on payment of such sum, as the Competent Authority may specify with prior approval of the Director of Mines/any officer authorized by the Director. The amount so collected shall be credited to the Government under the head of account specified under sub-rule (2) of Rule 4.
> (2) After the offence is compounded and the accused person is not interested to pay for the property seized or the Competent Authority is of the opinion that such property shall not be released in favour of the accused, he shall not compound the offence and take charge of the seized property and dispose it of by public auction or as per the directions of the Government.

(3) Where an offence is compounded under sub-rule (1), no proceeding or further proceedings, as the case may be, shall be taken against the offender in respect of the offence so compounded and the offender, if in custody, shall be released forthwith.

(4) The competent Authority shall maintain a register in Form O mentioning therein the details of every offence compounded by him under these rules and submit a monthly return to the Director of Mines."

5. The Deputy Director of Mines accepted the plea of the petitioner and proposed to compound the offence on the payment of Rs.1,00,000/- for release of the vehicle and forfeiture of the seized iron ore found in the

vehicle and sent his proposal for the approval of the Director of Mines. The Director of Mines while according his approval to the recommendation of the Deputy Director of Mines, directed to compound the offence by depositing a sum of Rs.2,00,000/-.

6. The petitioner being aggrieved by the same approached this Court in W.P.(C). No.5266 of 2009 and by order dated 6.4.2010, this Court was pleased to direct the petitioner to move the Director of Mines once again since there clearly appeared to be an error in the impugned order, which appeared to be a typographical or clerical error. It is further stated that pursuant to the aforesaid direction, the petitioner made the necessary representation and the same came to be disposed of vide order dated 11.2.2010 under Annexure-7, once again, reiterating his earlier direction to compound the offence at Rs.2,00,000/-. Hence the present challenge.

7. On perusing the Section 16 of the Rules, 2007, it is clear therefrom that the Deputy Director of Mines is vested his authority to compound the offence thereunder and the Director of Mines having in fact, approved the recommendation of the Deputy Director of Mines had no authority in law to enhance the amount by compounding the offence from Rs.1,00,000/- to Rs.2,00,000/-.

8. We are of the considered view that this enhancement by the Director of Mines is wholly without jurisdiction. In spite of the opportunities having been granted to the Director of Mines to correct the error in his order, the said Director of Mines has in the mean time retired, we quash the order dated 11.2.2010 passed by the Director of Mines, Orissa under Annexure-7 enhancing the compounding fee and confirm the order of the Deputy Director, Joda levying Rs.1,00,000/- as compounding fee on the petitioner.

With the above directions as noted hereinabove and the deposit of Rs.1,00,000/- (Rupees one lakh) as compounding fee to be complied with within a period of ten days from the date of receipt of the certified copy of

this order by the Deputy Director of Mines, Joda (O.P. No.3) and vehicle be released immediately thereafter.

8. The writ petition is allowed in terms of the directions noted hereinabove.

Writ petitioner allowed.

2010 (II) ILR – CUT- 235

V.GOPALA GOWDA, CJ & S.C.PARIJA, J.

W.P.(C) NO.15722 OF 2006 (Decided on 28.07.2010)

M/S. EPARI SADASIV & SONS ……. Petitioner.

.Vrs.

ASST. COMMISSIONER OF SALES TAX & ORS. …….. Opp. Parties.

ORISSA VALUE ADDED TAX ACT, 2004 (ACT NO. 4 OF 2004) – SEC.41 (1) & (2) r/w Rule 51 of the OVAT Rules, 2005.

Whether Asst. Commissioner of Commercial Tax, Intelligence Range has jurisdiction to conduct tax audit and issue Audit visit Report when he has not been delegated with the power by the Commissioner of Sales Tax, Orissa, to exercise and discharge the power and duties in relation to Rule 41 of the OVAT Rules, 2005 - Held – Yes.

Commissioner of Sales Tax has delegated his powers and duties with regard to selection of dealers for tax audit on random basis and issue of direction for conducting tax audit in respect of such dealers in accordance with the approved audit programme – The said notification excludes the Intelligence Ranges from exercising such powers to select the dealers for tax audit – But once the concerned Asst. Commissioner of Sales Tax has selected the dealer for tax audit, the Intelligence Range is not prohibited from conducting such tax audit.

Held, there is no illegality or impropriety in the action of the Opp.Parties in carrying out the tax audit of the petitioner's firm.

(Para 8 & 10)

For Petitioner - M/s. M.V.S.R.Pathi, N.Paikray, B.K.Mishra,

P.K.Hazra, K.K.Sahoo, S.P.Bhuyan & S.Dash

For Opp.Parties - Mr. T.K.Satpathy Addl. Standing Counsel

S.C. PARIJA, J. The petitioner, who is a registered dealer, has filed this writ petition challenging the jurisdiction of the Asst. Commissioner of Commercial Tax, Intelligence Range, Cuttack-opposite party no.2, in conducting tax audit and issuance of Audit Visit Report, especially when the said authority-opposite party no.2 has not been delegated with the power by the Commissioner of Sales Tax, Orissa, to exercise and discharge the power and duties in relation to Rule 41 of the Orissa Value Added Tax Rules, 2005 (OVAT Rules for short), under notification dated 1.12.2005, as per Annexure-5 to the writ petition. The petitioner also assails the submission of the Audit Visit Report in Form E-27 for the purpose of making audit

assessment under the provisions of Orissa Value Added Act, 2004 (OVAT Act for short), when the same was required to be submitted in Form VAT-303.

2. The main contention of the learned counsel for the petitioner was that the Commissioner for Sales Tax, Orissa, having issued notification dated 1.12.2005 (Annexure-5), delegating to the Assistant Commissioner's of Sales Tax (excluding Intelligence Ranges) to exercise all the powers and duties of the Commissioner specified in Section 41(1) and (2) of the OVAT Act and powers specified in Rule 41 of the OVAT Rules, the audit conducted by the Assistant Commissioner of Commercial Tax, Intelligence Range, Cuttack, and the Audit Visit Report (Annexure-1) submitted by him pursuant to such audit, is wholly illegal and without jurisdiction. The further plea of the learned counsel for the petitioner was that the Audit Visit Report submitted by the Assistant Commissioner of Commercial Tax, Intelligence Range, Cuttack-opposite party no.2 in Form E-27 for the purpose of making audit assessment under the provisions of OVAT Act and the subsequent order of assessment dated 7.12.2006 (Annexure-6) passed on the basis of such report are also improper and illegal, as the proper form prescribed for the same is Form VAT-303.

3. In the counter affidavit filed on behalf of opposite parties, it has been stated that as per the notification issued by the Commissioner of Sales Tax, Orissa, dated 1.12.2005 (Annexure-5), the Commissioner has delegated the powers to select dealers for the purpose of taking up tax audit during a particular period to the Assistant Commissioner of Sales Tax appointed under Section 3(2) of the OVAT Act, excluding the Intelligence Ranges. However, this power is only for selection of dealers in respect of whom tax audit is to be conducted. Therefore there is no bar in conducting tax audit by the audit team duly constituted under Rule 43 of the OVAT Rules. In the said

counter affidavit, it has been further stated that the inspection of the business transactions effected by the petitioner's firm was taken up simultaneously under both the OVAT Act and Orissa Entry Tax Act and the Rules framed thereunder and accordingly a common report had been prepared in Form E-27, which is substantially the same as Form VAT-303. In order to avoid duplication and for convenience in recording the observation made during the course of audit, the Audit Visit Report has been submitted in Form E-27, which is in substantial compliance of the statutory provisions as well as the principles of natural justice and no prejudice can be said to have been caused to the petitioner on that score.

4. On a perusal of the notification dated 1.12.2005 (Annexure-5) issued by the Commissioner of Sales Tax, Orissa, Cuttack, it is seen that the powers and duties of the Commissioner under Section 41(1) and (2) of the OVAT Act and all powers specified in Rule 41 of the OVAT Rules has been

delegated to the Assistant Commissioner of Sales Tax exercising jurisdiction over a circle (s), a Large Tax Payer Unit (s) or a Range (excluding Intelligence Range), with effect from the date of issue of notification.

5. Section 41(1) and (2) of the OVAT Act reads as under :

"41. Identification of tax payers for tax audit-

(1) The Commissioner may select such individual dealers or class of dealers for tax audit on random basis or on the basis of risk analysis or on the basis of any other objective criteria, at such intervals or in such audit cycle, as may be prescribed.

(2) After identification of individual dealers or class of dealers for tax audit under sub-section (1), the Commissioner shall direct that tax audit in respect of such individual dealers or class of dealers be conducted in accordance with the audit programme approved by him :

Provided that the Commissioner may direct tax audit in respect of any individual dealer or class of dealers on out of turn basis or for more than once in an audit cycle to prevent evasion of tax and ensure proper tax compliance."

6. Rule 41 of the OVAT Rules provides as follows :

"41. Selection of dealers for tax audit-

(1) The Commissioner shall, under the provision of Section 41, select by the 31st of January or by any date before the close of every year, commencing from the appointed day, not less than twenty per cent of registered dealers for audit during the following year, by random selection with or without the use of computers :

Provided that for the year commencing with the appointed day, the selection of dealers for audit under this sub-rule shall be made by the 30th of September of that year.

(2) The Commissioner, where considers it necessary to safeguard the interest of revenue or where any enquiry is required to be conducted on any specific issue or issues relating to any dealer, or class or classes of dealers, on being referred by an Officer appointed under sub-section (2) of Section 3, may direct audit to be taken up.

(3) The Commissioner may, on the basis of apparent revenue risk of the individual dealers, make selection of dealers for special or investigation audit. The revenue risk may be determined on objective

analysis of the risk parameters or on receipt of intelligence or information, regarding evasion of tax.

(4) For the control of large tax payers, the Commissioner may, plan audit checks across the totality of the business of such dealers, within an audit cycle of two years."

7. The notification (Annexure-5) and the schedule appended thereto shows that the delegations have been made in respect of powers and duties enumerated in Section 41(1) and (2) of the OVAT Act and Rule 41 of the OVAT Rules. The Commissioner of Sales Tax has delegated his powers and duties to be exercised by the authority stated therein in respect of the said provisions relating to selection of dealers for tax audit, after identification of such dealers and for issuing direction for conducting tax audit in respect of such dealers, in accordance with the tax audit programme approved by the said authority. Rule 41 of the OVAT Rules lays down the modalities for selection of dealers for tax audit. Further Rule 43 thereof provides that such tax audit shall be undertaken by a team constituted for the purpose and such team may consist one or more Assistant Commissioner, Sales Tax Officer and Assistant Sales Tax Officer, as the Commissioner may deem fit.

8. A combined reading of the aforesaid statutory provisions make its abundantly clear that the Commissioner of Sales Tax has delegated his powers and duties with regard to selection of dealers for tax audit on random basis and issue of direction for conducting tax audit in respect of such

dealers, in accordance with the approved audit programme. The said notification excludes the Intelligence Ranges from exercising such powers to select the dealers for tax audit. But once the concerned Assistant Commissioner of Sales Tax has selected the dealer for tax audit, the Intelligence Range is not prohibited from conducting such tax audit. Such provisions have been incorporated in the statute to check evasion of tax, causing loss of State revenue. Moreover, as the Assistant Commissioner of Sales Tax, Puri Range-opposite party no.1, who has conducted the assessment pursuant to the Audit Visit Report being not an authority exercising jurisdiction of the Intelligence Range, the impugned order of assessment passed on the basis of such report cannot be faulted.

9. Coming to the plea of the petitioner with regard to issue of Audit Visit Report in Form E-27 instead of Form VAT-303 for the purpose of making audit assessment under the provisions of the OVAT Act, it is seen that the Assessing Officer-opposite party no.1 had issued a notice of assessment as

a result of audit, enclosing a copy of the Audit Visit Report, to which the petitioner has submitted its show-cause/reply, (Annexure-4), explaining the irregularities mentioned in the said report. No plea of improper service of notice has been taken therein. Moreover, the Form VAT-303 and Form E-27 being substantially similar, which provides for indicating the details of the audit made, the copy of which has been supplied to the petitioner, there is substantial compliance of the statutory provisions, inasmuch as, the petitioner cannot complain of any violation of principles of natural justice.

10. For the reasons detailed above, we do not find any impropriety or illegality in the action of the opposite parties in carrying out the tax audit of the petitioner's firm and the subsequent order of assessment passed on the basis of such audit report, so as to warrant any interference. However, as the petitioner has moved this Court against the order of assessment, we permit the petitioner to avail the statutory remedy of appeal, which if filed within four weeks' hence, shall be considered on its merit and disposed of in accordance with law.

The writ petition being devoid of merit, the same is accordingly dismissed.

Writ petitioner dismissed.

2010 (II) ILR – CUT- 240

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

W.P.(C) NO. 6037 OF 2008(with batch case) (Decided on 23.03.2010)

M/S. TULASIDAS MODI & ORS. …….Petitioners

.Vrs.

UNION OF INDIA & ORS. ……Opp. Parties

ESSENTIAL COMMODITIES ACT, 1955 (ACT NO.10 OF 1955) – SEC.3 r/ w Orissa Public Distribution system (Control) Order 2008 – Clause 5.

Restrictions imposed Under Clause 5 on a dealer or person applying for licence in Kerosene if he or any of his family members has a commercial interest in such business – Held, Action is arbitrary and violative of Article 19(i)(g) of the Constitution of India – Direction issued to modify Clause 5 and till modification is made the same shall be kept in abeyance. (Para 11)

Case laws Referred to:-

1. AIR 1974 SC1300 : (State of Gujarat -V- Shri Ambica Mills Ltd.).
2. (2006) 3 SCC 334 : (Bombay Dyeing & Mfg. Co. Ltd.-V-Bombay Environmental Action Group)
3. AIR 1996 Allahabad 30 : (Daulat Ram Gupta -V-State of U.P.).
4. AIR 1989 Patna 68 : (Lal Babu Prasad -V- State of Bihar & Anr.).

For Petitioners :– M/s. Milan Kanungo, M.Verma,S.Das, B.P.Patnaik,

B.B.Panda & D.Pradhan. M/s. B.Sahu, A.Tripathy, B.Mohanty & S.S.Ray. M/s.Ramakanta Mohanty, D.K.Mohanty, A.P.Bose, S.K.Mohanty, S.N.Biswal, D.Bharadwaj, D.P.Patnaik, P.Jena,S.Mohanty & N.Das.

For Opp.Parties-:- Mr.J.K.Mishra (Asst.Solicitor General)
Mr.P.C.Biswal,(Central Govt.Counsel)
(For Union of India)
Additional Govt. Advocate (For State of Orissa).

I.M.QUDDUSI, ACJ. These writ petitions have been filed for quashing of the Orissa Public Distribution System (Control) Order, 2008 issued on 13th of March, 2008 by the Food and Supplies and Consumer Welfare Department and also for a declaration that the clauses thereunder are not applicable to those petitioners who are operating as wholesaler/sub-wholesaler in the State. Therefore, they were heard together and are disposed of by this common order. Since the facts and the relief claimed in all these writ petitions are similar, it is not necessary to discuss the facts of all the cases. Therefore, we refer to the facts as mentioned in W.P.(C) No.6037 of 2008.
M/S. TULASIDAS MODI -V- UNION OF INDIA [*I.M.QUDDUSI, ACJ.*]

2. The brief facts of the case are that the Food Supplies and Consumer Welfare Department of the Government of Orissa issued a notification on 13.3.2008 in exercise of powers conferred under Section 3 of the Essential Commodities Act, 1955 (10 of 1955) read with paragraph 5 of the Annexure to the Public Distribution System (Control) Order, 2001 published in the Gazette of India, Extraordinary Part II, Section 3, Sub-section (i), No.434, dated 31st of August, 2001 and the notification of Government of India, in the Ministry of Agriculture and Irrigation (Department of Food), GSR 800, dated 9th of June, 1978, published in the Gazette of India, Extraordinary Part II, Section 3, Sub-section (i) dated 17th of June, 1979 and the notifications in the Ministry of Industry and Civil Supplies (Department of Civil Supplied and Co-operation) No.S.O.681 (E) and S.O.682 (E) both dated 30th of November, 1974 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 30th of November, 1974, issued the order namely, Orissa Public Distribution System (Control) Order, 2008 (in short '2008 Order'). In Clause-5 of the 2008 Order, it has been mentioned that no dealer shall hold a license to deal in a commodity under the Public Distribution System under this Order if he or any of his family members has a commercial interest in a business in or are commercial users of the said commodity or is a member of any Advisory or Vigilance Committee or any other Committee entrusted with supervision of the Public Distribution System. The said paragraph is quoted as under for reference.

> "5. No dealer shall hold a license to deal in a commodity under the Public Distribution System under this Order if he or any of his family members have a commercial interest in a business in or are

commercial users of the said commodity or is a member of any Advisory or Vigilance Committee or any other Committee entrusted with supervision of the Public Distribution System.

Explanation : - For the purpose of this clause.

(i) Commercial interest shall include business partnership and a relationship of tenant/landlord of a commercial building;

(ii) Diesel and Petrol shall be deemed to be commodities closely related to Kerosene ;

(iii) Owner of a commercial vehicle including boat shall be deemed to be a commercial user of Diesel/Petrol; and

(iv) Family shall mean a family unit consisting of the individual concerned, his/her spouse, their unmarried sons and daughters and married sons and dependent parents."

Provided that the prohibition under this Clause shall not apply in relation to the vehicles meant for and primarily used for transportation of Kerosene from oil depots of the oil marketing companies to the

business premises of a wholesaler agent of an oil marketing company.

Provided further that the license shall not be cancelled for violation of provisions of this clause if the dealer or his family member, as the case may be, relinquishes his interest in such other businesses within a period of three months from the date of coming into force of this order."

3. Paragraph-9 of the 2008 Order deals with the power to refuse the license which is quoted as under for perusal;

"9. Power to refuse licence:

(1) The licensing authority may refuse to renew any license if it is of the opinion that the performance of the licensee was not satisfactory, that the licensee has contravened any provisions of the Act or any order issued there under or terms and conditions of license, the licensee has other commercial interests, which may be detrimental to the smooth functioning of Public Distribution System, that the expected size of operations of the dealer is not economically viable and/or that the renewal of license would otherwise be not in the interest of efficient functioning of the Public Distribution System'

(2) The Licensing Authority may refuse to grant or renew the license of a private dealer, if another applicant from categories mentioned in sub-clause (3) or (4) of clause (4) is available to be appointed as a dealer in the locality or area served or proposed to be served by the applicant; and

(3) The licensing authority may refuse to grant or renew the license of a sub-wholesaler in Kerosene if an agent wholesaler of oil company is operating in a business premises within 10 Km distance, from the business premises of the sub-wholesaler."

4. It has been submitted by the learned counsel for the petitioners that Kerosene is a Petroleum product. Regulation and development of Oil fields and Mineral Oil Resources, Petrol and Petroleum products other than liquid and substances declared by the Parliament by law as dangerously inflammable is included in the Union List vide Entry 53 and, therefore, the Union of India is only competent to legislate in the said field. The State does not possess legislative competence to make laws on the subject of regulation of Petrol and Petroleum Product which includes kerosene. In view of Article 162 of the Constitution of India, the State of Orissa has no executive power for regulation of kerosene. Regulation of kerosene is wholly within the domain of the Central Government. Petroleum and Petroleum product is an essential commodity under the Essential Commodities Act, 1955. Section 3 of the Essential Commodities Act, 1955 empowers the

Central Government to control production, supply and distribution of M/S. essential commodities. Section 5 of the Essential Commodities Act deals with delegation of powers by the Central Government to any officer or authority subordinate to the Central Government or State Government or such officer or authority subordinate to the State Government. Accordingly, the Central Government issued notification 3011.1974 delegated powers to the State government and Union Territories to exercise powers conferred on sub-section (1) of Section 3 of the Act to make orders to provide for matters specified in clauses (d), (e),(f),(g),(h), (i) (ii) and (j) of sub-section (2) thereof in relation to all essential commodities other than food stuff and fertilizers. Clause (iii) of the said notification made it clear that no order should be issued in pursuance of the powers delegated if it is inconsistent, with any order issued by the Central Government under the Act. Similarly by another notification delegated powers to the State government to make orders to provide for the matters specified in clause © of sub-section (2) thereof in relation to all essential commodities other than food stuff. Both the notifications specifically provided that no order inconsistent with any order passed by the Central Government shall be issued pursuant to the delegated power. As the various orders issued by the State Governments created a chaotic condition, the Central Government issued PDS Control Order, 2001, Clause 7 of the 2001 Order provided for licensing. It provided that the procedure for issue of licenses or authorization to the fair price shop for the distribution of essential commodities under Public Distribution System and duties responsibilities of the fair price ship owners shall be as in paragraph 5

of the annexure to the said order which, inter alia, provided that the State Governments shall issue an order under section 3 of the Act for regulating the sale and distribution of the essential commodities. In pursuance of powers delegated under paragraph-5 of the annexure, the Orissa Public Distribution System 9 Control) Order, 2002 was enacted. Thereafter the Orissa Public Distribution System (Control) Order, 2008 was issued whereby the Orissa Kerosene Control Order, 1962, Orissa Pulses and Edible Oil Dealers Orders, 1977, the Orissa Rice & Paddy (Control) Order, 1965, the Orissa Sugar Dealer Licensing Order, 1963 and the Orissa Public Distribution System (Control) Order, 2008 have been repealed. It is submitted by the learned counsel for the petitioner that the Order 2008 has tried to expand the definition of 'Dealer' to bring within its scope wholesalers/ sub-wholesalers/retailers and Storage Agents. It is contended by the learned counsel for the petitioners that as the regulation of petroleum and petroleum products is covered under the Union List, only Government of India is competent to legislate on the said field and the State Government has no power for regulating the distribution of kerosene. He has further contended that the OPDS (Control) Order, 2002 as well as the Order, 2008

are inconsistent with the PDS (Control) Order, 2001 in so far as the wholesalers and sub-wholesalers have been included in the definition of 'dealers'. It is further contended that Clause 5 of the Order, 2008 is violative of Article 19(1) (g) of the Constitution of India and that the aforesaid Clause 5 as well as Clause 9(2) and (3) are inconsistent with the Central Control Order of 2001. Lastly, it is contended that the increase in the license fee and security deposit is not reasonable.

5. Counter affidavit has been filed on behalf of opposite party no.3 stating that PDS Kerosene is allotted by the Central Government to the State Government for distribution to different districts of the State through the wholesalers/sub-wholesalers who obtain license from the licensing authority under the provisions of the Control Orders issued by the State Government in exercise of the power conferred under the Essential Commodities Act. The PDS kerosene is being made available at subsidized prices by the Government of India. The petitioners obtained license in accordance with the provisions of the OPDS (Control) Order, 2002 which has been renewed from time to time. The impugned Control Order, 2008 has replaced the Control Order, 2002. The petitioners had never challenged the validity of the Control Order, 2002. Rather they obtained the license under the said Control order, Section 5 of the Essential Commodities Act permits the State Government to make users and to issue notifications under section 3 in relation to such matter and subject to such conditions as may be specified by the Central Government. The Orissa PDS Order 2002 and 2008 have been issued in exercise of powers conferred by section 3 of the Essential Commodities Act.

It is further stated in the counter affidavit that the agreement between the petitioner and the oil companies does not exempt him from licensing requirement. The licensing of dealer in kerosene has been and is being regulated under the orders issued by the State Government in exercise of powers conferred under the Essential Commodities Act and the Petroleum Act and the Rules made thereunder do not preclude licensing system under the Essential Commodities Act. The PDS Control Order 2001 as well as the OPDS Control Order, 2008, have been issued in exercise of powers conferred under Section 3 of the Essential Commodities Act and there is no conflict between the above two Control Orders. It is further stated that the definition of 'dealer' in the Control Order of 2008 is similar to that in the Control Order of 2002 and includes wholesalers and sub-wholesalers. Agent wholesalers defined in clause 2 (c) are also covered in the definition of wholesalers in clause 2(s) and that of dealers in caluse 2(h). Hence all provisions of the Control Order, 2008 applicable to dealer and wholesalers are equally applicable to agent wholesalers. It is further stated that the definition of the 'public distribution system' as given in the PDS Control

Order, 2001 does not mean that the PDS transactions at the level of wholesalers can not be regulated by the State Government. The term 'dealer' has not been defined in the PDS (Control) Order, 2001 and, therefore, the definition of 'dealer' in the OPDS (Control) Order, 2008 can not be said to violate the Control Order of 2001. It is submitted on behalf of opposite party no.3 that the objective of Orissa Public Distribution System (Control) Order, 2008 is for effective and efficient functioning of the Public Distribution System by addressing the problem of diversion of PDS commodities in general and kerosene in particular. The contention of the petitioners that Clauses (5) and (9) of the OPDS Control Order, 2008 are inconsistent with the PDS Control Order, 2001 has been stoutly denied by the opposite party no.3. The case of opposite party no.3 is that these provisions have been made for preventing the scope of diversion of PDS commodities and toensure that dealers with dissatisfactory performance and unviable dealerships do not operate. It is further stated that it is a policy decision of the State Government to replace private dealers by institutional dealers so that there is better community participations, transparency and proper distribution of PDS commodities. Likewise sub-wholesalers are not required in places where retailers can directly lift their quota from agent wholesalers. These provisions do not contradict any specific provisions of the PDS (Control) Order, 2001. On the aforesaid ground it is prayed that the writ petition be dismissed.

6. No law/rule/order can be issued contrary to the provisions of the Constitution as in our country, Constitution is supreme. Part-III of the

Constitution is related to the fundamental rights. No doubt the State can impose reasonable restrictions which are necessary in the interest of the nation. Article 19 of the Constitution deals with Right to Freedom and Article 19(g) provides that all citizens shall have the right to practice any profession, or to carry on any occupation, trade or business. Clause (6) of Article 19 of the Constitution provides that nothing in sub-clause (g) of said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to the followings:

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service,

whether to the exclusion, complete or partial, of citizens or otherwise.:

But the restrictions can not be unreasonable, arbitrary or of an excessive nature.

7. In the instant matter, if we consider the impugned PDS Control Order separately, it would read as under:

"No dealer shall hold a license to deal in a commodity under the 2008 Order :

(A) If he or any of his family members have a commercial interest in a business in or are commercial users of the said commodity or a commodity closely related to the said commodity ; or

(B) Is a member of any Advisory or Vigilance Committee or any other Committee entrusted with supervision of the Public Distribution System."

In the explanation given below in Clause-5 of the 2008 Order, the following has been given :

"(i) Commercial interest shall include business partnership and a relationship of tenant/landlord of a commercial building ;

(ii) Diesel and Petrol shall be deemed to be commodities closely related to Kerosene ;

(iii) Owner of a commercial vehicle including boat shall be deemed to be a commercial user of Diesel/Petrol ; and

(iv) Family shall mean a family unit consisting of the individual concerned, his/her spouse, their unmarried sons and daughters and married sons and dependent parents."

Here, it is necessary to peruse the definition of "Family" given therein i.e. family shall a mean family unit consisting of the individual concerned, his/ her spouse, their unmarried sons and daughters and married sons and dependent parents meaning thereby that the case the spouse of a license holder is doing business closely related to a commodity irrespective of the fact that whether he/she is separated or judicially separated, the dealer can not continue his license or a person of such situation can not get any license. Further, if an unmarried son or daughter or married son are doing independent businesses and are separated (not the member of HUF), the dealer can not continue his license in his business in the essential commodities or fresh license can not be granted to a person having that circumstances.

8. The definition of "Dealer" has been given in the 2008 Order according to which dealer means any person, firm, association of persons, company, Panchayati Raj Institution, Urban Local Body, Co-operative Society, Women Self Help Group, Forest Protection Committee, Self Help Group or any other institution carrying on business on wholesale or retail basis in the purchase,

storage, sale and/or distribution of essential commodities meant for distribution under the Public Distribution System. The term "Dealer" includes wholesaler/sub-wholesaler/retailer and storage agents.

Clause 3 of the Kerosene (Restriction on use and fixation of ceiling price) Order, 1993 provides restriction on use of kerosene supplied under public distribution system and Clause 4of the said order provides procurement, storage and sale of kerosene under the public distribution system. Clause 3 and 4 thereof are quoted as under for perusal :

"3. Restriction on use of kerosene supplied under public distribution system;

(1) No person shall use kerosene supplied under the public distribution system for any purpose other than cooking and illumination ;

Provided that the Central or State Government may by order permit any person to use kerosene for such other purposes as it may specify in that order.

(2) No dealer appointed under the public distribution system or a transporter shall sell, distribute or supply, kerosene under the public distribution system to any person other than the person to whom the supplied are meant for ;

4. **Procurement, storage and sale of kerosene under the public distribution system:-**

(1) No dealer having stocks of kerosene supplied under the public distribution system at the business premises, including the place of storage ;

(a) shall, unless otherwise directed by the Government or Government Oil Company, refuse to sell, distribute or supply the kerosene to any consumer on any working day, during working hours,

(b) shall keep his business premises, including the place of storage, closed during working hours on any working day without the prior written permission of the Government or the Government Oil Company,

(c) shall sell, distribute or supply kerosene at a price higher than fixed by the Government or Government Oil Company ,

(2) Every dealer appointed under the public distribution system shall take all reasonable steps to ensure that adequate stocks of kerosene are available at the business premises including the place of storage at all times.

Explanation – for the purpose of sub-Clause

(1) the expression "working hours' means the working hours fixed by the concerned Oil Company in accordance with the Shops and

establishments act in force in the respective State or Union Territory."

It is the fundamental right of a citizen enshrined in clause (g) of Article 19(1) of the Constitution to practice any profession, or to carry on any occupation, trade or business. However, reasonable restrictions can be imposed on the exercise of such right in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. In applying the test of reasonableness, it is held that the court must take into account the following aspects ; (a) nature of the right infringed, (b) underlying purpose of the restriction imposed, 9c) evils sought to be remedied by the law, its extent and urgency, (d) how far the restriction is or is not proportionate to the evil; and (e) prevailing conditions at the time. If law imposing licensing does not set out the consideration, the law would be void, if considerations are set out in the law, but are departed from by the competent authority while administering the law then the order of the competent authority would be void. The considerations which generally prevail in judging the validity of a law or rule are whether the restrictions have been imposed by law; such restrictions are reasonable and is imposed for one of the specified purposes. Here is the question as to imposing restrictions on grant of license if any close relative of the applicant is doing business in petroleum product with a view to prevent corruption. The question is whether a person who intends to get license in kerosene can

restrict any of his close relative to leave that business because of the reason that he would be able to get the dealership in kerosene in such circumstances and why a person doing independent business in petroleum product should leave his business because of the reason that if he will not leave that business his close relative, may be a poor one, would be deprived of getting license of dealership of kerosene. It should be taken into notice that dealer in petroleum product is an independent earning member and he can not be controlled by any other friends and relative in this regard. In the case of State of Gujarat v. Shri Ambica Mills Ltd., AIR 1974 SC 1300, the apex Court held that one to whom the application of a statute is constitutional will not be heard to attack the statute on the ground that it must also be taken as applying to other persons or other situations in which its application might be unconstitutional. In the case of Bombay Dying & Mfg. Co. Ltd. V. Bombay Environmental Action Group, (2006) 3 SCC 334, the apex Court has held as under :

> "A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the appellants that the courts can not exercise their power of judicial review at all. By reason of any legislation whether enacted by the legislature

> or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act in good faith."

In Craies on Statute law, 7th Edn., it is stated at pp.297-

98: "The initial difference between subordinate legislation (of the kind dealt with in this chapter) and statute law lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority, and that courts of law, as a general rule, will not give effect to the rules, etc., thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled.The validity of statutes can not be canvassed by the courts, the validity of delegated legislation as a general rule can be. The courts therefore (1) will require due proof that the rules have been made and promulgated in accordance with the statutory authority, unless the statute directs them to be judicially noticed ; (2) in the absence of express statutory provision to the contrary, may inquire whether the rule-making power has been exercised in accordane with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance

of the regulation, or the sanction, if any, attached to the regulation; and it follows that the court may reject as invalid and ultra vires a regulation which fails to comply with the statutory essentials."

Similar restriction was imposed by the Government of Uttar Pradesh prohibiting grant of retail/petty diesel licence within a radius of 5 km. of a regular diesel retail outlet and the constitutional validity of the said order was challenged in the case of Daulat Ram Gupta v. State of Uttar Pradesh, AIR 1996 Allahabad 30 and the Court held that the direction was liable to be quashed being violative of Article 19(1) (g) of the Constitution and the said order is arbitrary and based on unwarranted assumption. The control order does not prohibit either expressely or by necessary implication the grant of retail dealer licencing to a person within 5 kms. Of the radius of regular diesel out let. Imposing ban against grant of licence or carrying on business on the general assumption is not justified.

Right to carry on trade or business is subject to constitutional restrictions as provided under Article 19(1)(g). Which restrictions are reasonable and which are unreasonable have been delineated by the Supreme Court in series of decisions.

In the case of Lal Babu Prasad v. State of Bihar and another, AIR 1989 Patna 68, the Government cancelled the coal trading license of the petitioner on the ground that the petitioner suppressed the fact that his father was carrying on the same business. The Court found the order of cancellation of licence void. Debarring a member of the family to carry on a particular trade because another member of the family carries on the same trade can not be reasonable restrictions. Cancellation of the licence on the said ground was clearly ultra vires Article 19(1)(g).

9. Clause (9) of the Control Order deals with renewal of the license. It says that renewal may be refused if the licensing authority is of the opinion that the performance of the licensee was not satisfactory, that the licensee has contravened any provisions of the Act, or any order issued thereunder or the terms and conditions of license, if the licensee has other commercial interests, which may be detrimental to the smooth functioning of Public Distribution System or if an agent wholesaler of oil company is operating in a business premise within ten kilometres from the business premises of the sub-wholesaler dealing in kerosene. No doubt the State Government has powers to issue control orders in exercise of powers conferred under Section 3 of the Essential Commodities Act but imposing a restrictions on a dealer or person applying for license under Kerosene which is beyond his control and if such a thing deprives him from getting license when he is not at any fault would be an arbitrary action.

10. In the instant cases, as discussed above, if the persons dealing with other commodities or agent of any oil companies are closely related to the petitioners, who are not dependent on the dealer or the person applying for dealership and are doing their business independently, how the dealer can be restricted or refused a licence on the ground that a person who is a relative of the dealer in kerosene or the person applying for dealership but not under his control is doing business in commodities closely related to kerosene.

11. In view of the above facts and circumstances and the discussion made above, this Court is of the opinion that the clause 5 may be modified accordingly and till modification is made, the same shall be kept in abeyance.

The writ petitions are accordingly allowed in part. There would be no order as to costs.

Writ petitioner allowed in part.

2010 (II) ILR – CUT- 251

B.P.DAS, J & B.P.RAY, J.

W.P.(C) NO.23 OF 2009. (Decided on 14.7.2010).

GEOMIN MINERALS & MARKETING (P) LTD. ……. Petitioner

.Vrs.

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

MINES & MINERALS (DEVELOPMENT & REGULATION) ACT, 1957 – SEC.11(5) & 11 (3) r/w Mineral Concession Rules, 1960 – Rule 59(1).

Application for grant of prospecting Licence and Mining Lease – Claim for preferential consideration of application – Recommendation in favour of POSCO for consideration of its application challenged as illegal – Alternative remedy – Although revision lies against the order of the State Govt. the application of the petitioner has not been rejected – Held, on facts, the writ petition is maintainable – The writ petition can not be said to be premature as the petitioner could not have waited till the harm is caused to him – Delay of one and half decades – The writ petition does not suffer from delay and latches – The area be construed to be an unreserved area resulting notification of 1991 – Held, the petitioner is entitled to preferential right of consideration over later

applicants – No cogent reason in the recommendation made in favour of POSCO, justifying the application U/s. 11(5) of the Act – From the record it appears that there is absolutely no examination of inter se merit – The decision taken by the State Govt. is without due application of mind – Recommendation made in favour of POSCO by the State Govt. is set aside – Direction issued to the State Govt. to take a fresh decision in terms of the direction of the revisional authority by giving the petitioner the preferential right of consideration – Further direction issued. (Para 11,12,13,15,& 24)

Case laws Referred to:-

1.AIR 1995 SC 333 : (State of Goa & Ors. -V- A.H.Jaffar & Sons.).
2.AIR 2008 SC 1840 : (State of Goa & Ors. -V- A.H. Jaffar & Sons).
3.(1998) 8 SCC-1 : (Whirlpool Corporation -V- Registrar of Trade Marks).
4.AIR 1955 SC 661 : (Bengal Immunity Co.Ltd. -V- State of Bihar).
5.AIR 1964 SC 1006 : (State of Madhya Pradesh -V- Bhailal Bhai).
6.AIR 1995 SC 1991 : (State of Maharshtra -V- Digambar).
7.(1998) 2 SCC p.523 : (B.S.Bajwa -V- State of Punjab).
8.AIR 1961 SC 459 : (Hingir Rampur -V- State of Orissa).
9.(1969) 3 SCC 838 : (Baijnath Kadio -V- State of Bihar)
10.(1976) 4 SCC 108 : (Amritlal Nathubai Shah -V- Union Government of India)

11.AIR 1991 SC 818 : (Indian Metals & Ferro Alloys Ltd. -V- Union of India & Ors.).
12.AIR 1992 Orissa 61 : (Orissa Mining Corporation Ltd. & Anr. -V- Union of India).
13.AIR 2001 SC 410 : (State of Orissa & Ors. -V- Union of India & Ors.)
14.AIR 1990 SC 85 : (India Cement Ltd.-V- State of Tamil Nadu).
15.AIR 1973 Guj. 117 : (Amritlal Nathubhai Shah -V- Union Government of India & Anr.).

For Petitioner - Dr.A.M.Singhvi, H.N.Salve, A.Gupta, P.Pattnaik, J.Mohanty, N.K.Kaul, Aswini Mata, Prashant Mehta.

For Opp.Parties – Mr. Anindya Ku. Mitra, M/s. S.K.Nayak, A.C.Baral, D.Nayak,T.Routray, G.K.Nayak, (for O.P.1-State)
M/s. Mohan Parasaran, Farooq M. Razack, J.K.Mishra, (for O.P.2 Union of India)
Mr. P.Chatterjee, M/s. D.Mohanty, S.Mohanty, R.R.Sahoo, S.M.Patnaik, S.Nanda, (for O.P.3- POSCO)
Mr. Sanjit Mohanty M/s. Milan Kanungo, D.Pradhan, S.K.Mishra, S.N.Das (for VISA Steel Limited-Intervener).

B. P. DAS, J. The petitioner, Geomin Minerals & Marketing (P) Ltd. which is a Company incorporated under the Indian Companies Act, 1956, has filed this writ petition, inter alia with the following prayers:

> "Order the opposite parties to dispose of all pending applications for Mineral Concessions filed by the petitioner and set out in the petition in accordance with its vested right to preferential consideration in view of the fact that the petitioner's applications have been filed on the first date of availability and eligibility.
>
> Issue a writ of prohibition or any other appropriate writ, order or direction restraining the opposite parties from considering applications for Mineral Concessions of later applicants to the petitioner until the applications of the petitioner are first considered and disposed of by according priority or preferential right based on the petitioner being a first day applicant having applied for the concerned Mineral Concessions set out in the petition on the first date of availability and eligibility."

2. The facts of the case are as given hereinbelow:-

2.1 On 29.10.1991, the petitioner-company filed several applications for grant of Prospecting Licence and Mining Lease. According to the petitioner, it has the preferential right for consideration of such applications for grant of

Prospecting Licence and Mining Lease on account of the fact that it had filed the applications on the 1st day of availability and eligibility in pursuance of a notification dated 23.8.1991 issued by the Govt. of Orissa in the Department of Steel and Mines, (O.P.1), which was published in the Official Gazette on 13.9.1991, in terms of Rule 59 (1) of the Mineral Concession Rules, 1960 (in short "M.C. Rules") whereby applications for grant of Prospecting Licence and Mining Lease in respect of various areas were invited and consequently mineral concessions were made available with effect from 29.10.1991. The notification is annexed as Annexure-1 to the writ petition and the various applications submitted by the petitioner for grant of Prospecting Licence and Mining Lease are annexed as Annexure-2 series. One of such applications is in respect of an area of 186 hects. in village Rantha in the district of Sundergarh.

2.2 While the applications of the petitioner were pending for consideration of the State Government, M.C.Rules was amended in 2002 to include Rule 63-A, which required opposite party No.1 to dispose of the applications for Reconnaissance Permits, Prospecting Licence and Mining Lease within 6, 9 and 12 months respectively. Opposite party No.1 failed to take any action in disposing of the applications of the petitioner which had been pending since 1991 despite upteem number of reminders to opposite

party No.1 and while the applications of the petitioner were still pending, POSCO India Pvt. Ltd, ('POSCO' hereinafter) which was subsequently impleaded as opposite party No.3 by virtue of our order dated 13.5.2009 on its application for impleadment, had filed various applications for mineral concessions in September 2005 over areas in the districts of Keonjhar and Sundergarh partially or wholly overlapping with the areas for which various applications were filed by the petitioner

2. 3 The further case of the petitioner is that when POSCO filed its applications for Mineral Concession, the petitioner's applications had been pending for approximately fourteen years. The petitioner and it's group of companies were in the process of setting up an Integrated Steel Plant in the State of Orissa with a capacity of 12 million tonnes per annum. It is further stated that petitioner came to know that on or about 22.6.2005 opposite party No.1 had entered into a Memorandum of Understanding (MoU) with POSCO, whereby opposite party No.1 agreed to grant Prospecting Licence and Captive Mining lease for 600 million tonnes of iron ore to POSCO after approval of Government of India. In the said MoU, as stated by the petitioner, it was agreed that opposite party No.1 would recommend to the Central Government (O.P.2) for grant of mineral concession and use its best efforts to obtain approval from opposite party No.2. After filing of the writ

petition, on 9.1.2009, opposite party No.1 finally asked opposite party No.2 to accord prior approval for grant of mineral concession to POSCO-opposite party No.3 purportedly under Section 11(5) of the Mines and Minerals (Development and Regulation) Act, 1957 (in short "M.M.(D&R) Act") but without following proper procedure.

3. According to the petitioner, the area of 186 hects. in village Rantha in the district of Sundergarh applied for by it for Prospecting Lincence vide application no. 1334 dated 29.10.1991 for Iron Ore and Manganese Ore, is overlapping with the area applied for by POSCO.

3.1 The petitioner further submitted that the recommendation made in favour of POSCO was challenged by one Dhananjay Kumar Dagara before this Court in W.P.(C) No. 15315 of 2007 (hereinafter "Dagara's case") wherein it was pleaded that the petitioner therein was entitled to preferential consideration on account of the date on which he had filed application for Mineral Concession which was much prior to the application filed by POSCO. The present petitioner, on coming to know of the said writ petition, filed an application for intervention on 19.2.2008. During hearing of the aforesaid writ petition, opposite party No.1-State filed an affidavit before this Court on 19.2.2008 indicating therein that all pending applications

concerning the notifications referred to above, would be heard afresh, considering the preferential rights of the applicants, if any. On 7.3.2008, the present petitioner received a notice from opposite party No.1 with regard to its application for Prospecting Licence, being P.L. Application No. 1334, whereby the petitioner was directed to appear for a hearing on 10.4.2008.

3.2 According to the petitioner, it had earlier received a notice on 17.9.2007 for personal hearing pursuant to which it appeared before opposite party No.1 on 3.11.2007. Opposite party No.1, in fact acted upon the affidavit filed by it before this Court in W.P.(C) No. 15315 of 2007 and started re-hearing of the applications filed by the applicants.

4. Vide order dated 22.2.2008, this Court dismissed the application for intervention filed by the present petitioner by recording that the petitioner did not have any cause of action and the dismissal order would not prevent the intervenor from taking steps independently in respect of his grievance, if any. Thereafter the judgment in WP.(C) No. 15315 of 2007 (Dagara's case) was delivered and in paragraph-42 and 43 of which it has been held thus:-

> " 42. So far as the petitioner's grievance about return of his application for prospecting licence after the same was recommended with the approval of the Chief Minister is concerned,

> this has been dealt with in paragraph-15 of the counter affidavit dated 8.1.2008 filed by the State. In pargraph-15, it has been specifically stated that the contention of the petitioner that the petitioner's application for prospecting licence dated 29.10.1991 is without defect is not correct at all. The said application had several defects which are pointed out in paragraph-15. It was also stated that the Government of India after scrutiny of the proposal returned the same for fresh examination along with other applications which were proposed to have been recommended but were rejected. Accordingly, the petitioner was noticed under rule 12 (1) of the Rules to appear in person on 30.1.2001 and the petitioner attended the personal hearing. The said action taken by the Government in 2001 has not been challenged by the petitioner. Thus the said action of the Government in 2001 cannot be collaterally challenged in this writ petition in 2007. Such collateral and stale challenge without any explanation for the delay is not maintainable. In any event, the appropriate authority of the Government has not taken any final decision after the matter has been remanded by the revisional authority for hearing by the State. Hearing is continuing. It is open to the petitioner to appear before the Secretary in connection with his application for hearing. No

final decision has been taken by the Secretary. So going by these facts, it cannot be said that the petitioner's case at the moment is ripe for interference by this Court. However, this Court considered all the points discussed above, since questions were raised about the competence and legality of the hearing process.

43. For the reasons discussed above, this Court is of the opinion that there is no merit in this writ petition and all the contentions of the writ petitioner fail. The writ petition is dismissed. There would be no order as to costs."

5. The petitioner's further case is that the judgment of this Court in the Dagara's case did not deal with the matter in controversy in the present case, i.e. consideration of the applications as the first day applications and their priority over the later applications. As the petitioner's applications were not considered, the petitioner filed W.P.(C) No. 6484 of 2008 on the allegation that the opposite parties failed to consider the applications of the petitioner within the time specified in Rule-63-A of the M.C. Rules. On 14.7.2008 this Court disposed of the aforesaid writ petition directing the opposite parties to dispose of the applications of the petitioner within six months, without any discrimination and in accordance with law. The relevant portion of the judgment is quoted hereinbelow.

"xxx xxx xxx we dispose of this writ petition with a direction to the State of Orissa in the Department of Steel and Mines to consider the pending P.L./R.P. application of the petitioner for the area excepting the area which is subject matter of the writ petition before the Hon'ble Delhi High Court and for which the intervener is the applicant as expeditiously as possible, preferably within a period of six months from the date of production of a copy of this order without any discrimination and in accordance with law."

5.1 Thereafter the petitioner approached this Court in W.P.(C) No.15424 of 2008 with a prayer to direct the opposite parties to dispose of all pending applications for Mineral Concession filed by it in accordance with its vested right of preferential consideration in view of the fact that the petitioner's applications had been filed on the first date of availability and eligibility.

This Court disposed of the said writ petition on 12.11.2008 with the following orders:-

"This writ petition has been filed for seeking a direction to the opposite parties that they should consider and dispose of the application for mineral concession filed by the petitioner in accordance with law.

Heard Mr. Ranjit Kumar, learned counsel for the petitioner and Mr. S.K. Nayak, learned Senior Counsel for the opposite parties.

Mr. Nayak, learned Senior counsel assured us that the application of the petitioner shall be considered strictly in accordance with law by passing a speaking order within a period of three months from today.

In view of the above submission, we do not want to keep the writ petition pending and hence dispose of the same with a request to Opp. Party No.1 to consider the application of the petitioner for mineral concession by passing a speaking order within a period of three months from today."

Thereafter an application was filed by the State for extension of time to comply with the order of this Court dated 12.11.2008 and this Court by order dated 30.3.2009 passed in Misc. Case No. 2165 of 2009 extended the period by three months from the date of the order, i.e. 30.3.2009.

5.2 The petitioner by letter dated 28.11.2008 requested the State Government to consider its Mineral Concession applications in accordance with law as per the direction of this Court dated 12.11.2008. When the petitioner did not get any response to the said letter, it sent a reminder on 19.12.2008, but to no effect. Thereafter, when the petitioner came to know that the State Government is not going to accord priority or restrict the invocation of Section 11 (5) of the M.M.(D & R) Act to unique cases, as set

out in the earlier petition, the petitioner filed the present writ petition on the ground that it is entitled to get the preferential right for obtaining a prospecting license and the opposite parties have not acted in terms of section 11 (5) of the M.M.(D & R) Act and there has been discrimination in the action of the State Government as because in many cases the State Government has processed the applications of the year 1991 in the years 2000, 2001, 2002, 2003, 2004 and 2005 by applying preferential right based on first day applicant status, which it has not done in the case of the petitioner. The opposite parties have favoured some other entities ignoring the application filed by the petitioner as well as the vested preferential right accrued in favour of the petitioner. Petitioner further submits that in Dagara's case opposite party No.1-State did not disclose before this Court that the State had granted at least 21 mineral concessions from 2000 to 2005, even after amendment of section 11 in December 1999, based on preferential right to applicants and applications filed pursuant to same notification dated 23.8.1991. All these grants were with the approval of opposite party No.2. Therefore both opposite party Nos. 1 and 2 were well aware that after

amendment also preferential right, at least to consider, was very much existing as per section 11 and they had acted accordingly and change in their stand was only to favour POSCO.

6. The State Government, in its counter affidavit filed through the Commissioner-cum-Secretary to the Government of Orissa, Department of Steel & Mines, took the following stand.

6.1 The present writ petition is pre-mature on the ground that previously the petitioner had filed two writ petitions, the last one being W.P.(C) 15424 of 2008, which was disposed of on 12.11.2008 at the stage of admission and while disposing of the said writ petition, this Court directed the State Government to consider the applications of the petitioner for mineral concessions by passing a speaking order within a period of three months from the date of the order, i.e. 12.11.2008. Despite best effort, since the petitioner's applications could not be disposed of within the time stipulated by the Hon'ble Court, a petition was filed to extend the time by ten months' and this Court by its order dated 30.3.2009 granted another three months' time for disposal of the applications of the petitioner. The stand of the State is that before expiry of the time granted by this Court on 30.3.2009, the present writ petition has been filed on 5.1.2009, by which date the State had not taken any decision on the same. The writ petition is therefore premature and does not merit consideration of this Court in exercise of its extraordinary jurisdiction under Article 226 of the

Constitution of India. As this Court has already directed the State to pass a speaking order, the petitioner could have waited till passing of such an order and if aggrieved, it could have challenged the said order before the Central Government by filing Revision Petition as prescribed under Section 30 of the M.M. (D&R) Act read with Rule-54 of the M.C. Rules.

6.2 As to the contentions of the petitioner in regard to the amended provisions of Section-11 of the M.M.(D&R) Act, it is averred that after the amendment, the preferential claim of the petitioner is not sustainable as it is contrary to the scheme of the Act and contrary to the clear language of the provisions. The applicability of section-11 of the Act, as it stood before amendment, is totally misconceived. Further it relied upon the judgment passed by this Court on 2.5.2008 in W.P.(C) No. 15315 of 2007 (Dagara's case) wherein it was held that the applicants for prospecting licence or mining lease could not claim that their applications were to be disposed of

first on the basis of their claim of preferential right under the provision of section 11 (2) of the Act after amendment.

6.3 Apart from that, certain legal questions were raised in the counter affidavit, which were also raised by the learned counsel for the State during the course of hearing and the same shall be dealt with in this judgment.

6.4 It is also indicated in the counter affidavit that mere filing of an application for mineral concession does not confer any accrued right on the applicant unless the application is decided for grant in its favour in accordance with the provisions of the Act and the Rules. Hence the allegation of violation of the petitioner's fundamental right guaranted under Articles, 14, 19 and 21 of the Constitution of India is a misnomer.

6.5 The further stand taken by the State in its counter affidavit is that the State Government has adopted a broad strategy to encourage value addition and end use of mineral inside the State. Due to enhancement of steel prices in the international market and demand of steel in recent past, a number of promoters were attracted to set up Steel Plants in the State due to its abundant reserve of iron ore. Regarding grant of prospecting licence over an area of 9.566 hectares in respect of the petitioner's application dated 29.10.1991, it is indicated that all the applications filed for the area on the date of its availability were considered simultaneously and the P.L. was granted in favour of the most meritorious applicants after determination of their merits under provision of sections 11 (2) and (3) of the M.M. (D&R) Act and the M.C. Rules. The State Government has received a good number of

M.C. applications over the Khandadhar area which was notified on 23.8.1991. So far, 49 companies have signed MoU with the State Government to set up steel plants in the State, out of which, 28 have begun partial production. As per the MoU, the promoter company will be considered for allocation of Mining Lease for iron ore after achievement of specified criteria/milestone. Therefore, the State Government has considered all the applications for the area simultaneously and have decided to grant the area in favour of the most meritorious applicant in terms of the provisions of sections 11 (2), (3), (4) and (5) of the M.M. (D&R) Act. The State has further indicated that the mineral concession can be given to a later applicant out of turn under the provision of section 11 (5) of the Act. Therefore, according to the opposite party-State, the allegation of the petitioner that it has been discriminated in not considering its application is not correct.

6.6 So far as the interest of POSCO is concerned, it is indicated that the State is always entitled to override the preferential rights to earlier applicants subject to recording of special reasons under sub-section (5) of Section-11 of the M.M.(D&R) Act. Thus, from time to time, considering the applications of the applicants, the State Government has either granted mineral concessions to an applicant basing on the date of filing or for special reasons, in accordance with the provisions of Section-11 and keeping the State's interest in view.

6.7 Regarding the specific allegation of the petitioner about the recommendation of P.L. application of M/s. Action Ispat & Power (P) Ltd., it is indicted that the area applied for by the petitioner for P.L./M.L. is different from that of M/s. Action Ispat & Power (P) Ltd., though the area applied for by both are covered under the 1991 notification.

6.8 The sum and substance of the stand taken in the counter affidavit filed by the State is that the amendment made in 1999 to the M.M. (D&R) Act, 1957 clearly provides for a separate method of consideration of applications in respect of an area notified in the official gazette. As per the amended Act, the sole consideration for disposal of applications for the notified area is merit, as enumerated in sub-section (3) of Section-11. Any attempt to dislodge the meritorious credentials of an applicant in respect of an area notified in the official gazette is contrary to the meaning of plain reading of the section-11 and negation of merit and preferential treatment of applicants based on chronological order would be detrimental to the mining industry and lead to unscientific mining and wastage of scarce mineral resources. Preferential right, as used in section-11, is neither a vested right nor a substantive right as it is not an absolute right enforceable in law. At

best, the use of the term "preferential right" can only be resulted as an expectation of an earlier applicant that his application will be considered in preference to a later applicant. The State Government being otherwise empowered under the statute can act in a manner contrary to the expectations of an earlier applicant provided that special reasons are to be recorded subject to the test of reasonableness. The allegations of the petitioner are unfounded and without any basis of law. The allegation of the petitioner that the State acknowledged the existence of prior applicants only because POSCO's recommendation was made under Section 11 (5) of the Act is wrong and baseless. Though the earlier recommendation in favour of POSCO was made under Section 11 (5) of the Act, it had taken into consideration the other applications to determine the relative merits on the yardstick of section 11 (3) of the Act and in Dagara's case this Court has

clarified that the preferential right in respect of the notified area, if any, does not survive after the 1999 amendment, for which the claim of the preferential right of the petitioner in this writ petition is not sustainable.

7. Though several adjournments had been granted to the Union of India to file counter affidavit, it did not file its counter affidavit in time and ultimately when this Court passed order dated 13.5.2009 to the effect that "if the Union of India fails to file counter affidavit by 10.6.2009, this Court will proceed with the matter in absence of any counter affidavit", the Union of India filed its counter affidavit. In the said counter affidavit the stand taken by the Union of India was that in terms of the provisions of M.M.(D&R) Act, 1957 and M.C. Rules, 1960, applications for grant of Mineral Concessions including Reconnaissance Permit, Prospecting Licence and Mining Lease are filed with the State Government, which is the owner of the minerals. The State Government evaluates the proposal in terms of the provisions of the M.M. (D&R) Act and M.C. Rules and accords preferential rights in terms of Section-11 of the M.M.(D&R) Act read with Rule-35 of M.C. Rules for grant of Mineral Concession to an applicant. Only in case of a mineral listed in the First Schedule to the M.M.(D&R) Act, prior approval of the Central Government is obtained by the State Government before granting the Mineral Concession. Thereafter in the counter affidavit, the Union of India ultimately explains the different procedures of M.M.(D&R) Act and further contended that Iron Ore is the First Schedule mineral. The proposal under section-11 of the Act falls under two categories, i.e. notified and non-notified. In case of notified area, applications are invited by the State Government through gazette notification and all these applications received in pursuance of the said notification during the period specified in such notification are examined in terms of the provision of 11 (3) of the M.M.(D&R) Act and the State Government grants the Mining Leas / Prospecting Licence /

Reconnaissance Permit to such one of the applicants, as it may deem fit. In case of non-notified area, the underlying principle is "first come first serve". However the area can be considered in favour of a later applicant in terms of section 11 (5) of the Act provided the same is supplemented with 'special reasons' for grant of the area in favour of such applicant. It is also indicated in the counter affidavit that the petitioner is confusing the principles of "preferential right" and "first come first serve" by citing Hoda Committee Recommendation, which is totally out of place and in a wrong context.

8. During the pendency of the writ petition, M/s. POSCO India Pvt. Ltd filed Misc. Case No. 5480 of 2009 praying inter alia to be impleaded as a party to this proceeding. The prayer for intervention was allowed and

subsequently POSCO filed its counter affidavit. In the counter affidavit filed by POSCO through its Director (Mining Division), it is indicated that POSCO, Korea has entered into a Memorandum of Understanding (MoU) dated 22.6.2005 with the Government of Orissa for setting up an integrated steel plant for a total production capacity of 12 million tonnes per annum at Paradeep in Jagatsinghpur District. Through this MoU, POSCO has proposed an investment of about US $ 12 billion or approximately Rs.54,000 crores for the said plant for carrying value additions in the State for a 100% export project. It is further stated that this investment is the largest ever Foreign Direct Investment in India. The MoU which spells out requirement of iron ore mines for captive use at the plant, POSCO applied on 27.9.2005 for grant of Prospecting Licence for Khandadhar Block in Sundargarh district in accordance with the M.M.(D&R) Act, 1957 and M.C.Rules,1960. It is further indicated that parts of the Khandadhar area were thrown open for re-grant vide notification No. SRO 647/1991 dated 23.8.1991 published in Official Gazette dated 13.9.1991 issued under Rule 59 of the M.C.Rules. Pursuant to the said notification dated 23.8.1991, a number of applications have been filed for grant of Prospecting Licence and Mining Lease over the said area and the State Government after considering all the applications found POSCO to be the most meritorious amongst all the applicants and recommended its case to the Central Government for prior approval under Section 11 (5) of the M.M.(D& R) Act vide its letter dated 19.12.2006. The recommendation dated 19.12.2006 made by the State Government was challenged by Kudremukh Iron Ore Company Ltd (in short 'KIOCL') before this Court in W.P.(C) No. 1775 of 2007 and this Court by order dated 16.4.2007 disposed of the writ petition filed by KIOCL and directed the KIOCL to approach the Revisional Tribunal established under Section 30 of the M.M.(D&R) Act. The Revisional Application of the KIOCL was disposed of on 27.9.2007. Thereafter the State Government acting in compliance with the directions of the Revisional Authority issued notices under Rules 12 and

26 of the M.C.Rules to the applicants requiring them to furnish deficient/additional information and to appear for personal hearing. During the course of hearing of those applications before the State Government, a writ petition was filed by one Dhananjaya Kumar Dagara (supra) challenging the order dated 27.9.2007 passed by the Revisional Tribunal. In the said writ petition, the State of Orissa, the Union of India and the Director of Mines (Government of Orissa), POSCO and KIOCL were the opposite parties. The petitioner therein claimed the preferential right under section 11 of the M.M. (D&R) Act and in alternative claimed that its application having been filed on 29.10.1991, ought to be disposed of in accordance with the law in force at that time by according preferential rights of a first applicant. This Court

disposed of the writ petition filed by Dhananjaya Kumar Dagara (supra) vide judgment dated 2.5.2008 with the observation as indicated in the foregoing paragraph.

8.1 With regard to the survival of preferential right under the pre-amended provision of Section 11 (2) of the M.M.(D&R) Act after its amendment in 1999, it was submitted that the same is no more res integra after the judgment in Dagara's case. After such decision, the State Government considered all the applications basing on personal hearing and determination of inter-se merits and decided to recommend the POSCO's application for grant of Prospecting Licence over a contiguous area of 2500 hectares (comprising of 2085 hectares of notified area and 415 hectares of non-notified available area) to the Central Government for approval under Section 11 (5) of the M.M.(D&R) Act. The recommendation made vide communication dated 9.1.2009 sets out the special reasons for which POSCO has been preferred over other applicants for the area. The special reasons cited in favour of such recommendation include the details of the investment proposed by POSCO, ability to carry out scientific exploration and mining, financial capability, eco-friendly, resource efficient technology, potential to generate high order revenue and employment opportunities in the State. The communication dated 9.1.2009 also indicates that before recommending the application of POSCO, the State Government had determined the individual merits of all other applicants on the basis of personal hearing and additional information furnished by the respective applicants.

8.2 The further ground taken in the counter is that the manner of disposal of applications over the Khandadhar area was the subject matter of challenge in Dagara's case, wherein this Court has in no uncertain terms ruled that the applications for the areas notified under Rule 59 of the MC Rules deserve simultaneous consideration and that no applicant can have

any preferential right of prior consideration solely on account of the fact that his application was filed on the first available date or a prior date. It is indicated that the principle of "first come first serve" is not absolute and also does not apply to the areas notified in the Official Gazette.

8.3 The sum and substance of the contentions of POSCO is that no preferential right is available to the petitioner as claimed and the said position has already been clarified by this Court in the judgment rendered in Dagara's case as the preferential right of the first applicant does not survive after 1999 amendment.

8.4 It is further submitted that if at all the petitioner in any manner is aggrieved by the action of the State Government in recommending the case of POSCO under section 11 (5) of the M.M.(D & R) Act, it can seek a revision of the order passed by the State Government before the Revisional Authority of the Central Government.

9. Though M/s VISA Steel Ltd. has filed an application for intervention, the same has not yet been considered. But we have heard the learned counsel for the intervener.

10. In the aforesaid factual background and rival contentions made in the writ petition as well as counter affidavits, the following issues emerge for consideration.

1. *Whether the writ petition is maintainable due to availability of alternative remedy ?*
2. *Whether the writ petition is premature ?*
3. *Whether the writ petition is maintainable due to delay and laches ?*
4. *Whether the writ petition is barred by res-judicata ?*
5. *Whether the area in question was earlier reserved or it is a non-reserved area?*
6. *Whether the petitioner has any preferential right under Section-11 of the M.M. (D&R) Act ?*
7. *Whether recommendation made by the State Government under section 11 (5) of the M.M. (D&R) Act in favour of POSCO is valid ?*

The question of res-judicata shall be considered while dealing with other issues as it is intrinsically related to other issues. Some other

miscellaneous issues raised in this case shall also be considered herein below.

11. **Issue no.1**

Whether the writ petition is maintainable due to availability of alternative remedy ?

11.1 Admittedly, under section 30 of the M.M. (D&R) Act, 1957 read with Rule 54 of M.C. Rules, 1960, revision lies to the Central Government. Section 30 empowers the Central Government to revise any order made by

the State Government or other authority of its own motion or on application made within the prescribed time by an aggrieved party, whereas Rule 54 of the M.C. Rules provides that "any person aggrieved by any order made by the State Government or other authority in exercise of the powers conferred on it by the Act or these Rules may, within three months of the date of communication of the order to him, apply to the Central Government in triplicate in Form-N, for revision of the order".

11.2 To the question raised by the opposite parties regarding maintainability of the writ petition, Dr. A.M. Singhvi, learned Senior Counsel for the petitioner, submitted that since the circumstances under which the petitioner approached this Court has been taken into consideration, it can be safely concluded that the petitioner does not have an alternative remedy.

Learned counsel further submitted that no order whatsoever on the petitioner's P.L. application or in respect of opposite party No.3's application for grant of mineral concession has been passed till date, giving any scope to the petitioner to approach the Revisional Authority and several applications filed by different parties for P.L. and M.L. application over the area are pending for consideration of the State Government and no order has been passed. So the question of alternative remedy does not arise.

According to him, the recommendation dated 9.1.2009 in favour of POSCO, could not have been the subject-matter of revision before the Central Government because even the said recommendation has not been produced before this Court by any of the opposite parties. The petitioner could only know about the alleged recommendation from the averments made in the counter affidavit filed by O.P.3 and according to it at best it can be said to be an application by the State Government to the Central Government in order to seek the Central Government's prior approval under section 11 (5) of the M.M.(D&R) Act to enable the State Government to pass an order in favour of O.P.3 overriding the preferential right of the earlier applicant, such as the petitioner, because the prior approval is a necessary

re-condition to the passing of any order under Section 11 (5) of the Act. It is only after approval of Central Govt. under section 11(5) if any order is passed and communicated rejecting petitioner's application for prospecting licence, the petitioner can file revision before the Central Government.

He further submitted that the aforesaid recommendation cannot be construed to be an order attracting the provisions of Rule-54 of the M.C. Rules. According to him, the petitioner has taken a stand that it has cause of

action against opposite parties 1 and 2 to the extent that O.P.1 has taken a stand that the petitioner has no preferential right for consideration of its applications and there is no other alternative remedy available other than by way of writ petition. The further argument of Dr. Singhvi is that existence of an alternative remedy is not a bar to file writ petitions in appropriate cases and when principles of natural justice are violated or jurisdictional issues arise or constitutionality of State action is challenged or issues regarding fundamental rights are raised or vires of statutes are put to judicial scrutiny, the question of maintainability of writ petition cannot be raised as a bar.

11.3 On the other hand, Mr. Pratap Chatterjee, learned Senior Counsel for O.P.3- POSCO, strongly objected to the aforesaid submission of learned counsel for the petitioner and submitted that as recommendation was made in favour of POSCO, the petitioner should have approached the revisional authority challenging such recommendation.

11.4 Mr. Mohan Parasaran and Mr. Farooq M. Razack, learned Addl. Solicitors General of India, referring to the decisions in the case of ***State of Goa and ors. Vs. A.H. Jaffar & Sons, AIR 1995 SC-333*** and ***State of Goa and ors. Vs. A.H. Jaffar and Sons***, ***AIR 2008 SC-1840***, took the same stand, as has been taken by learned counsel for POSCO, and submitted that the writ petition should be dismissed in limine being not maintainable. Their further stand was that the petitioner should be allowed to agitate this matter before the Revisional Authority in revision application and time limit should be fixed for deciding the revision application by the Revisional Authority.

11.5 The State Government has also taken the same stand so far as availability of alternative remedy is concerned.

11.6 Perused the decisions reported in AIR 1995 SC-333 and AIR 2008 SC-1840 (supra) and more particularly the observations made in paragraph-6 of the latter judgment, which is not applicable to the facts and circumstances of the present case as in that case rejection order had been

passed and communicated to A.H.Jaffar & Sons and no constitutional or other issues were raised for consideration of the Court.

We may also refer to the decision of the Apex Court in the case of ***Whirlpool Corporation v. Registrar of Trade Marks***, (1998) 8 SCC-1. In paragraph-15 of the said judgment it was observed thus:-

> "Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to

entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. xxx xxx xxx"

11.7. Perusal of Section 30 and Rule 54 would show that revision lies against an order passed by the State Government in exercise of the powers conferred on it under the M.M.(D&R) Act and M.C. Rules. Such order must be communicated to the party concerned.

11.8 Petitioner's grievance is that its applications have not been decided and that no orders have been passed on those applications. It is the admitted position that as on date the Petitioner's applications have not been rejected. They could not have been rejected without following the procedure set out in Rule 12 in respect of prospecting licence applications and Rule 26 in respect of mining lease applications. The said rules expressly provide for an opportunity of hearing *("after giving an opportunity of being heard")* before rejection. They also provide that the refusal to grant or rejection must be *"for reasons to be recorded in writing and communicated to the applicant".*

11.9 That apart, as opposite party No.1 & 3 have stated that the recommendation made on 9.1.2009 seeks the Central Government's prior approval under Section 11(5) of the Act, the Central Government is bound to reject the recommendations as no "special reasons" could have been given following the hearing and its minutes as produced before this Court. The reasons recorded in the minutes are on the basis of inter-se merit consideration under Section 11(3) conditions. Opposite party No.1's case is that POSCO was found best on section 11(3) criteria. Central Government having laid down guidelines must follow them unless held by Court of law to be inapplicable or ultra vires.

11.10 Apart from that, in the present case the Government seeks to exercise powers under section 11(5). The provisions of Section 11 (5) makes it very clear that no order can be made until the Central Government grants its approval. In the present case, from the minutes of the hearing, it is seen that the reasons cited by the State Government for recommending the case of opposite party No.3 are the very criteria of Section 11(3). Those are not the "special reasons" in terms of section 11(5). Even the Central

Government in its Policy formulated in June 2009 has made it clear to the State Governments that "special reasons" under Section 11(5) cannot be the same as indicated in Section 11(3) but must be much stronger reasons.

Paragraph 8.13 of that policy is quoted herein below:-

> "It has been generally noticed that the State Governments have been invoking the parameters given in Section 11(3) of MMDR Act while giving priority to later applicants under Section 11(5) of MMDR Act. It is pointed out that conditions at Section 11(3) are appropriate to choose from amongst applicants applying on the same day [real or deemed under Section 11(2)], and the conditions under Section 11(3) are not the same as the 'special reasons' mentioned in Section 11(5) of the Act. Xxx xxx xxx and these special reasons have to be stronger than the matters referred to in Section 11(3) of die MMDR Act. Moreover, 'special reasons' have to be exceptional by their very nature and not routine or obvious".

In our considered opinion, the writ petition is maintainable. This answers the issue no. 1.

12. ***Issue no.2,***

Whether the writ petition is premature ?

This issue is answered in favour of the petitioner as the petitioner has approached this Court at a time when its right to be considered along with POSCO has been threatened to be infringed by the action of the State, which, according to the petitioner, is illegal and contrary to the statutory provision. So the petitioner prayed for preferential right under Article 226 of the Constitution of India.

Hence the writ petition cannot be said to be premature as the petitioner could not have waited till the harm is caused to him (See ***Bengal Immunity Co. Ltd., v. State of Bihar*** and others, AIR 1955 SC-661).

13. ***Issue No.3***

Whether the writ petition is maintainable due to delay and laches ?

13.1 According to learned counsel for POSCO, in the un-amended writ petition, the petitioner did not seek any declaration as regards the validity of the notifications dated 5.6.1962, 6.12.1962 and the notification dated 23.8.1991 under which the petitioner had made the Mineral Concession applications. The prayer for declaring the above notifications as void and for quashing of the same were added to the writ petition by way of an

amendment in June 2009 with an intent to overcome the embargo imposed by the judgment of this Court in Dagara's case.

He further submitted that the vested right to preferential consideration as claimed by the petitioner is no longer available to anyone under the M.M. (D&R) Act after its amendment on 18.12.1999. The petitioner has not challenged the said amendment. So, long delay is manifest on the face of the records. It is also much beyond the period of limitation for filing a revision application as provided under section 54 of the M.C. Rules, i.e. three months.

His further contention was that such a long delay is a good ground for dismissal of the writ petition as the delay is unreasonable and much beyond the period of limitation prescribed by a civil action for the remedy. In this regard learned counsel for the POSCO placed reliance on the case of ***State of Madhya Pradesh v. Bhailal Bhai***, AIR 1964 SC 1006. Learned counsel further placed reliance on paragraph-21 of the judgment in the case of **State of Maharashtra v. Digambar**, AIR 1995 SC 1991, wherein it has been held that *"where a High Court in exercise of its power vested under Article 226 of the Constitution issues a direction, order or writ for granting relief to a person including a citizen without considering his disentitlement for such relief due to his blameworthy conduct of undue delay or laches in claiming the same, such a direction, order or writ becomes unsustainable as that not made judiciously and reasonably in exercise of its sound judicial discretion, but as that made arbitrarily*".

13.2 Learned counsel for the Union of India submitted that the petitioner has invoked the writ jurisdiction after inordinate delay of over one and a half decades, which is not justified. So the writ petition should not be entertained. Learned counsel placing reliance on the decision in Dagara's case submitted that the petitioner is not entitled to any relief whatsoever and his further contention was that though the petitioner has filed applications on 29.10.1991, admittedly it did not do anything till 2004 save and except sending representations, as stated by the petitioner, to the State Government for consideration of its applications. The petitioner did not do anything till 1999, when Section-11 of the M.M.(D&R) Act was amended.

Therefore, if at all any preferential right was in existence in favour of the petitioner on the strength of its application dated 29.10.1991, the same does not survive after amendment to Section-11 of the Act.

13.3 The same was also the plea taken by the State Government.

13.4 On the other land, learned counsel for the petitioner submitted that prior to the judgment of this Court in Dagara's case, the State Government was invariably proceeding with the applications according to the preferential right to the first applicants throughout, i.e. prior to and after the 1999 amendment, both for notified and non-notified areas.

The applications of the petitioner were also being considered in accordance with the preferential rights. The cause of action arose for the first time during the pendency of the Dagara's case when the petitioner learnt that the State Government in collusion with POSCO was considering the post-1999 application of POSCO after considering the post-1999 amendment and not considering the applications of the petitioner even though its applications were of the year 1991 for preferential right of being first applicant. Thereafter the petitioner moved an application to be impleded itself in Dagara's case. The intervention application was dismissed vide order dated 22.2.2008 on the ground that the petitioner had no cause of action and the matter had to be decided between the parties to that petition. However, it was expressly recorded that the order will not prevent the intervenor from taking steps independently in respect of his grievance, if any. Thereafter, the petitioner filed W.P.(C) No. 6484 of 2008 in July 2008 to assert its rights to non-discriminatory treatment. Thereafter another writ petition being W.P.(C) No. 15424 of 2008 was filed and ultimately on 5.1.2009, the present writ petition has been filed.

Learned counsel further submitted that right from the beginning, the petitioner has taken steps which is evident from different communications made to the effect that the applications of the petitioner were under consideration. In this regard, learned counsel for the petitioner drew our attention to a communication dated 5.11.2004 issued by the Directorate of Mines to the Joint Secretary to Government of Orissa, Department of Steel & Mines on the Revision Application filed by M/s Larson & Tubro Ltd. In paragraph 2 (iii) of the aforesaid communication views have been given in regard to the P.L. Application filed by the petitioner over an area of 173.00 hects in village Khajuridihi R.F. of Sundergarh district.

13.5 Fact remains, though the above communication, is not related to Khandadhar block, which is the subject-matter of dispute in the present writ petition, from said document it is clearly evident that the applications of the petitioner for P.L. and M.L. were under consideration on 5.11.2004. That apart, this Court in its order passed on the intervention application filed by

the petitioner in Dagara's case has categorically held that there is no cause of action for the intervener to file the intervention petition, but observed that the said order will not prevent the intervenor from taking steps independently in respect of his grievance, if any. The State Government was considering the applications of the petitioner. No adverse order was passed on its applications. The question of approaching the Court did not, therefore, arise then. That apart, a bare reference to the order passed by this Court in W.P.(C) No. 6484 of 2008, wherein the petitioner prayed for a writ of mandamus as against the opposite party- State to consider its P.L./R.P. applications, which were pending before the State since 1991, reveals that this Court, without expressing any opinion on the merits of the case of the petitioner one way or the other disposed of the writ petition directing the Department of Steel and Mines to consider the pending P.L./R.P. applications of the petitioner as expeditiously as possible, preferably within a period of six months. This being the order of this Court, if at all any laches are there, that has been washed away by the aforesaid order of this Court and that too, as we have stated earlier, no decision till date, i.e. for about 19, years has been taken by the State Government on the applications of the petitioner, though the same were under active consideration of the State Government, as evident from different communications, one of such being dated 5.11.2004 as indicated above. Then, in W.P.(C) No. 15424 of 2008 wherein a direction was sought by the petitioner to the opposite parties to consider and dispose of the applications for mineral concession filed by it in accordance with law, this Court passed the order dated 12.11.2008 to the following effect.

> "xxx xxx xxx
>
> Mr. Nayak, learned counsel assured us that the application of the petitioner shall be considered strictly in accordance with law by passing a speaking order within a period of three months from today.
>
> In view of the above submission, we do not want to keep the writ petition pending and hence dispose of the same with a request to Opp. Party No.1 to consider the application of the petitioner for mineral concession by passing a speaking order within a period of three months from today.
>
> Xxx xxx xxx"

So the reliance placed by the opposite parties on the decision in the case of ***B.S. Bajwa v. State of Punjab***, (1998) 2 SCC page-523, in which it

has been held that issues of seniority in service matters should not be reopened after considerable lapse of time if inter-se rights of other have crystallized, has no effect to the facts and circumstances of this case. In our considered opinion, the writ petition does not suffer from any laches or delay

and merits consideration. So the plea of the opposite parties to reject the writ petition on the ground of delay and laches is rejected.

14. ***Issue no. 5***
Whether the area in question was earlier reserved or it is a non-reserved area ?

One of the prayers of the petitioner in this writ petition is to quash Notification No. 5988-MG dated 5.6.1962, Notification No. 11791/MG dated 6.12.1962 (hereinafter called "1962 Notifications") and the Notification bearing S.R.O. No. 647/91 dated 23.8.1991 published in the official gazette on 13.9.1991 (hereinafter called "1991 Notification").

14.1 According to learned counsel for the petitioner, there is no reserved area in the eye of law because in 1962, when the notifications were issued, the State Government had no power or jurisdiction or authority to reserve the minerals over the areas either for itself or for exploitation in the public sector. 1962 notifications, according to the petitioner, are therefore, ultra vires of the M.M. (D & R) Act as it stood then. Since the 1962 notifications are void, the 1991 notification having been issued under Rule-59 could be of no effect. In order to substantiate its argument, the petitioner submitted that the M.M. (D & R) Act came into effect on 10.6.1958. It contained a declaration in Section 2 thereof, that the control of the regulation and development of mines and minerals had been taken over by the Central Government in public interest, and according to the petitioner, as a result of such declaration in the light of Entry 54 of List I, the State Government was denuded of all legislative competence in respect of mines and minerals for the reason that the extent of the control was all pervasive as the totality of the field was taken control of by the Central Government. No part of the field of mines or minerals development or regulation was left out or not covered for there to be any scope for legislation by the State Government.

In this regard, learned counsel for the petitioner placed reliance on the decisions of the Apex Court in the case of **Hingir Rampur v. State of Orissa**, AIR 1961 SC 459, **State of Orissa v. M.A. Tulloch**, AIR 1964 SC 1284 and **Baijnath Kadio v. State of Bihar**, (1969) 3 SCC 838.

His further argument was that prior to amendment of the M.C. Rules made on 16.1.1980, there was no provision in the M.M. (D & R) Act, which

permitted the State Government to reserve minerals over areas either for itself or for exploitation in the public sector.

Reliance was placed by the petitioner on an unreported judgment of Karnataka High Court in the case of **M/s J.S.W. Steel Ltd. v. State of Karnataka** in Writ Appeal No. 807 of 2007 disposed of on 12.3.2007, wherein it was observed that in the case of **Amritlal Nathubhai Shah v. Union Government of India** (1976) 4 SCC 108 (hereinafter Amritlal's case), the decisions of M.A. Tulloch (supra) and Baijnath Kadio (supra) have not been taken note of and in view of the decisions in the case of M.A. Tulloch (supra) and Baijnath Kadio (supra), the State has no legislative competence in the field of mines and minerals.

14.2 On the contrary, learned counsel for POSCO referring to the decision in the case of Amritlal (supra) submitted that Amritlal's case has been followed in the cases of **Indian Metals & Ferro Alloys Ltd. v. Union of India & others**, AIR 1991 SC 818 and **Orissa Mining Corporation Ltd. and another v. Union of India**, AIR 1992 Orissa 61, wherein it was observed that the State is the owner of the mines and minerals within its territories. The State Government has inherent power to reserve any land bearing minerals and this right has been recognized in Amritlal's case and in the followed up judgments mentioned above.

14.3 Learned counsel for the Union of India submitted that the principle as enshrined in the Constitution is reflected in the M.M. (D & R) Act and the principle employed as well as Section 2 of the M.M. (D & R) Act clearly amplifies this provision. The Preamble to the M.M. (D & R) Act, 1957 clearly states that the Act provides for the development and regulation of mines and minerals under the control of the Union. Section 2 of the M.M. (D & R) Act contains the declaration that in the "public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided".

It is submitted by the learned counsel for the Union of India that from the scheme of M.M. (D & R) Act and MC Rules, it is abundantly clear that the State Government is the owner of the minerals. However the Union, in public interest, for the purpose of development and regulation of mines and mineral has retained control to itself in the matter of regulation of mines and development of minerals, where in respect of grant of a Reconnaissance Permit or licence for prospecting of Mineral or Mining Lease concerning specified in the First Schedule to MMDR Act, its previous approval is necessary and in respect of minor minerals and other major minerals, which have not been specified, the powers have been delegated to the State

Government. It was further argued that as per Section-5 of the M.M. (D & R) Act, the State Government grants the Reconnaissance Permit or a

Prospecting Lease or Mining Lease. However, in respect of minerals specified in First Schedule to the M.M. (D & R) Act, previous approval of the Central Government is necessary. Section-10 of the M.M. (D & R) Act provides that an application for Reconnaissance Permit or a Prospecting Lease or Mining Lease "in respect of any land in which the minerals vest in the Government shall be made to the State Government concerned". The sum and substance of the argument of the learned counsel for the Union of India is that Amritlal's case still holds good and the argument of learned counsel for the petitioner that it is par incuriam is not correct.

14.4 Now, let us examine, whether the State has any power to issue the notifications of 1962. A bare perusal of the 1962 notifications, which simply say that "it is hereby notified for information of the public that the following mineral-bearing areas in this State whose descriptions are given in the Annexure are reserved for exploitation in the public sector". Argument was advanced by the opposite parties that the notifications are made under Rule 59 of the M.C. Rules, which has been made under section 13 of the Act, and our attention was drawn to paragraphs-4, 6 and 7 of the judgment in the case of Amritlal's case. Pragraphs-4, 6 and relevant portion of paragraph-7 of the said judgment are quoted hereinbelow:-

> "4. Section 4 of the Act provides that no person shall undertake any prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a prospecting licence or, as the case may be, a mining lease, granted under the Act and the rules made thereunder, and that no such licence or lease shall be granted "otherwise than in accordance with provisions of the Act and the rules". But there is nothing in the Act or the Rules to require that the restrictions imposed by Chapters-II, III or IV of the Rules would be applicable even if the State Government itself wanted to exploit a mineral for, as has been stated, it was its own property. There is therefore no reason why the State Government could not, if it so desired, "reserve" any land for itself, for any purpose, and such reserved land would then not be available for the grant of a prospecting licence or a mining lease to any person.
>
> 6. We have gone through sub-sections (2) and (4) of Section 17 of the Act to which our attention has been invited by Mr. Sen on behalf of the appellants for the argument that they are the only provisions for specifying the boundaries of the reserved areas, and as they relate to prospecting or mining operations to be undertaken by the Central Government, they are enough to show that the Act does not

contemplate or provide for reservation by any other authority or for any other purpose. The argument is however untenable because the aforesaid sub-sections of Section 17 do not cover the entire field of the authority of refusing to grant a prospecting licence or a mining lease to anyone else, and do not deal with the State Government's authority to reserve any area for itself. As has been stated , the authority to order reservation flows from the fact that the State is the owner of the mines and the minerals within its territory, which vest in it. But quite apart from that, we find that Rule 59 of the Rules, which have been made under Section 13 of the Act, clearly contemplates such reservation by an order of the State Government. That rule deals with the availability of areas for the grant of a prospecting licence or a mining lease in such cases, and provides as follows:

59. Availability of certain areas for grant to be notified:- In the case of any land which is otherwise available for the grant of a prospecting licence or a mining lease but in respect of which the State Government has refused to grant a prospecting license or a mining lease on the ground that the land should be reserved for any purpose, the State Government shall, as soon as such land becomes again available for the grant of a prospecting or mining lease, grant the licence or lease after following the procedure laid down in rule 58.

7. xxx xxx xxx. It clearly contemplates reservation of land for any purpose, by the State Government, and its consequent non-availability for the grant of a prospecting licence or mining lease during the period it remains under reservation by an order of the State Government. A reading of Rules 58, 59 and 60 makes it quite clear that it is not permissible for any person to apply for a licence or lease in respect of a reserved area until after it becomes available for such grant, and the availability is notified by the State Government in the Official Gazette."

The decision in Amritlal's case was subsequently followed in **Indian Metals & Ferro Alloys Ltd. v. Union of India & others**, AIR 1991 SC 818, **Orissa Mining Corporation Ltd. and another v. Union of India**, AIR 1992 Orissa 61, **MSPL Ltd v. Union of India & others**, MANU/ DE/0928/2008 and **State of Orissa and others v. Union of India and others**, AIR 2001 SC 410.

Perused the decisions referred by the petitioner in support of its stand in the case of Hingir Rampur (supra), M.A. Tulloch (supra), Baijnath Kadio (supra) and the ***India Cement Ltd v. State of Tamil Nadu***, AIR 1990 SC. 85.

14.5. Before going into the rival contentions made on the applicability of the Judgment of Amritlal (supra), let us examine whether 1962 notifications issued in terms of Rules-58 and 59 of M.C. Rules, as they stood in 1962, survived after Rule 58 of M.C. Rules was obliterated from the statute book by virtue of subsequent amendment to Rule. It is worthwhile to mention here that in terms of the GSR 449 (E) dated 13.4.1988, Rule-58 of M.C. Rules stood omitted from 1960 Rules. There was no saving clause with regard to any action taken under the said rule.

Rule-58 did not have any saving clause and it having being wiped out from the statute book, any action taken under it having not been saved, the 1962 notifications also lost their force after 13.4.1988. In this regard, we may refer to paragraph-19 of the decision of the Apex Court in the case of M.A. Tulloch (supra), which is quoted herein below:-

> "19. Before proceeding further it will be convenient to clear the ground by adverting to two matters: (1) The effect of a Central Act under its exclusive legislative power which covers the field of an earlier State Act which was competent and valid when enacted is not open to doubt. The Parliamentary enactment supersedes the State law and thus it virtually effects a repeal, (2) the effect in law of a repeal, if it is not subject to a saving as is found in Section 6 of the General Clauses Act is also not a matter of controversy. Tindal, C.J. stated this in Kay v. Goodwin [4]:
>
> "I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

Added to this, in our considered opinion, the omitted Rule-58 is also repugnant to the inserted section 17-A of the Act because of the reason that the omission of Rule-58 did not require the approval of the Central Government, Rule-58 also inconsistent and repugnant to Section 4 (3) of the Act.

At this stage, the changes took place in the Act should not be lost sight of, which are.

(a) The sub section 3 of Section 4 of the Act was inserted by Act 37 of 1986 with effect from 10.2.1987.

(b) By Section 17-A a new provision was inserted in the Act by enactment of Act 37 of 1986 with effect from 10.2.1987.

The above two provisions came into force on one day, i.e. 10.2.1987.

By sub-section (3) of Section 4 of the M.M.(D&R) Act, for the first time power was conferred with the State Government to reserve mineral

exploitation for itself but only after prior consultation with the Central Government.

Section 17-A of the Act provides for reservation of an area for the purpose of conservation. Sub-section (2) of Section 17-A provides for reservation by the State Government for Public Sector Corporations with prior approval of the Central Government.

In view of the above statutory changes, even if for the sake of argument we accept the submission of the learned counsel for the opposite parties that 1962 notifications survived after Rule 58 was wiped out from the statute book, it cannot survive after 10.2.1987, when section 17-A of the Act came into force, as 1962 notifications have not received the approval of the Central Government.

Hence on the day 1991 notification was issued 1962 notifications were not in operation at all.

As the 1962 notifications lost their force with the wiping out of Rule-58 of M.C. Rules due to incorporation of Section 3 (4) and Section 17-A on 10.2.1987, there is no requirement of issuance of the notification under Rule-59 of M.C. Rules in the year 1991. Hence, it will be construed to be an un-reserved area, resulting notifications of 1991 issued on 23.8.1991 as non-est in the eye of law.

In view of the aforesaid findings, there is no need to delve into the merits of the argument advanced by the petitioner that the decision of the Apex Court Amritlal (supra) contradicts with the views taken by larger Bench in the case of Hingir Rampur (supra), M.A. Tulloch (supra) and Baijnath Kadio (supra) and also per-incuriam and hence not binding. The question becomes academic.

15. Issue No.6, and 7 are:-
Whether the petitioner has any preferential right under Section-11 of the M.M. (D & R) Act ?

Whether recommendation made by the State Government under Section 11 of the M.M. (D&R) Act in favour of POSCO is valid ?

15.1 According to the petitioner, it has applied for the area in question on 29.10.1991 and it stands on a better position so far as the merit is concerned in terms of the criteria set out under Section 11 (3) of the Act, read with Rule 35 of the M.C. Rules.

15.2 So far as preferential right, as claimed by the petitioner, is concerned, which it claims on the basis of its application made on 29.10.1991, was under the pre-amended provisions of Section 11 (2) (3) and (4).

The pre-amended provisions of Section 11 (2) (3) (4) and the post amended provisions of 11 (2) (3) (4) are quoted hereinbelow.

Pre-amended provisions of Section 11(2),(3) and (4) are as follows:

11(2). Subject to the provisions of sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier shall have a preferential right for the grant of the licence or lease, as the case may be, over an applicant whose application was received later:

Provided that where any such applications are received on the same day, the State Government, after taking into consideration the matters specified in sub-section (3), may grant the prospecting licence on mining lease, as the case may be, to such one of the applicants as it may deem fit.

11(3). The matters referred to in sub-section (2) are the following:-

(a) any special knowledge of, or experience in, prospecting operations or mining operations, as the case may be, possessed by the applicant;
(b) the financial resources of the applicant;
(c) the nature and quality of the technical staff employed or to be employed by the applicant;
(d) such other matters as may be considered.

11(4). Notwithstanding anything contained in subsection (2) but subject to the provisions of sub-section (1), the State Government may for any special reasons to be recorded and with the previous approval of the Central Government, grant a prospecting licence or a mining lease to an applicant whose application was received later in preference to an applicant whose application was received earlier.

Post amended provisions of Section 11(2), (3) and (4) are as follows:

11(2). Subject to the provisions of sub-section(1), where the State Government has not notified in the official gazette the area for grant of reconnaissance or prospecting licence or mining lease as the case may be and two or more persons have applied for a reconnaissance permit prospecting licence or a mining lease in respect of any land in such area, the applicant whose application was received earlier shall have the preferential right to be considered for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, over the applicant whose application was received later:

Provided that where an area is available for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, and the State Government has invited applications by notification in the official gazette for grant of such permit, licence or lease, all the applications received during the period specified in such notification and the applications which had been received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day, the State Government for the purposes of assigning priority under this sub section.

Provided further that where any such application are received on the same day, the State Government, after taking into consideration the matter specified in sub-section(3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

11(3). The matters referred to in sub-section (2) are the following: -

(a)any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;

(b) the financial resources of the applicant;

(c) the nature and quality of the technical staff employed or to be employed by the applicant;

(d) the investment which the applicant proposes to make in the mines and in the industry based on the minerals;

(e) such other matters as may be prescribed.

11(4). Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit."

15.3 The aforesaid will show that sub section (2) of section 11 has undergone a substantial change by way of amendment with effect from December 1999 (20.12.1999). The principle of "first come first serve" still remains in respect of non-notified areas.

15.4 Perused the judgment rendered in Dagara's case again. This Court after setting out section 11 before and after amendment observed as follows:

> 13. It appears that sub- section (2) of section 11 has been substantially amended in 1999. Under the amended provision after 1999, the principle of first come, first served does not survive and consequently no preferential right exists in respect of notified area. As such the assertion made by the petitioner is contrary to section 11(2) as amended. It may be true that at the time when the notification was gazetted on 13.9.1991, Section 11(2) did not contemplate any difference in respect of application for notified area and non-notified area. The 1991 notification has not provided for any fixed date of receipt of application for an area notified by the State Government. But after the amendment on 18.12.1999 a new proviso to sub-section (2) of section 11 was added. A new sub-section (4) was also added. Admittedly no preferential right of the petitioner, if any, survives after the amendment."

15.5 Even otherwise, it is pertinent to mention here that in Dagara's case, the validity of 1962 notifications was not challenged and the present case differs from the Dagara's case as the validity of 1962 notifications had never been questioned by both the parties in that case and Dagara's case proceeded on the premises that the area was reserved and notified one. So, what would be the effect of amendment where the area is non-notified area ? In the pre-amended section-11 (2), one will find that the person who has applied for a P.L. or M.L. in respect of the an area and whose application was received earlier, **shall have preferential right for grant** of Licence and Lease, as the case may be, over the applicant whose application was received later. Whereas, in the post amended section of 11 (2) as referred, the provision is that the applicant whose application was received earlier **shall have preferential right to be considered for grant** of R.P., P.L. and M.L. as the case may be.

We, therefore hold that the petitioner is entitled to preferential right of consideration over later applicants whose applications were filed after 29.10.1991.

In this regard, we may refer to the decision of the Apex Court in the case of Indian Metals (supra). The relevant paragraph, i.e. Paragraph-16 of the said judgment, is quoted herein below:-

> "16. Now, to turn to the contentions urged before us: Dr. Singhvi, who appeared for ORIND, vehemently contended that the rejection of the application of ORIND for a mining lease was contrary to the statutory mandate in S. 11(2); that, subject only to the provision

contained in S.II(1) which had no application here, the earliest applicant was entitled to have a preferential right for the grant of a lease; and that a consideration of the comparative merits of other applicants can arise only in a case where applications have been received on the same day. It is no doubt true that S. 11 (2) of the Act read in isolation gives such an impression which, in reality, is a misleading one. We think that the sooner such an impression is corrected by a statutory amendment the better it would be for all concerned. On a reading of S.11 as a whole, one will realize that the provisions of sub-section (4) completely override those of sub-section (2). This sub-section preserves to the S.G. a right to grant a lease to an applicant out of turn subject to two conditions : (a) recording of special reasons and (b) previous approval of the C.G. It is manifest, therefore, that the S.G. is not bound to dispose of applications only on a "first come, first served" basis. It will be easily appreciated that this should indeed be so for the interests of national mineral development clearly require in the case of major minerals, that the mining lease should be given to that applicant who can exploit it most efficiently. A grant of M.L, in order of time, will not achieve this result."

The only thing to be noted here is that Section-11 (4) of the pre-amended M.M.(D & R) Act provides for grant of prospecting licence to an applicant whose application was received later by giving any special reason to be recorded. In the post-amended Act the same was incorporated in Section-11 (5). In view of the aforesaid dictum of the Apex Court, the petitioner may not have a vested right for grant of Mining Lease, but it has a vested right to be considered. The State Government has a right to grant lease to an applicant out of turn as provided under Section 11 (5) of the Act, subject to certain conditions.

15.6 Fact remains, in the case of POSCO, its application though later, was considered pressing into service the provisions of section 11 (5) of the Act. Two conditions are required to be satisfied as per section 11(5), i.e. (i) that there must be "special reasons" recorded in writing, and (ii) the prior approval of the Central Government (for minerals specified in the 1st Schedule) must be obtained before passing an order under Section 11(5) of the M.M.(D&R) Act. Similar was the position under Section 11 (4) prior to the amendment in December 1999.

15.7 The term "special reasons" has not been defined in the M.M.(D&R) Act. As to what would constitute a "special reason" for grant of mineral concession to a later day applicant in preference to an earlier day applicant must, therefore, be seen from the objects and reasons of the M.M.(D&R)

Act. What is abundantly clear is that Section 11(5) provides for an exception from the general rule, that is, an earlier day applicant being given preference over a later day applicant. It also follows from the use of the term "special" that the reasons must be out of the ordinary or exceptional as even mentioned by the Central Government in its Guidelines of June 2009, the relevant paragraph, i.e. paragraph-8.13 has already been quoted in this judgment in paragraph No. 11.10.

15.8 The term "special reason" must necessarily have nexus with the objects of the M.M.(D&R) Act i.e. mineral development and/or its conservation. That "special reasons" under Section 11(5) cannot be the same as Section 11(3) reasons is evident, as section 11(3) is the criteria for same day applicants' inter-se merit. Moreover, section 11(5) is an exception for later applicant to be given preference. Special reasons must be something "different and stronger" or "exceptional" in the words of the Central Government also.

15.9 Lastly there is no cogent reason ascribed in the recommendation nor any justification has been given justifying the application of Section 11(5). A bare reading of the recommendation would show that it is like that of section 11 (3). Hence, in our considered opinion, application of section 11(5) has not been made in the spirit of legislative provision. At the cost of repetition, we may quote hereinbelow the direction of the Central Government dated 27.9.2007 while dealing with the matter of Kudremukh (supra).

> " xxx when a number of applications were lying pending for grant of mineral concession, it was obligatory on the part of the State Government to have examined all the pending applications before it and pass order thereon after examining their inter-se-merits and then come to the conclusion for granting mineral concession, which in the case, the State Government has failed to do. As regard setting up of pellestisation plant by the petitioner, the State Government could have put the same as a condition while granting PL to the petitioner as has been done in case of POSCO while sending their proposal to the Central Government for prior approval.
>
> In view of the foregoing, we are of the opinion that State Government has erred in not considering all the mineral concession applications simultaneously that were pending with them for the area and instead State Government has without passing order on those applications has recommended the case of impleaded party for grant of PL. Therefore, State Government's order dated 19.12.2006 is set aside with the direction to consider all the pending applications simultaneously and examine inter-se merit of all the applications and

then pass an order as per law after affording an opportunity of hearing to all the applicants.

15.10 The aforesaid order of the Revisional Authority was challenged before this Court in Dagara's case. This Court while dealing with the writ petition disposed of the same with the following observation/ direction:

> "In any event, the appropriate authority of the Government has not taken any final decision after the matter has been remanded by the revisional authority for hearing by the State. Hearing is continuing. It is open to the petitioner to appear before the Secretary in connection with his application for hearing. No final decision has been taken by the Secretary. So going by these facts, it cannot be said that the petitioner's case at the moment is ripe for interference by this Court. However, this Court considered all the points discussed above, since questions were raised about the competence and legality of the hearing process"

15.11 So, the matter was left to the State Government to carry out the direction of the Revisional Authority, wherein it was categorically directed to consider the pending applications simultaneously and examine inter-se merit of all the applications and then pass an order as per law after affording an opportunity of hearing to all the applicants.

15.12 The present petitioner also filed a writ petition earlier being W.P.(C) No. 6484 of 2008 inter alia with a prayer to direct the opposite parties for expeditious disposal of the pending applications for mineral concessions filed by the petitioner in accordance with law. This Court by order dated 14.7.2008 disposed of the writ petition, which has already been quoted in the foregoing paragraph.

Subsequently, the petitioner filed a writ petition being W.P.(C) No. 15424 of 2008 with similar prayer as prayed in the previous writ petition. The writ petition was disposed of by order dated 12.11.2008 which has already been quoted in the aforesaid paragraph.

Thereafter, when the State Government could not dispose of the applications within the stipulated period of three months, an application being Misc. Case No. 2165 of 2009 was filed by the State and this Court disposed of the said application by its order dated 30.3.2009, which is quoted hereunder:-

> "Under exceptional circumstances, the period is extended by three months from today to dispose of the application as directed by this Court earlier vide order dated 12.11.2008.
>
> With this observation, the petition stands disposed of."

15.13 It is a fact that no order has been passed till date by the State Government on the application of the petitioner in question and other applications in terms of the order of the Revisional Authority as well as the order passed by this Court, but a recommendation has been made in favour of POSCO.

Now, we have to examine from the records, which were produced before us by the State, as to whether the State Government has complied with the order of this Court as well as the Central Government, as the case may be, by dealing with the applications of the petitioner and others in their comparative merit and whether the recommendation made in favour of POSCO taking recourse to sub-section-5 of Section-11, is correct.

15.14 Perused the records.

On perusal of file bearing No. 11 (B) SM-2/2006 dealing with the subject "P.L. application No. 2122 dated 27.9.2005 of POSCO India Pvt. Ltd", we find that after personal hearing of all those applicants, the Secretary has concluded thus:-

> "As the area applied for has not been prospected, the ML applications filed by some M0U signed companies cannot be considered. Further as per Government guidelines two MoU signed companies i.e M/s Jindal Stainless Ltd. (formerly M/s Jindal Strips Ltd.) and M/s POSCO India (P) Ltd. have achieved the milestones vis-à-vis their respective MoUs. The case of JSL is being considered elsewhere. POSCO India (P) Ltd. on account of its ability to carry out scientific exploration and mining, capability to mobilize adequate financial resources needed to be invested in prospecting and mining and setting up of value addition facilities including a 12 MTPA steel plant based on eco-friendly and resource-use efficient technology, that will generate high order revenue and employment deserves precedence over all other applications filed both for notified and non notified areas. Hence, it can be safely concluded that M/s POSCO India (P) Ltd. stands out as the most meritorious among all the MoU signed applicants as well as other non-MoU applicants.
>
> Further, none of the ML applicants (whether M0U signed or not) has submitted legally acceptable prospecting report. Therefore, all the ML applications filed over the area do not satisfy the condition as prescribed under section 5(2)(a) of the Act. Hence, all the applications are liable for rejection even when found meritorious otherwise".

Thereafter it was approved by the Government of Orissa for recommendation of Prospecting licence for a period of three years in favour of POSCO.

15.15 Now, let us look to the manner in which the comparative merit was dealt with as per the direction of the Central Government in file No. 11 (B) SM-4/2007 under the subject "Determination of Relative merits of prior applications of the P.L. application dated 27.9.2005 of POSCO India (P) Ltd.".

We are only dealing with the manner in which the case of the petitioner has been dealt with. Following is the comments on the petitioner's application:-

> "P. Hota the Director of the company attended the personal hearing on 10.4.2008 and submitted the deficient documents and additional information. He stated that his above company is a Joint Venture between Navayug Group and T.P. Minerals Group. It was submitted that the company proposes to invest Rs.4400 to Rs.7800 crore in mining and Rs.34,000 crore in industry and are interested to have one port based steel complex of 12 mtpa capacity on the east coast of Orissa. The applicant company possesses merit for consideration but the area is not large enough to meet the huge demand of the proposed 12 mtpa plant. The steel plant project is till under consideration by High Level Clearance Authority (HLCA) and therefore a decision needs to be awaited."

15.16 On a bare reading of the order of the Central Government and the decision of the Apex Court in Indian Metals (supra), it can be said that the dictum of Apex Court can only be achieved if all the applications are considered simultaneously and the interse merit of all the applicants is examined, as rightly directed by the Revisional Authority.

From the record it appears that there is absolutely no examination of inter se merit save and except the conclusion arrived at, as quoted hereinbefore. The decision taken by the State Government is not in terms of the directions of the Revisional Authority and has been passed in hot haste and without due application of mind.

The aforesaid answers issue nos. 6 and 7 against the State Government.

16. Now we like to deal with the question of discrimination and/or mala fide. Mala fide, though raised in the writ petition, yet the same has not been

proved by cogent materials, but we are surprised to note that the State Government has taken different stands at different points of time for different applicants.

17. In the case of Shiv Kumar Agrawal v. State of Orissa (W.P.(C) No. 9775 of 2008), the counter affidavit filed by the State reveals that the applications received till 20.12.1999, i.e. the effective date of amendment, including those undisposed of applications received before 29.10.1991 were considered for determination of interse merit. Accordingly, the State Government recommended the P.L. Application of M/s Bhushan Steel and Strips Ltd pursuant to 1991 notification for grant to the Central Government and the Central Government accorded its due approval.

18 Now in the present case, if we accept the statement made in the counter affidavit filed in the case of Shiv Kumar Agrawal (supra), 20.12.1999 being the closing date, then POSCO's application could not have been considered, which was filed on 27.9.2005.

19. We are unable to accept the contention of the learned counsel for the State that the aforesaid statement made in the affidavit is a mistake committed by the officer and does not bind the Government.

20. This is not the only infirmity. The consistent argument of learned counsel for the State as well as the Union of India is that no preferential right is available to the petitioner. Though we have summed up the same in issue no. 6, we will be failing in our duty if we do not bring the materials available on the record produced by the State Government. As it appears, after 20.12.1999, which is stated to be the effective date of amendment, pursuant to the notification bearing S.R.O. No. 647 dated 23.8.1991, P.L and M.L. have been granted to 15 (fifteen) applicants on the basis of preferential right.

21. So the argument of opposite parties 1 and 2 is that there is no preferential right after the 1999 amendment and even if we have settled that no such preferential right is available, surprisingly in 15 (fifteen) cases, the State Government, after the amendment has taken a conscious decision to grant P.L. and M.L. on preferential basis.

22. This clearly shows that the stand taken by the Government is totally inconsistent and the Mineral Policy of the State is totally in a mess and the State Government has adopted a policy that would suit to the situation and suit to favoured parties.

23. We, therefore, while expressing our grave dissatisfaction in the manner in which the mineral resources of the State have been dealt with,

reject the stand taken by the State that the so called affidavits as well as the things done in the past are due to the wrong action of some Government officials, because we find from the record that the aforesaid decision is the conscious decision of the State Government not in one case but in 15 cases and no Government official has committed any mistake as pleaded.

24. In view of the findings recorded in the foregoing paragraphs, we have no hesitation to allow the writ petition and set aside the recommendation made by the State Government dated 9.1.2009 in favour of POSCO-O.P.3 and direct the State Government to take a fresh decision, as directed above, and in terms of the order dated 27.9.2007 passed by the Revisional Authority in Revisional Application File No. 22 (41)/2007-RC-I by giving the petitioner the preferential right of consideration. In the event the State Government decides to invoke the provisions of Section 11 (5) of the M.M.(D&R) Act, "special reasons" for the same in terms of the guidelines dated 24.6.2009 issued by the Ministry of Mines, Government of India, be recorded in writing. The State Government shall complete the entire exercise within a period of four months from today.

25. In view of the aforesaid conclusion, so far as intervention application of M/s VISA Steel Ltd. is concerned, we are of the view that if VISA has any cause of action, it is open to it to file independent writ application, if so advised. We reject the intervention application.

We make no order as to cost.

B. P. DAS, J.

B. P. RAY, J. I have had the privilege of going through the judgment prepared by my esteemed brother Hon'ble Justice Das. While I am in complete agreement with the conclusion reached by Hon'ble Justice Das, I feel it necessary to amplify in regard to issue no.5. I have gone through the judgment of the Gujarat High Court in the case of ***Amritlal Nathubhai Shah v. Union Government of India and another AIR 1973 Guj. 117*** passed by the Hon'ble Chief Justice P.N. Bhagwati of the Gujarat High Court (as His Lordship the then was), which was affirmed by the constitutional Bench of the Apex Court and paragraph-11 of the judgment has noted the distinction of Rule-59 before 1963 amendment of M.C. Rules, 1960 and it would be profitable to quote the paragraph-11 of the said judgment.

> "11. There is also inherent evidence in the Mineral Concession Rules, 1960 which strongly supports this conclusion. Rule 59 contemplates a case where the State Government has refused to grant a prospecting licence or a mining lease on the

ground "that the land should be reserved for any purpose" and thus clearly recognizes the executive power of the State Government to reserve land for

any purpose. **Prior to amendment of Rule 59** by the notification dated 9th

> July, 1963, the words used in the rule were **"land should be reserved for any purpose other than prospecting and mining minerals**" but by the amendment the words **"other than prospecting or mining minerals**" were omitted, **so that it is now sufficient to attract the applicability of the rule, that the land is reserved for any purpose which may include even reservation for mining minerals.** The words "land should be reserved for any purpose" are highly significant and they clearly postulate that the State Government has executive power to reserve land for any purpose which would include exploitation of bauxite in the public sector. The respondents sought to explain away these words by suggesting that the reservation referred to in these words must be read to mean reservation under a rule framed by the Central Government under Section 13 or Section 18. But this suggestion is wholly untenable. There is no rule made by the Central Government under Section 13 or Section 18 reserving land for any purpose or empowering the State Government to do so and if there is no such rule, it is difficult to imagine why the Central Government should have framed Rule 59 dealing specifically with the case where a prospecting licence or mining lease has been refused by the State Government on the ground that the land should be reserved for any purpose. **There is also no reason why the Central Government should have found it necessary to amend Rule 59 by omitting the words "other than prospecting or mining for minerals". If the contention urged on behalf of the petitioners were correct, not only would the enactment of Rule 59 but also its amendment be rendered an exercise in futility on the part of the Central Government. Xxx xxx xxx."**

It need be reiterated that so far as the State of Orissa is concerned, reliance was placed on 1962 notifications (Notification No. 5988-MG dated 5.6.1962, Notification No. 11791/MG dated 6.12.1962). It would, therefore be abundantly clear that such notifications were prior to 1963 amendment of Rule 59 of M.C. Rules and therefore were clearly without necessary legislative competence.

In view of the conclusion of the Gujrat High Court which has been affirmed by the Apex Court in ***Amritlal Nathubhai Shah Vs. Union Government of India*** (1976) 4 SCC 108, I have no hesitation to hold that the State Government had no legislative competence to reserve the land as on 1962 prior to 9th July, 1963 when the amendment to Rule 59 came into force.

Writ petition allowed.

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

W.P.(C) NO.5588 OF 2004 (Decided on 29.7.2010)

M/S. SRG IRON & STEEL (P) LTD., JAMSHEDPUR. …… Petitioner

.Vrs.

COMMISSIONER OF COMMERCIAL TAXES, CUTTACK & ORS. …….. Opp.Parties.

ORISSA SALES TAX ACT, 1947 (ACT NO.14 OF 1947) – SEC.16-AA r/w Rule 94-C of the OST Rules 1947.

Vehicle transporting white Kerosene from Andhra Pradesh to Jharkhand through Girisola unified check gate of Orissa – Driver or person in charge of the vehicle to produce transit pass (in form No.XXXII-T in triplicate containing a declaration not to unload, deliver or sold the goods under transport in the State of Orissa) before theOIC. Entry check post – O.I.C. Entry check post is to sign the transit pass, keep the original and handover the duplicate and triplicate to the Driver – Driver shall deliver the triplicate copy at the Exit check post – Non delivery of transit pass at the Exit Check post – Authorities to raise rebuttal presumption that the goods must have been sold in Orissa - S.T.O. levied Tax, surcharge and penalty under the OST Act and further Tax and penalty under the O.E.T Act – Order challenged in writ petition.

Held, Levy of Tax, surcharge and penalty under the OST Act/OET Act are held to be just and proper. (Para 9 & 10)

For Petitioners - M/s. A.K.Mohanty.
For Opp.Parties – Mr. M.S.Raman,
Addl. Standing Counsel (Revenue)

B.N.MAHAPATRA, J This writ petition has been filed with a prayer for quashing the order dated 11.09.2009 (Annexure-1) passed by the Sales Tax Officer, Unified Check Gate, Girisola, Ganjam, opposite party No.2 (here-in-after mentioned as "S.T.O.") in which the S.T.O. levied Rs.4,51,693/- towards tax, surcharge and penalty under the Orissa Sales Tax Act, 1947 (for short "O.S.T. Act") and Rs.55,536/- towards tax and penalty under the Orissa Entry Tax Act, 1999 (for short "O.E.T. Act") as well as order dated 08.10.2003 (Annexure-3) passed in PU 224/2003-04 by the Additional

Commissioner of Sales Tax, South Zone, Berhampur (for short "Addl. Commissioner") declining to interfere with the order of the S.T.O.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner is a company

registered under the Companies Act, 1956 having its registered office in the district of Singhbhum (East) of Jharkhand State. It carries its business of manufacturing steel and iron rods. The petitioner for its manufacturing process imports white kerosene oil from M/s. Annapurna Niwas Pvt. Ltd., Flat No. B-5, Door No. 31-32, 81 Sri Ram Krishna Arcade, Daba Gardens, Visakhapatnam, Andhra Pradesh, opposite party No.3. On 06.08.2003, the petitioner while transporting 20 KL of super white kerosene from Visakhapatnam, Andhra Pradesh to Jamshedpur, Jharkhand by a tanker bearing registration No. WB-03-A-9467 under Invoice No.547 dated 05.08.2003 valued Rs.2,70,400/-, the same was intercepted at Girisola Unified Check Gate on 06.08.2003. The S.T.O. served show cause notices dated 06.08.2003, 11.08.2003 and 21.08.2003 upon the driver of the tanker to show cause as to why penalty in addition to tax should not be levied for selling the goods carried in the tanker within the State of Orissa in violation of the declaration furnished under Section 16-AA of the Orissa Sales Tax Act, 1947 on different occasions. In pursuance to the said notices, the petitioner appeared before opposite party No.2 on 19.08.2003 and sought for one month's time to settle the matter by producing all the documents. The S.T.O. allowed two days time. Thereafter on 23.08.2003 a telegram was received at the Girisola Unified Check Gate requesting time upto 28.08.2003. Nobody appeared on 28.08.2003. After waiting for some more days the S.T.O. passed the impugned order under Annexure-1 raising the aforementioned tax, surcharge and penalty.

Being dissatisfied with the said order of the S.T.O., the petitioner filed a revision petition before the learned Addl. Commissioner and the later vide order passed under Annexure-3 did not inclined to interfere with the order of the learned S.T.O. Hence, this writ petition.

3. Mr.A.K.Mohanty, learned counsel appearing for the petitioner submits that the petitioner is a registered dealer in the State of Jharkhand and all the consignments were received by it with their seal and signatures on the body of challan-cum-invoice. In spite of the same, O.P. No.2-Sales Tax Officer on a presumption held that on seven different occasions in violation of the declaration furnished under Section 16-AA of the Orissa Sales Tax Act, white kerosene valued Rs.18,51,200/- carried in the particular tanker was sold within the State of Orissa. There was no evidence on record to show that the Driver of the tanker sold white kerosene on seven occasions within the State of Orissa. The petitioner never complained non-receipt of consignments, rather produced receipts of goods within a stipulated period.

Taking the advantage of innocence of the Driver, opposite party No.2 prepared a statement and forcibly obtained his signature. Since, pursuant to the show cause notice, the Driver of the tanker had explained in writing that goods were received outside the State as per the undertaking given at the

entry gate, the presumption of violation of the declaration furnished at the entry point is without any basis. Without making proper investigation levy of tax, surcharge and penalty is not justified. Therefore, the orders passed under Annexures-1 and 3 are not sustainable in the eye of law.

4. On being noticed, O.P. No.3, the consigner filed counter affidavit repudiating the allegations made by the Sales Tax Officer (O.P. No.2) in his order. It is stated that O.P. No.3 is the licensed importer of super kerosene oil and the petitioner used to purchase imported super kerosene from it by placing purchase orders. It (O.P. No.3) being the consignor in the transaction had no authority or business to enquire into the manner of utilization of the goods sold on receipt of cost of goods along with CST and after loading the tanker and dispatching the same. It had also deposited tax realized in the transactions with the appropriate taxing authority. Thus, the O.P. No.3 cannot be made liable for any alleged selling of kerosene somewhere in the midway and the observation made against it in the impugned order is entirely baseless and damages its business reputation and good will. Moreover, as O.P. No.3 was not given any opportunity of hearing, the observation made under Annexures-1 and 3 are not sustainable.

5. Mr. Raman, learned counsel appearing on behalf of the opp. parties 1 and 2 supporting the orders of the STO and the Addl. Commissioner passed under Annexures-1 and 3 respectively, vehemently argued that the O.P. No.2 has rightly imposed tax, surcharge and penalty and there is no infirmity in his order as well as in the order of the Addl. Commissioner.

6. The only question that falls for consideration by this Court is whether, on the facts and in the circumstances of the case, the S.T.O. is justified in imposing tax, surcharge and penalty amounting to Rs.4,51,693/- under the O.S.T. Act and tax and penalty of Rs.55,536/- under the O.E.T. Act totaling to Rs.5,07,229/- for the alleged violation of declaration given in transit passes issued at the Unified Check Gate, Girisola.

7. To resolve the issue under the O.S.T. Act, it is necessary to know what is contemplated under Section 16-AA of the O.S.T. Act and Rule 94-C of the Orissa Sales Tax Rules (for short "O.S.T. Rules"). The provisions of Section 16-AA of the O.S.T. Act and Rule 94-C of the O.S.T. Rules are reproduced below:

> **Section 16-AA. "Regulatory measures for transport of goods through Orissa —**
>
> (1) When a vehicle or boat carrying goods, coming from any place outside the State and bound for any other place outside the

State, passes through the State, the driver or other person in-charge of such vehicle or boat shall —

(a) declare in such form and manner before the officer-in-charge of the first check-post or barrier after his entry into the State that the goods under transport shall not be unloaded, delivered or sold in the State;

(b) obtain, in the prescribed manner, a transit pass in such form containing such particulars as may be prescribed from the said officer; and

(c) deliver the transit pass so obtained to the officer-in-charge of the last check-post or barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person-in-charge of the vehicle or boat:

Provided that where the goods carried by such vehicle or boat are, after their entry into the State, transported outside the State by any other vehicle, boat or conveyance, the onus of proving that the goods have actually been moved out of the State shall be on the owner or person-in-charge of the vehicle or boat.

Explanation – In a case where a vehicle or boat owned by a person is hired for transportation of goods by any other person, the hirer of that vehicle or boat shall, for the purpose of this Section, be deemed to be the owner of the vehicle or boat, as the case may be.

(2) The officer-in-charge of any check-post or barrier or any other officer, not below the rank of a Sales Tax Officer, duly authorized by the Commissioner, may detain any vehicle or boat and keep it stationary as long as may reasonably be necessary for examination of the contents therein and the records relating to the goods under transport by such vehicle or boat, and seize the same if —

(a) it is presumed under sub-section (1) that the goods carried by the vehicle or boat, as the case may be, has been sold in the State; or

(b) the driver or the other person-in-charge of the vehicle or boat, as the case may be, fails, without reasonable cause, to produce or deliver the transit pass required under sub-section (1); or

(c) he has reason to believe that the goods carried by the vehicle or boat, as the case may be, has been unloaded, delivered or sold within the State in contravention of the declaration furnished under sub-section (1),

he may direct the driver or the other person-in-charge of the vehicle or boat, as the case may be, to pay within a specified period, by way of penalty, a sum equivalent to twenty per centum of the value of the

goods under transport by such vehicle or boat, as the case may be, or rupees twenty thousand, whichever is higher, in addition to tax as otherwise payable under this Act, failing which the officer may

confiscate the goods under transport in the prescribed manner to recover such penalty and tax:

Provided that —

(a) before taking any action for confiscation of the goods the officer shall give the driver or the person-in-charge of the vehicle or boat, as the case may be, an opportunity of being heard and, if necessary, may make an enquiry in the manner prescribed; and

(b) where the goods under transport are not available at the time of seizure of the vehicle or boat, as the case may be, the officer may detain the vehicle until such penalty and tax are paid.

(3) Where the goods seized are of a perishable nature they shall be sold in the prescribed manner.

(4) Where any goods seized under this Section are sold, the sale-proceeds thereof, after deduction of the tax including penalty payable under this Section and the expenses of such sale, be paid to the person from whom the goods are seized.

(5) No order of penalty shall be made under this Section in respect of goods which are not liable to payment of tax under this Act."

Rule 94-C

"Where a vehicle carrying goods intends to transit through Orissa from a place to another place outside Orissa, the driver or any other person claiming to be in-charge of such vehicle shall produce before the Officer-in-charge of the entry Check-Post/barrier a transit pass in Form-XXXII-T in triplicate, collect the duplicate and triplicate copies duly signed by the said officer and proceed to transit through the Check-Gate/barrier mentioned in the transit pass after depositing the duplicate with the Officer-in-charge of the exit Check-Post/barrier.

Explanation – "Transit Pass" duly signed by the officer-in-charge of the check-gate referred to in this rule shall be deemed to be "Way-Bill" as provided under Section 16-A of the Orissa Sales Tax Act.]"

(Underlined for emphasis)

8. A conjoint reading of provisions of Section 16-AA of the O.S.T. Act and Rule 94-C of the O.S.T. Rules makes it clear that when a vehicle or a

boat carrying goods coming from any place outside the State and bound for any other place outside the State, passes through the State, the driver or any other person-in-charge of such vehicle or boat, shall produce before the Officer-in-Charge of the entry check-post/barrier a transit pass in Form-XXXII-T in triplicate containing the declaration that the goods under transport

shall not be unloaded, delivered or sold in the State. The S.T.O. in-charge of the entry check-post/barrier duly signs the transit pass, keeps the original with him hands over the duplicate and triplicate copies to the driver or any other person claiming to be in-charge of such vehicle. The driver or any other person in-charge of such vehicle or boat shall deliver the triplicate copy of the transit pass obtained from the entry Check Gate to the officer-in-charge of the last check-post/barrier while the vehicle along with goods leaves the State. The transit pass duly signed by the officer-in-charge of the entry check gate serves the purpose of a 'way-bill'. Under sub-section (2) of Section 16-AA, the officer-in-charge of the check-post/barrier or any other person not below the rank of a Sales Tax Officer duly authorized by the Commissioner may detain any vehicle or boat and keep it stationary as long as may reasonably be necessary for examination of the contents therein and the records relating to the goods under transport by such vehicle or boat. They may also seize the same, if it is presumed that the goods carried by the vehicle or boat has been sold in the State or the driver or any other person-in-charge of the vehicle or boat, as the case may be, fails, without reasonable cause, to produce or deliver the transit pass required under sub-section (1); or he has reason to believe that the goods carried by the vehicle or boat, as the case may be, has been unloaded, delivered or sold within the State in contravention of the declaration furnished at the entry check gate.

> Thus, if the driver or any other person in-charge of such vehicle or boat fails to deliver the transit pass obtained from the entry check gate to the officer-in-charge of the last check-post or barrier before he exits from the State, it shall be presumed that the goods carried thereby have been sold within the State by such person. The officer may also direct the driver or the other person-in-charge of the vehicle or boat to pay within a specified period, by way of penalty, a sum equivalent to twenty per centum of the value of the goods under transport by such vehicle or boat, as the case may be, or rupees twenty thousand, whichever is higher, in addition to tax as leviable on such goods. If the driver or the person-in-charge of such vehicle or boat fails to pay the tax and penalty imposed, the officer may confiscate the goods under transport to recover such penalty and tax. Before confiscating the goods, the officer shall give the driver or any other person-in-charge of the vehicle or boat, an opportunity of being heard, and, if necessary, may make an enquiry in the manner

prescribed. Where the goods under transport are not available at the time of seizure of the vehicle or boat, as the case may be, the officer may detain the vehicle until such penalty and tax are paid. Thus, when a vehicle or boat carrying goods, coming from any place outsidethe State and bound for any other place outside the State, INDIAN LAW REPORTS, CUTTACK SERIES [2010]

passes through the State, it is obligatory on the part of the driver or any other person-in-charge of the vehicle or boat to deliver the triplicate copy of the transit pass obtained from the entry check gate to the officer-in-charge of last check-post/barrier before the vehicle along with goods leaves the State. On failure to discharge such obligation it shall be presumed that the goods carried by the vehicle has been sold within the State and the driver or the person-in-charge of the vehicle or boat shall pay tax and penalty as provided in Section 16-AA of the O.S.T. Act.

9. In the present case demands have been raised for violation of the declaration made by the driver of the vehicle bearing registration No.WB-03-A-9467 in the transit passes in several times. On 06.08.2003, while the said vehicle reached the Unified Check Gate, Girisola, loaded with 20 KL of super white kerosene valued Rs.2,70,400/-, the S.T.O. issued notices under Section 16-AA of the O.S.T. Act to the driver of the said vehicle for violation of the declaration furnished in seven numbers of transit passes. Admittedly, in the past the driver or any other person-in-charge of the vehicle No.WB-03-A-9467 had not handed over to the officer-in-charge of the Check Gate at exit point six numbers of transit passes issued to the driver/person in-charge of the vehicle by the officer-in-charge of the entry check-gate. Thus, the requirement of Section 16-AA of the O.S.T. Act read with Rule 94-C of the O.S.T. Rules was not complied with and for which it was presumed that the goods carried on seven occasions were sold within the State. The fact of non-delivery of transit pass at the exit point is sufficient to establish a prima facie case against the driver/owner of the vehicle. Needless to say that the presumption that arose out of non-delivery of the transit pass at the exit point is a rebuttable presumption. It is only where the presumption is successfully rebutted, the authorities concerned are required to rely upon the rule of presumption. Under Section 16-AA of the O.S.T. Act, the onus of proving that the goods carried on six occasions were delivered outside the State shall lie on the owner or the person-in-charge of the vehicle. The words contained in Section 16-AA of the O.S.T. Act only require the authorities concerned to raise a rebuttal presumption that the goods must have been sold in the State, if the transit pass is not handed over to the officer at the exit check-post/barrier. Such presumption when drawn against the owner or person-in-charge of the vehicle, he is held to have sold the goods inside the State of Orissa. The person concerned shall be liable to pay the tax and

penalty as prescribed under Section 16-AA of the O.S.T. Act. The case of the petitioner is that due to heavy rush at the exit check-post (the Unified Check-Post, Jamsola) the driver of the vehicle did not hand over the transit pass issued by the entry check-post to the officer-in-charge of the exit check-post before passing through the exit gate. However, the petitioner produced

copies of delivery-challan-cum-invoices in which the consignee has acknowledged the receipt of the goods affixing their round rubber seal and contended that all the previous six consignments of Kerosene were actually received by the consignee outside the State and not sold inside the State of Orissa as presumed by the learned S.T.O. The Revisional Authority on verification of the case records found that the driver of the vehicle in his statement dated 11.09.2003 recorded by the learned S.T.O. had categorically stated before the learned S.T.O. that he was driving the alleged vehicle only for that particular consignment and did not know anything about the transaction of any consignment by the said vehicle previously. Interestingly, the same driver has signed all the other previous six delivery challans-cum-Invoices etc. But different persons have signed in the declarations in the Transit Passes bearing Nos.00485, 12953, 08523, 21275, 24259, 15344 and 08550 as revealed from the connected records received from the checkpost. This clearly proves that the acknowledgment receipts produced by the consignee are false and fabricated to escape from a valid charge of clandestine sale inside the State of Orissa with an ulterior motive to evade tax. It is also not at all believable that in all the six previous occasions due to heavy rush at the exit check-post at the Unified Check-post, Jamsola, the driver of the vehicle could not hand over the transit pass issued by the entry check gate to the officer in charge of the exit check gate before passing through the said gate. Moreover, if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner. In the instant case as stated above, the petitioner has not complied with the statutory requirements.

10. In the fact situation, levy of tax, surcharge and penalty under the O.S.T. Act under Annexure-1 is found to be just and proper.

11. The issue involved under the O.S.T. Act and O.E.T. Act is same. The provisions contained in Section 16-AA of the O.S.T. Act and Rule 94-C of the O.S.T. Rules are similar to the provisions contained in Sections 24 and 25 of the O.E.T. Act. Tax and penalty under the O.E.T. Act have been levied on the similar grounds on which tax and penalty are levied under the O.S.T. Act. For the reasons stated in the foregoing paragraphs, the levy of tax and penalty under the O.E.T. Act is also held to be valid.

12. In view of the above, we are not inclined to interfere with the orders passed by the S.T.O. and the Addl. Commissioner under Annexures-1 and 3 respectively.

13. In the result the writ petition is dismissed. No order as to costs.

Writ petition dismissed.

2010 (II) ILR – CUT- 296

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

W.P.(C) NO.14412 OF 2008 (Decided on 11.08.2010).

SIDDHARTH DIXIT …….. Petitioner.

.Vrs.

SMT. SUJATA DIXIT …… Opp.Party.

CIVIL PROCEDURE CODE -1908(ACTNO. 5 OF 1908) ORDER-9 RULE-13

Husband filed divorce proceeding –Notice could not be served on the OPP. Party – Despite substituted service OPP. Party also did not appear –Exparte decree passed.- Application filed under Order 9 Rule 13 C.P.C.to set aside the Exparte decree- Trial Court set aside the Exparte decree- Hence this writ petition .

Admittedly notice could not be served on the OPP. Party for which application under Order 5 Rule 20 C.P.C. filed -Court being satisfied for compliance of requirement of order 5 Rule 20 C.PC. had permitted the petitioner to take steps for substituted service by way of publication of notice in a widely published English News paper - So now it is not open for the trial Court to say that grant of permission to the petitioner at that stage was not justified – Held, grounds on which the trial Court has set aside the exparte decree is not sustainable .

(Para 7 & 8)

Case laws Referred to:-

1.AIR 1980 Allahabad 336 : (S.P.Srivastva -V- Smt.Premlata Srivastava).
2.AIR 1997 Rajasthan 63 : (Surrender Kumar -V- Kiran Devi).

For Petitioner - M/s. Yeesan Mohanty, B.C.Mohanty & G.N.Dash.
For Opp.party - M/s. S.K.Padhi, M.Padhi, G.Misra, & A.Das.
M/s. G.P.Dutta, M.Dutta, A.Ghose, S.K.Mohanty & B.K.Sahoo.

L.MOHAPATRA, J. This writ application is directed against the order dated 2.9.2008 passed by the learned Judge, Family Court, Rourkela in Misc.Case No.5 of 2008 filed under Order 9, Rule 13 of the Code of Civil Procedure(in short 'C.P.C.') for setting aside the ex parte decree of divorce.

2. The petitioner and the opposite party got married on 18.2.1991 as per Hindu rites and customs at Kolkata. Both of them were blessed with two

children, a son namely, Siddhant in the year 1994 and a daughter namely, Shraddha in the year 1999. There were differences between both of them during this period and subsequently the relationship became such that they had to remain away from each other. The petitioner thereafter filed Civil

Proceeding No.227 of 2005 in the court of the learned Judge, Family Court, Rourkela seeking for divorce. Notice was issued to the opposite party but, the same could not be served. Thereafter, steps for service of notice as provided under Order 5, Rule 20 C.P.C. were taken and in spite of paper publication, the opposite party having not appeared in the case, an ex parte decree of divorce was passed on 9.3.2006. After waiting for the appeal period, the petitioner contracted second marriage with another woman. The opposite party coming to know about the ex parte decree, filed Misc.Case No.5 of 2008 before the learned Judge, Family Court, Rorurkela under Order 9, Rule 13 C.P.C. to set aside the ex parte decree. In the impugned order, the learned Judge, Family Court having set aside the ex parte decree, this writ application has been filed challenging the same.

3. As it appears from the discussion made by the learned Judge, Family Court in paragraphs 3, 4, 5 and 6 of the impugned order, after filing of the Civil Proceeding, notice was issued to the opposite party, who was staying at Kolkata then. Notice could not be served due to want of time and an application was filed by the petitioner for substituted service under Order 5, Rule 20 C.P.C.. The said petition having been allowed, notice was published in the 'Times of India'. In spite of publication of notice, opposite party having not appeared, an ex parte decree was passed by the court. In the application filed under Order 9, Rule 13 C.P.C., the learned Judge, Family Court came to hold that there was no material before the court to come to a conclusion that the opposite party was avoiding service of notice on her and in absence of such a finding, the application filed by the petitioner under Order 5, Rule 20 could not have been allowed and, therefore, the substituted service made by the petitioner by way of paper publication cannot be held to be a valid service of notice and, accordingly, the ex parte decree of divorce is liable to be set aside.

4. Shri Yeesan Mohanty, learned Senior Counsel appearing for the petitioner assailed the impugned order stating that after the ex parte decree was passed, the petitioner waited for the appeal period to be over and, thereafter married for the second time. Under these circumstances, application under Order 9, Rule 13 C.P.C. could not have been allowed and the only course open to the opposite party was to pray for permanent alimony. In this connection, reliance is placed by the learned Senior Counsel

on a decision of the Allahabad High Court in the case of ***S.P.Srivastva Vrs. Smt. Premlata Srivastava*** reported in A.I.R. 1980 Allahabad 336. In the said reported case, the husband filed a suit for divorce under Section 13 of the Hindu Marriage Act. The suit was decreed ex parte on 2.6.1973. The wife filed an application under Order 9, Rule 13 C.P.C. on 15.4.1976 for

setting aside the ex parte decree on the allegation that she had never been served with summons on divorce petition. The husband had contracted a second marriage with another woman on 14.4.1976. The trial court having allowed the application filed by the wife under Order 9, Rule 13 C.P.C., the matter was brought before the High Court. The High Court on consideration of different orders passed by the trial court came to a finding that there were some irregularities in service of summons but that would not be a ground for setting aside the ex parte decree and allowed the revision.

5. Though the above decision is silent about the submission of Shri Y. Mohanty, learned Senior Counsel for the petitioner that the only option available to the opposite is to claim for permanent alimony, another decision of Rajasthan High Court supports such a submission. In the case of ***Surrender Kumar Vrs. Kiran Devi*** reported in AIR 1997 Rajasthan 63, it was held that after an ex parte decree of divorce is passed, if the husband has contracted a second marriage after expiry of appeal period, the petition filed under Order 9, Rule 13 C.P.C. at the instance of the wife is not maintainable and the wife can file an application under Section 25 of the Hindu Marriage Act claiming permanent alimony.

6. Shri Dutta, learned counsel appearing for the opposite party submitted that the first notice issued by the court admittedly was not served on the opposite party. The subsequent publication of notice in the 'Times of India' in pursuance of an order passed by the court for substituted service was on a date on which the opposite party was in China and, therefore, had no scope to know about publication of such notice. This submission of the learned counsel, Shri Dutta was seriously opposed by the learned counsel appearing for the petitioner. There is no material before us to show that on the date of publication of notice in the 'Times of India', opposite party was in China. This point was also never taken before the trial court and had such a point been taken, the parties would have been directed to adduce evidence in this regard. Therefore, we decline to entertain a disputed question of fact raised for the first time in this writ application.

7. So far as finding of the learned Judge, Family Court in setting aside the ex parte decree is concerned, we are of the view that such a finding is not sustainable. Admittedly, notice could not be served on the opposite party

on the first occasion due to want of time. Therefore, an application was filed by the petitioner under Order 5, Rule 20 C.P.C. and permission having been granted by the court, notice was published in a widely distributed English Newspaper. The court being satisfied with regard to compliance of requirement of Order 5 Rule 20 C.P.C., had permitted the petitioner to take

steps for substituted service by way of publication in a widely distributed English Newspaper. Therefore, it is not open for the trial court now to say that grant of permission to the petitioner at that stage was not justified. The ex parte order has not been set aside in any other ground by the trial court in the impugned order.

8. For the reasons stated above, we are of the view that the ground on which the trial court has set aside the ex parte decree is not sustainable and, accordingly, the impugned order is set aside. The petitioner may approach the trial court in an application under Section 25 of the Hindu Marriage Act for permanent alimony in view of the changed circumstances and in the event, such an application is filed, the trial court shall permit the parties to adduce evidence and determine the permanent alimony on the basis of such evidence.

The writ application is accordingly disposed of.

Writ petition disposed of

2010 (II) ILR – CUT- 300

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

W.P.(C) NOS.15658 & 16550 of 2007 (Decided on 22.6.2010)

ICHHAMANI SWAIN ……. Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 ART.226.

Family Pension – Petitioner's husband working as lineman in the department of Telecommunication since 1947 – Died in harness on 24.07.1957 – Petitioner applied for Family Pension – Pension granted w.e.f. Dt.22.09.1977 – Petitioner filed O.A. claiming Family Pension w.e.f. Dt.24.07.1957 – O.A. dismissed – Hence the writ.

Supreme Court vide Judg. Dt.30.04.1985 held that the Family Pension Scheme 1964 was extended w.e.f. Dt.22.09.1977 to the families of those Government Servants who were borne on pensionable establishment and are presently not covered under the Scheme, namely, the families of those Government employees who retired/died before 31.12.1963 – Held, the Opp.Parties have not committed any illegality in granting family pension to the petitioner w.e.f. Dt.22.09.1977. (Para 5)

For Petitioner - Mr. P.Parija & Associates
For Opp.Parties – Mr. N.N.Mohapatra
(for Opp.Party No.1)
Mr. J.K.Mishra (for Opp.Party No.3)
Mr. S.B.Jena & Associates
(for Opp.Party No.2)

B.P.RAY, J. These two writ petitions have been filed under Articles 226 & 227 of the Constitution of India assailing the orders passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack.

2. The writ petition bearing W.P.(C) No. 15658 of 2007 has been filed challenging the order dated 21.9.2007 passed in Original Application No. 590 of 2006 by which the learned Tribunal refused to grant family pension to the petitioner from the date of death of her husband which was way back in

the year 1957. The writ petition bearing No. 16550 of 2007 has been filed by the said petitioner challenging the order of the Tribunal dated 15.11.2007 passed in Original Application No. 555 of 2006 by which the learned Tribunal dismissed the Original Application filed by the petitioner for appointing the son of the petitioner under the Rehabilitation Assistance

Scheme. Both the writ petitions were heard together and are disposed of by this common judgment.

3. According to the petitioner, her husband late Sarat Chandra Swain, who was working as Lineman in the Department of Telecommunication since 1947 and died in harness on 24.7.1957. According to the petitioner, after the premature death of her husband, she applied for family pension as well as the benefits under the D.C.R.G scheme and thereafter went on addressing representations to various authorities. However, the petitioner was granted family pension @ Rs.375/- per month with effect from 22.9.1977 and this order was passed in the month of April, 1996. It is the admitted case of the petitioner that she was paid arrears of the family pension from 22.9.1977 till April, 1996 and thereafter she is being granted family pension. The grievance of the petitioner is that her husband having died on 24.7.1957, she should have been granted family pension with effect from the date of death of her husband and not from 22.9.1977. Another grievance of the petitioner was that she has not been sanctioned the D.C.R.G. benefits.

4. The learned Tribunal in the impugned order held that no illegality has been committed by granting the family pension to the petitioner with effect from 22.9.1977. Accordingly, the Original Application filed by the petitioner was dismissed by the impugned order under Annexure-7. Pursuant to the notice, a counter affidavit has been filed by opp. party Nos. 1 and 2 in which it has been stated that under the Family Pension Scheme, 1964 which came into force with effect from 1.1.1964 with certain terms and conditions, the petitioner was not eligible to get any family pension. However, the Family Pension Scheme, 1964 was extended to the category of the family of the petitioner with effect from 22.9.1977 and accordingly the petitioner became eligible to get family pension with effect from 22.9.1977. As such no illegality has been committed in granting family pension to the petitioner with effect from 22.9.1977.

5. We have perused the materials available on record and also perused the GID-10 under Rule, 54 which has been annexed as Annexure-B/1 to the counter affidavit filed in the Original Application from which it would appear that Family Pension Scheme, 1964 was a contributory one and the said scheme was having condition which was done away with effect from 22.9.1977. It further appears, during the course of hearing of the writ

petitions in the Hon'ble Supreme Court of India relating to Family Pension Scheme, 1964, the Government of India made a statement on 15.4.1985 before the Court indicating as to what extent they would be prepared to accept the claim of the family pensioners. Keeping in view the statement filed by the Government, the Hon'ble Supreme Court of India in judgment dated 30.4.1985 held that the Family Pension Scheme, 1964 was extended

with effect from 22.9.1977 to the families of those Government Servants who were borne on pensionable establishment and are presently not covered under the scheme, namely, the families of those Government employees who retired/died before 31.12.1963. It further appears on the basis of such statement made by the Government of India and pursuant to the order of the Hon'ble Supreme Court of India dated 30.4.1985, the families of the category alike the petitioner were eligible to get pension under the Scheme 1964 with effect from 22.9.1977. In such view of the matter, the opposite parties have not committed any illegality in granting the pension to the petitioner with effect from 22.9.1977. Accordingly, we do not find any error in the order of the Tribunal and therefore, the writ application filed by the petitioner for granting family pension anterior to 22.9.1977 stands dismissed.

So far as W.P.(C) No. 16550 of 2007 is concerned, the petitioner has prayed for a compassionate appointment of her son on account of the death of her husband. The learned Tribunal by the impugned order dismissed the Original Application on various counts. Without examining the correctness of the reasoning of the Tribunal, we are of the considered view that no illegality has been committed by the Tribunal in refusing to issue direction for compassionate appointment after 50 years of the death of the employee. Therefore, this writ petition is also devoid of merit and is dismissed.

There shall be no order as to cost.

Writ petitones dismissed.

2010 (II) ILR – CUT- 303

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

Jail Criminal Appeal no.73 of 2000 (07.07.2010)

MADHABA BENIA …….. Appellant.

.*Vrs*.

STATE OF ORISSA ……. Respondent.

INDIAN PENAL CODE, 1860 (ACT NO. 45 OF1860) – 304 PART-II.

Husband assaulted wife by a knife with single blow – They were living separately for the last two months – Husband requested the deceased to come to his house to celebrate "Paraba" – Deceased refused – On the relevant date appellant had come to call his wife so it cannot be said that he had premeditated to kill her on that day – No evidence that there was quarrel between the appellant and the deceased prior to the occurrence – When the deceased refused to the proposal the appellant got annoyed and assaulted – No intention of the appellant to cause murder – Offence committed squarely falls under 3rd Clause of Section 299 I.P.C. which is punishable U/s.304 Part-II I.P.C. – Held, conviction of the appellant U/s.302 I.P.C. is modified to one U/s.304, Part-II I.P.C. (Para 6,7,8)

For Appellant - Miss Bijoy Laxmi Tripathy, Advocate.
For Respondent- Additional Standing Counsel.

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1. In Sessions Case No. 228 of 1996, learned Sessions Judge, Koraput at Jeypore found the present appellant guilty of the offence punishable under Section 302, I.P.C. and sentenced him to suffer imprisonment for life. The aforesaid judgment and order of sentence are impugned in the present appeal.

2. A compendium of the prosecution case is as follows –

Deceased Nilabati Benia is the wife of the present appellant. She is the niece of informant Baidehi Khilla (P.W.3). After the death of her first husband, deceased Nilabati married the present appellant. She had a daughter named Suryamani from her first marriage. As the present appellant was working as an N.M.R. at Kolab, he was staying there at Kolab with his wife (deceased) and daughter Suryamani. About two months prior

to the occurrence there was some misunderstanding between the husband and wife, and deceased Nilabati with his daughter Suryamani came to stay with the informant (P.W.3) at Chakarliguda. The occurrence happened at about 4.30 p.m. on 17.04.1996. On that day sometime before 4.30 p.m. the present appellant came to the house of the informant P.W.3 to call the deceased to a company him to his house for celebrating 'Paraba'. Deceased Nilabati assured the present appellant to go to his house next

day. Thereafter the informant (P.W.3) and deceased Nilabati left the house to sell earth ('Murja'). While they were so leaving the house, the present appellant came from behind and gave a blow on the left shoulder of the deceased with a knife. After giving such a blow he ran away towards the nearby hillock. As the knife stuck to the wound, deceased Nilabati asked the informant (P.W.3) to remove the same from the wound, and when the informant (P.W.3) could not remove the knife, deceased herself removed the knife and requested the informant to tie the wound with a piece of cloth. However, the deceased collapsed at the spot with profuse bleeding from the wound. The informant (P.W.3) immediately went to Kolab Out-Post and reported the incident orally. At that time the I.O. (P.W.9), who happens to be the Officer-in-Charge of Koraput Sadar P.S., was present in Kolab Out-Post on duty. He reduced the oral report into writing vide Ext.8, sent the report for registration of the case and took up investigation himself. On completion of the investigation he filed charge-sheet implicating the present appellant with the offence punishable under Section 302, I.P.C.

3. Prosecution has examined ten witnesses to prove the charge. P.W.3 is the informant and sole eye-witness to the occurrence. P.W.4 has testified about the fact that he saw the present appellant running away from the spot towards the nearby hillock. P.W.5 is a witness to the disclosure statement of the present appellant and consequent discovery of the wearing apparels of the present appellant, which he had put on at the time of occurrence. P.Ws.2 and 6 are the witnesses to the inquest. P.W.7 is the Police Officer of Jeypore Town P.S., before whom the present appellant Madhaba Benia appeared, identified himself and confessed to have stabbed his wife with a knife, and on the basis of such information he (P.W.7) made Station Diary Entry No. 474, dated 17.04.1996. P.W.10 is the A.S.I. of Police of Kolab Out-Post, who produced Station Diary Entry No. 384, dated 17.04.1996 made on the basis of oral statement of the informant P.W.3. P.W.1 is the Medical Officer, who conducted autopsy over the dead body of the deceased and P.W.10 is the Investigating Officer.

The defence plea is one of complete denial and false implication.

4. Learned counsel appearing for the appellant does not dispute the fact that death of the deceased Nilabati is a homicidal death. Such fact is otherwise proved by the evidence of the Medical Officer (P.W.1) and the

informant (P.W.3). She contends that there are material discrepancies in the evidence of the prosecution witnesses and no conviction would lie on the basis of such evidence. In the alternative, it is contended by learned counsel for the appellant that the appellant having given one knife blow on a non-vital part of the body of the deceased like her left shoulder without any pre-meditation, the overt act alleged against the present appellant constitutes an offence under 3rd Clause of Section 299, I.P.C. which is, at best, punishable

under Section 304, Part-II of the I.P.C. Learned counsel for the State on the other hand supports the impugned judgment.

5. P.W.3 is the sole eye-witness so far as the occurrence is concerned. Perusal of the evidence of P.W.3 (informant) shows that there is no effective cross-examination of her to discredit her testimony so far as the assault by the present appellant on the deceased by knife is concerned. There is nothing in her evidence to show that she has had any motive to implicate the present appellant falsely. Further, P.W.3 has been corroborated in material particulars by P.W.4, who is an immediate post occurrence witness and has seen the present appellant running away from the spot towards the hillock side. He also saw the deceased lying on the road and P.W.3 crying by sitting by her side. On seeing P.W.4, P.W.3 disclosed that the present appellant assaulted the deceased with a knife and she (P.W.3) also requested P.W.4 to save the deceased. P.W.4 also saw the knife lying at the spot and that was stained with blood. From the cross-examination of P.W.4, it is found that the present appellant was known to him and he had seen him on many prior occasions. The evidence of P.W.4 lends corroboration to the evidence of P.W.3 under Section 11 of the Evidence Act. Further, M.Os. II and III are the shirt and pant respectively of the present appellant. Those M.Os. were seized at the instance of the present appellant in presence of P.W.5, before whom the present appellant had made disclosure statement prior to the seizure of the aforesaid M.Os., vide Ext.2. The chemical examination report speaks of presence of human blood on the aforesaid M.Os. II and III. There is no explanation by the present appellant in his statements recorded under Section 313, Cr.P.C. as to under what circumstance his pant and shirt came to be stained with blood. This piece of evidence is another corroboration to the evidence of P.W.3. In that view of the matter, we do not find any justification to disbelieve P.W.3 so far as the occurrence is concerned.

6. Coming to the alternative contention of the learned counsel for the appellant, it is found from the evidence of the Medical Officer (P.W.1) that the deceased had sustained stab injury above the lateral end of the left clavicle of size 1" x ½" x chest depth. On dissection P.W.1 found that the aforesaid external wound had directed medially downwards penetrating the

pleura, upper lobe and middle lobe of left lung with massive haemorrhage and clots in the left side of the chest. There are also two minor external injuries, one bruise on the right forehead and another bruise below right eye over zigoma. Cause of death is opined to be stab wound on the left clavicle. The evidence of P.W.1, therefore, leaves no room for doubt that the present appellant had given single blow on the left shoulder of the deceased. According to P.W.3, the occurrence witness, such knife blow was given from

behind the deceased while both appellant and the deceased were on standing position. P.W.3 has further testified that the present appellant aimed the blow to the left shoulder of the deceased with a knife. It is further found from the evidence of P.W.3 that on the relevant date the present appellant had come to the house of P.W.3, where his deceased wife was living since two months past and requested her to come to his (appellant's) house to celebrate 'Paraba'. The deceased had left her matrimonial home owing to some dispute between her and the present appellant. When the present appellant, on the relevant date of occurrence, had come to call his wife (deceased) to his house, it cannot be said that he had premeditated to kill her on that day. From the cross-examination of P.W.3 it is found that there was no quarrel between the present appellant and the deceased prior to the occurrence. As it seems, when the deceased showed no interest to return to the house of the present appellant on that day saying that she will join him tomorrow, the appellant probably got annoyed and assaulted her in the manner as alleged by P.W.3 by giving a single blow to the left shoulder of the deceased with a knife. No intention on the part of the present appellant to cause the murder of his wife can be inferred from the totality of facts and circumstances proved in the case.

7. Regard being had to the totality of the circumstances, as discussed supra, it is held that the present appellant by assaulting his deceased wife by a knife with single blow had necessary knowledge that by such of his act he is likely to cause death of his wife, and the offence committed by him squarely falls under 3rd Clause of Section 299, I.P.C., which is punishable under Section 304, Part-II of the I.P.C.

8. In the result, therefore, we modify the conviction of the appellant to one under Section 304, Part-II, I.P.C. and set aside his conviction under Section 302, I.P.C. Accordingly, we sentence the appellant to suffer rigorous imprisonment for a period of seven years. Regard being had to the economic condition of the appellant, as submitted by learned counsel for the appellant, we do not propose to impose sentence of fine any further. It is submitted by learned counsels for the parties that the appellant is in custody since the date of his arrest on 18.04.1996 and he has already suffered the sentence recorded in this appeal. If that be so, the appellant be released

from custody forthwith, if his detention is not required in connection with any other case.

The Jail Criminal Appeal is accordingly allowed in part.

Appeal allowed in part.

2010 (II) ILR – CUT- 307

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

Jail Criminal Appeal No.74 of 2000. (Decided on 04.08.2010).

LENDU PARAJA ……. Appellant.

.*Vrs.*

STATE OF ORISSA …… Respondent.

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

Prosecution proved that in the night of occurrence the deceased was assaulted by the appellant by means of fist and kick blows – Deceased died seven days after the incident – P.W.7 the doctor opined that had treatment been given to the deceased at the proper time, her life could have been saved – As per the evidence of P.W.1 the appellant had an axe in his hands but he did not use the same – Held, appellant had no intention for causing death of the deceased, though he had knowledge that such assault may cause death – Appellant is liable for conviction for the offence U/s.304-Part-II I.P.C. but not U/s.302 I.P.C.

(Para 7)

For Appellant - Mrs. Usharani Padhi.
For Respondent - Additional Government Advocate.

The appellant faced trial for commission of offence under Section 302 of Indian Penal Code for causing death of his wife Sanai in the night of 25.11.1997 at village Fukaguda. The trial court found him guilty of the offence and sentenced him for imprisonment for life. Hence this appeal.

2. The case of the prosecution is that in the night of 25/26.11.1997 hearing hullah of the deceased P.Ws. 1, 2 and 3 went to the house of the appellant and saw the appellant assaulting the deceased by giving fist and kick blows. When the said witnesses intervened, they were threatened and out of fear they left the place. On the next day morning the appellant left his

house and did not return to the village. A village panch was convened on 26.11.1997 which was attended by some of the witnesses namely P.Ws. 1, 2 and 5, but the appellant did not attend. The deceased who was present in the village panch disclosed that she was having pain in her stomach and chest because of the assault received by her at the instance of the appellant in the previous night. Later on the deceased died on 03.12.1997. P.W.2 went to the Police Station along with P.W.1 and lodged the F.I.R., on the basis of which investigation was taken up. Charge sheet was filed for commission of offence under Section 302 I.P.C. against the appellant and he faced trial for

commission of the said offence. Relying on the evidence of P.Ws.1, 2 and 3 as well as the disclosure made by the deceased in the village panch, the trial court found the accused guilty of the charge and convicted him thereunder.

3. The prosecution in order to prove the charge examined nine witnesses, out of whom P.Ws. 1, 2 and 3 claimed to have seen the appellant assaulting the deceased by kick and fist blows in the night of occurrence. P.W.4 is the daughter of the deceased, who came to the house of the deceased after the incident. She was informed by the deceased that the appellant had assaulted the deceased on her belly severely for which she was suffering pain. P.W.5 is a witness who was present in the village panch when a disclosure was made by the deceased to the effect that she was assaulted on her belly by the appellant. P.W.6 is a witness to the seizure and P.W.7 is the doctor, who conducted the Post-Mortem examination, P.W.8 is a constable who accompanied the dead body for Post-Mortem examination and P.W.9 is the I.O.

The appellant denied the prosecution case and complained of false implication.

4. The trial court relying on the evidence of P.Ws. 1, 2, 3, 4, 5 and the medical evidence of the doctor (P.W.7) arrived at a finding that the assault by the appellant on the deceased was seen by these three witnesses namely, P.Ws. 1, 2 and 3 and their evidence with regard to assault by means of kick and fist blows gets corroboration from the evidence of the doctor, who conducted post-mortem examination. The trial court also relied upon the disclosure made by the deceased in the village panch and on consideration of the evidence, convicted the appellant for commission of offence under Section 302 I.P.C.

5. Mrs. Padhi, learned counsel appearing for the appellant, assails the impugned judgment solely on the ground that even if the entire prosecution

case is accepted to the extent that the deceased was assaulted by the appellant by means of fist and kick blows, the deceased having been died seven days after the occurrence, the appellant could not have been convicted under Section 302 I.P.C. There being no intention to cause death in the worst case the appellant could have been convicted for commission of offence under Section 304 Part-II I.P.C.

Learned counsel for the State placed reliance on the evidence of P.Ws.1 to 5 and 7 to support the impugned judgment.

LENDU PARAJA -V- STATE OF ORISSA

6. Undisputedly, P.Ws.1, 2 and 3 claimed to have seen the appellant assaulting the deceased by means of fist and kick blows in the night of occurrence. Though P.W.1 stated that he saw the appellant assaulting the deceased by means of kick and fist blows, P.W.2 stated to have seen the assault through the gap of the door. P.W.3 also similarly claimed to have seen the incident through the gap of the door. P.W.9, the I.O. in cross-examination has stated that P.W.2 did not state before him that he had seen the entire incident through the gap of the door of the house of the deceased. Similarly, P.W.3 has also not stated before him that the deceased was lying on the floor at the time of incident and the appellant was threatening to kill her. If the evidence of P.W.9 in this regard is taken into consideration, the claim of P.W.2 to have seen the assault through the gap of the door appears to be an after thought. But however, evidence of P.Ws. 1 and 3 in this regard cannot be disbelieved.

The next piece of evidence available against the appellant is the disclosure of the deceased in the village panch. P.Ws. 1, 2 and 5 have stated that in the village panch the deceased complained that she had been assaulted by the appellant. The evidence in this regard so far as P.W.5 is concerned, appears to be doubtful. P.W.9, the I.O. has stated in cross-examination that P.W.5 never stated before him that the deceased declared before the panchayat that she was assaulted on her belly, but she had stated that the deceased declared that the accused jumped twice on her belly. This part of the evidence of P.W.5 is not corroborated by P.Ws. 1 and 2. They stated that the deceased made a disclosure before the panchayat that she had been assaulted by the deceased. The evidence of P.Ws.1 and 2, therefore, clearly establishes that in the night of occurrence the deceased was assaulted by the appellant and on the next day the deceased made a disclosure before the panchayat that she had been assaulted by her husband. The evidence with regard to the disclosure before the panch also

gets support from the evidence of P.W.4 who is the daughter of the deceased. P.W.4 had come to the house of the deceased after the incident and the deceased disclosed before her that she had been severely assaulted by the appellant and that she was suffering a lot of pain in the belly. Such evidence of the witness also gets corroboration from the evidence of P.W.7, the doctor, who conducted the post-mortem examination. Out of the two external injuries one was multiple bruises over lower part of chest wall and abdomen wall. After dissection it was found that the abdomen cavity contained about two litres of ultered blood present with clotted blood in greater omentum and mesentery of small intestine with tear of mesentery and perforation of intestine. P.W.7 also opined that the internal injuries found in the chest and abdomen cavity could also be caused by forceful kick with

heel of the foot. The injuries were also anti-mortem in nature and the internal injuries are sufficient to cause the death. Though the doctor opined that the internal injuries are sufficient to cause death, in cross-examination he has admitted that had the deceased been given proper treatment at the earliest possible time, her life might have been saved.

7. On analysis of the entire evidence we find that the prosecution is able to prove that in the night of occurrence the deceased was assaulted by the appellant by means of fist and kick blows and that the deceased died after seven days of the incident. Considering the evidence of P.W.7 to the effect that had treatment been given to the deceased at the proper time, her life could have been saved, as well as the evidence of P.W.1 that the appellant had an axe in his hands but non user of the same for assaulting the deceased though he had the opportunity to use the same, we are of the view that the appellant had no intention for causing death of the deceased, though he had knowledge that such assault may cause death. Accordingly, the appellant is liable for conviction for commission of offence under Section 304 part- II I.P.C.

8. Accordingly, we set aside the judgment and order of the learned Addl. Sessions Judge, Jeypore in S.C. No. 61 of 1998 convicting the appellant for commission of offence under Section 302 I.P.C. and convict the appellant for commission of offence punishable under Section 304 Part- II I.P.C. and sentence him for imprisonment for a period of seven years.

It is stated at the Bar that the appellant is in custody for more than ten years by now. In view of the above, it is further directed that the appellant be released forthwith, unless his detention is required in any other case.

Appeal allowed in part.

2010 (II) ILR – CUT- 311

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

CRIMINAL REFERENCE NO.1 OF 2002 (Decided on 05.05.2010)

STATE OF ORISSA ……. Petitioner.

.Vrs.

KUNDA @ BHATUA LAKRA …….. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.318.

Accused is deaf and dumb – Conviction U/s. 302 I.P.C. – Learned Sessions Judge made a reference U/s.318 to this Court for imposition of sentence.

Before making a reference U/s. 318 Cr.P.C. it is obligatory on the part of the trial Court to make necessary enquiries and endeavour to find out if the accused was made to understand the proceedings – However in case of conviction the High Court has to satisfy itself whether a fair trial was conducted against him or not.

In this case the accused was properly defended in the trial Court by a State defence Counsel – While recording his statement U/s.313 Cr.P.C. a Specialist teacher from Deaf and Dumb school was engaged as an interpreter – Held, the trial was conducted fairly by following the due procedure and sufficient opportunity was also afforded to the accused to defend his case. (Para 4)

For Petitioner - Mr. J.P.Pattnaik,
Addl.Government Advocate.
For Opp.Party - Mr. D.P.Dhal & S.K.Sahoo.

PRADIP MOHANTY, J. The learned Sessions Judge, Sundargarh having convicted the accused-opposite party under Section 302, IPC by judgment dated 12.11.2002 in Sessions Trial No. 201 of 1998 has made this reference under Section 318 Cr.P.C. for passing of necessary orders regarding imposition of sentence by this Court being of the view that the accused is unable to understand the proceedings.

2. The case of the prosecution as unfolded during trial is that the accused-opposite party, a deaf and dumb, was residing with his father, mother, brother and sister-in-law at village Chandiposh. He used to loiter in the village and was avoiding any work for which his father was often becoming displeased with him. On the date of occurrence, i.e., 19.03.1998, a quarrel ensued between the accused and his deceased father on a flimsy

ground. Consequently, the accused picked up a wooden plank (a piece of fire-wood) and mercilessly assaulted on the head, back, arms and body of his father causing severe bleeding injuries, which resulted in his death. The further case of the prosecution is that the accused was digging a grave near their house to bury his deceased father. While doing so, the villagers arrived. Seeing them, the accused tried to escape but he was caught hold of and tied. Then the villagers took him to the Rajgangpur Police Station along with the weapon of offence. The informant orally reported the matter before the I.I.C. of the said Police Station, who reduced his oral report to writing, registered the case and took up investigation. Upon completion of investigation, the I.O. submitted charge-sheet against the accused-opposite party under Section 302, IPC.

3. In course of trial, to bring home the charge, prosecution examined as many as eleven witnesses including the doctor and exhibited 14 documents. Defence examined none. Being a deaf and dumb, the accused-opposite party did not take any plea in course of his examination under Section 313 Cr.P.C. and his examination could not be carried out by the court in spite of taking assistance of an interpreter summoned from the School of Deaf and Dumb.

4. It is well settled that before making a reference under Section 318, Cr.P.C. it is obligatory on the trial court to make necessary enquiries and endeavour to find out if the accused can be made to understand the proceedings and come to a definite conclusion. The law is also well settled that in case of accused, who is deaf and dumb and against whom a finding of conviction is returned by the trial court, the High Court has to satisfy itself whether a fair trial was conducted against him. This Court examined the

records thoroughly. In the instant case, the accused-opposite party was properly defended before the trial court by a State Defence Counsel. Proper cross-examination of the witnesses was also carried out on behalf of the learned defence counsel. While recording the statement of the accused under Section 313, Cr.P.C., a specialist teacher from the School for Deaf and Dumb, Sundargarh was engaged by the trial court as an interpreter. Although he made sincere attempts to translate the questions put by the court to the accused, the accused could not be made to understand the questions put to him and his responses were not intelligible to the court or to the interpreter. Therefore, this Court comes to a conclusion that the trial was conducted fairly by following the due procedure and sufficient opportunity was also afforded to the accused to defend his case.

5. There is no quarrel that the High Court while examining the materials on record in a reference made under Section 318, Cr.P.C. may pass such orders as it thinks fit. In such view of the matter, this Court proceeded to examine the evidence against the accused-opposite party.

6. P.W.6 is the informant and a co-villager of both the deceased and the accused-opposite party. He deposed that while he was ploughing his land, one Ram Bahadur intimated him about the occurrence. He came to the house of the accused and saw the deceased lying inside the house near the entrance. There were injuries on his head, backside and legs. His left hand was fractured. One broken fire-wood stained with blood was found to have been kept by the side of the door frame. The accused was digging a grave to bury the deceased. When he along with other villagers arrived there, the accused tried to run away and was caught hold of by them. He along with the mother and younger brother of the accused went to the police station. He orally reported about the occurrence before the O.I.C., who reduced it to writing, read over and explained the same to him and finding the same to be correct he put his signature. He corroborated the F.I.R. story. Nothing has been elicited in cross-examination to discredit his evidence. He admitted that the accused is a deaf and dumb and the villagers tease him saying mad. P.W.8, who is a neighbour of both the deceased and accused, is the only witness to the occurrence. She at the time of occurrence was the Panchayat Samiti Member. She stated that her house is situated near the house of the deceased and the accused. She saw the accused climbing on a Kendu tree and his father asking him that he should tie the bullocks and only then he would be given food. But, the accused indicated by gesture that he wanted food immediately. At that time, he had already climbed down from the kendu

tree. Then altercation arose between them. The accused lost his temper, ran to the house, picked up a piece of fire wood and assaulted on both the hands and face of the deceased, as a result of which the deceased fell down. He gave few more blows on his back, backside of the neck and other places for which his father died. Immediately thereafter the accused picked up a spade and started digging a hole on the ground. At that time P.W.7 and other villagers arrived there. Seeing them he tried to run away from the spot but was chased and caught hold of by them. She stated that the accused was able to work and used to understand gestures and communicate by gesturing. In cross-examination, she admitted that she had narrated the incident to P.Ws.6 and 7. Medical evidence of P.W.11 also supports the version of P.W.8. P.W.11, who conducted autopsy over the dead body of the deceased, stated that all the injuries were ante mortem in nature. The cause of death was due to injuries to vital organs, haemorrhage and shock. The death of the deceased was homicidal in nature. He proved the post-mortem

examination report marked Ext.14. P.W.11 answered to the query made by the I.O. that the injuries found on the body of the deceased could be caused by M.O.I, the wooden plank, and were sufficient to cause the death. Nothing has been elicited from him in cross-examination. P.W.4, who is the wife of the deceased and mother of the accused, deposed that at the time of occurrence she had been to the jungle for collecting green leaf. On return, she found her husband lying dead. She denied to have any knowledge how her husband died. P.W.7 is a post-occurrence witness who supported the evidence of P.W.8. Nothing has been elicited in cross-examination to disbelieve him as a reliable witness. P.W.1 is a witness to the inquest and seizure of the weapon of offence (wooden plank). He proved the inquest report (Ext.1), the seizure list (Ext.2) and his signature thereon. P.W.2 is a witness to the seizure of the weapon of offence vide Ext.2 as well as the wearing apparels of the accused vide Ext.3. He proved Exts.2 and 3 and his signature thereon. P.W.3 is also a witness to the seizure of the weapon of offence vide Ext.2 and the sample earth, blood stained earth vide Ext.4. P.W.10 is the I.O, who investigated into the case and ultimately filed the charge-sheet.

7. P.W.8 is the only witness to the assault on the deceased by the accused. Her house is situated near the house of the accused and the deceased. On her way back home from forest after picking up some wood, she had the occasion to witness the occurrence. She has given vivid description of the occurrence in her evidence and the reason for the assault. Nothing has been elicited from cross-examination to discredit her testimony. She has further stated that after assaulting the deceased, the accused

started to dig a hole to bury him. At this juncture P.Ws.4, 6 and 7 arrived at the spot and seeing them the accused started to run and was apprehended by the aforesaid three witnesses along with others. This part of the evidence of P.W.8 is corroborated by P.Ws.4, 6 and 7. P.W.8 being a Panchayat Samiti Member commands respect in the area. It is not the case of the defence that she is inimical to the accused. In our opinion, therefore, the evidence of P.W.8 inspires confidence. No doubt defence has pointed out certain contradictions in her evidence. Contradictions are bound to occur even in case of a truthful witness but if the same are not material contradictions and do not go into the root of the prosecution case, the same are of no consequence and the defence cannot take aid of the same. All these witnesses are independent witnesses and they have no axe to grind against the accused. Evidence of P.W.8 receives corroboration from the evidence of P.W.9, who stated that hearing cries of P.W.8 she immediately came out of the kitchen room and saw her father-in-law lying dead inside the room with bleeding injuries all over his body. The I.O. also proved Ext.13,

the report of the Chemical Examiner which shows that the blood stained earth seized from the spot were stained with human blood. Thus, from the materials available on record, it is evident that the accused-opposite party is the assailant.

8. Now, the question is whether the act committed by the accused-opposite party comes within the purview of Section 302, IPC or Section 304 Part-I, IPC. On scanning the evidence of P.W.8, it is found that due to sudden altercation the accused-opposite party got provoked, lost control over him and assaulted the deceased by means of a wooden plank, as a result of which the deceased died. Furthermore, the accused-opposite party is a deaf and dumb. Therefore, this Court is of the opinion that the accused-opposite party is liable to be convicted under Section 304 Part-I, I.P.C.

9. In the result, conviction of the accused-opposite party under Section 302, IPC, as made by the learned Sessions Judge, Sundargarh, is converted to one under Section 304 Part-I, IPC and the accused-opposite party is sentenced to undergo rigorous imprisonment for ten years.

It is stated at the Bar that the accused-opposite party has remained in custody from the date of his remand and by now has completed more than ten years. If that be so, he accused opposite party be set at liberty forthwith, unless his detention is required otherwise.

Crimanal Reference answered.

2010 (II) ILR – CUT- 316

PRADIP MOHANTY, J & S. K. MISHRA, J.

W.P.(C) NO.12037 OF 2009. (Decided on 05.08.2010).

UNION OF INDIA & ORS. …… Petitioners.

.Vrs.

SRI PURNA CHANDRA NAYAK …… Opp.Party.

SERVICE – Assured Career Progression (ACP) scheme provides two financial upgradation in the entire service career of a Government Servant if no regular promotion during the prescribed period (12 yrs. & 24 yrs.)- Opp.Party got Ist financial upgradation but he was denied the second – In OA Tribunal held Opp.Party is eligible for promotion – Department challenged the order of the Tribunal.

Held, once the Department has granted the first financial upgradation on completion of 12 years of service without promotion, it can not deny the second financial upgradation on the ground that he does not possess the requisite qualification for promotion.

(Para 5)

For Petitioners - Mr. Sidharth Sankar Mohapatra
(Central Government Advocate)

For Opp.Party - M/s. C.Ananda Rao, Sarat Kumar Behera & A.K.Rath

S.K.MISHRA, J. The simple question that arises in this case is whether to avail benefit of Assured Career Progression, in short the 'ACP', it is necessary for the employee to have requisite qualification for getting promotion to the higher cadre.

2. The Department of Meteorology, Ministry of Earth Science, Union of India has preferred this writ petition against the orders passed by the Central Administrative Tribunal in O.A. No.122 of 2005, wherein the Tribunal ordered that the second financial upgradation as per the 'ACP' scheme be granted to the applicant within 60 days from the date of receipt of copy of the order.

3. Bereft of unnecessary details, the fact of the case is that the opposite party at present working as Observatory Attendant in Meteorological Department, Bhubaneswar and having been declared surplus while working in the DNK Project, was redeployed in the present organization.

In order to meet the genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues, on the recommendation of the 5th Pay Commission, the Government of India, as a

safety net measure accepted and floated a policy commonly known as Assured Career Progression (ACP) Scheme. The scheme provides for grant of two financial upgradations in the entire service career of a Government servant, if no regular promotion during the prescribed periods (12 and 24 years) has been availed of by an employee. It further provides that if an employee has already got one regular promotion, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP Scheme. It also envisages that in case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP scheme shall accrue to him. Condition No.6 of the said scheme envisages that fulfillment of conditions of normal promotion shall be ensured for grant of benefits under the ACP scheme. The applicant having been denied the benefits of the ACP under Annexure-12 dated 20.12.2004 approached the Tribunal by filing an Original Application under section 19 of the A.T. Act, 1985 seeking to quash the impugned order of rejection under Annexure-12 and to direct the respondents, i.e. present petitioners to grant the benefits of two upgradations as provided under the Scheme.

4. The present petitioners, i.e., Meteorological Department, *inter alia,* pleaded that as the opposite party does not fulfill the eligibility conditions provided in the rules for promotion to the next grade, he was not entitled to the ACP scheme. The petitioners pleaded that for getting financial upgradation under the ACP scheme, one has to fulfill norms for promotion, as provided in the rules. It is further maintained by the petitioners that according to the opposite party he is a non-matriculate, and in spite of

opportunity he failed to substantiate that he had appeared in the HSC examination.

5. It is not disputed at this stage that as per the order dated 08.09.2005, the opposite party was granted the first financial upgradation w.e.f. 22.01.2001. Taking such factor into account, the Tribunal has held that the respondent, i.e. present petitioners cannot canvass the plea that the applicant, i.e., opposite party is not eligible for promotion. In other words, the plea raised by the petitioners is hit by the principles of waiver and acquiescence. Once the Department has granted the first financial upgradation on completion of 12 years of service without promotion, then it cannot deny the second financial upgradation on the ground that he does not possess the requisite qualification for a promotion.

6. It is further seen that such order was challenged by the Union of India, Meteorological Department in W.P.(C) No.9721 of 2009, wherein the orders passed by the Tribunal were held to be correct. In pursuance of the orders of this Court on 17.07.2009 in the above Writ Petition, the Government of India, Ministry of Health and Family Welfare, Directorate

General of Health, have clarified that Union of India has no objection to grant the second ACP scheme to the opposite party in that case. Once the Union of India has accepted order of the Court and has granted second ACP to one employee, then the Union of India cannot deny the same benefit to the similarly placed employees.

7. Thus, on the basis of the aforesaid discussion, this Court comes to the conclusion that the reasons recorded by the Tribunal are proper and need no interference.

Accordingly, the writ petition stands dismissed as devoid of merit. But keeping in view the peculiarity of the case, there shall be no order as to the costs.

Writ petition dismissed.

2010 (II) ILR – CUT- 319

M.M.DAS, J.

W.P.(C) NO.10614 OF 2009 (Decided on 21.06.2010).

GIRIJA SANKAR DASH …… Petitioner.

.Vrs.

SECRETARY, BOARD OF SECONDARY, EDUCATION ORISSA, CTC. & ANR. ……. Opp.Parties

EXAMINATION – Petitioner appeared Annual H.S.C. Examination 2008 – He secured 41 marks in Third Language Sanskrit (TLS) – Applied for re-addition/re-checking of marks – Board intimated that there is no change in his marks – Petitioner filed writ petition – Board issued fresh mark sheet where in petitioner secured 91 marks in TLS.

This Court in innumerable cases found that when applications are made by the students for re-addition/re-checking of answer papers, ordinarily, they get a reply in a formatted letter indicating "no change" - Had the petitioner not approached this Court, the actual marks obtained by him in TLS would not have been awarded to him – Although petitioner's grievance has already been redressed but considering the mental trauma he suffered for not getting admission to a College of high repute for the callous attitude of the authorities this

Court directed the Board to pay Rs.5000/- as cost to the petitioner which shall be recovered from the erring officials.

For Petitioner -S.K.Mishra
For Opp.Parties -D.Mohapatra

Heard Mr. Mishra, learned counsel for the petitioner and Mr.D.Mohapatra, learned counsel for the Board of Secondary Education, Orissa, Cuttack.

The petitioner appeared in the Annual H.S.C. Examination, 2008. After the results were declared he obtained his memorandum of marks. Finding that he has secured 41 marks in Third Language Sanskrit (TLS), he made an application by depositing requisite fees there with for re-addition/rechecking of the said paper within the time stipulated in the Regulation of the Board. The petitioner was intimated on 21.3.2009 under Annexure-3 that there is no change in the marks allotted to him in TLS. Being aggrieved, the petitioner has approached this Court in the present writ petition claiming that he peformed well in the said paper and expected much

more marks and also challenging the intimation by the Board that there was no change in the marks after rechecking and re-addition.

On notice being issued to the Board, it appears from Annexure-4 to the additional affidavit filed by the petitioner that the Board issued a fresh memorandum of marks dated 22.1.2010 indicating that the petitioner has secured 91 marks in TLS thereby increasing the aggregate also by 50 marks.

Mr. Mohapatra, learned counsel for the Board has produced the answer script of the petitioner and also the written instruction in support of his contention that the mistake was unintentional and the person, who rechecked the answer script of the petitioner added the marks awarded to the petitioner in respective answers and finding the same to be 91 as well as finding that in the cover page of the answer script, the total was mentioned as 91, he inadvertently concluded that there was no change which was intimated to the petitioner. But immediately after receipt of the notice from this Court, the matter was rechecked and the mistake was detected. Accordingly, the Inspector of Schools, Sambalpur Circle has been directed by letter dated 11.6.2010 to initiate disciplinary proceedings against the three persons, who according to the Board, are responsible for the said mistake. Even accepting the contention of Mr. Mohapatra, the facts of the case reveal complete callous attitude of the authority of the Board in dealing with the careers of the students as this Court in innumerable cases found that where ever applications are made for rechecking/re-addition of answer scripts by

the students as per the Regulation of the Board within the time stipulated, ordinarily, they get a reply in a formatted letter indicating “no change” . It also shows that such applications are never considered seriously by the Board. Had the petitioner not approached this Court, in all probability, actual marks obtained by him in TLS would not have been awarded to him. Though this Court accepting the contention that the same might have resulted from a bona fide act, but, nevertheless, the injury caused to the petitioner is irreparable.

I, therefore, while finding that the petitioner’s grievance has already been redressed by increasing the marks in TLS as ‘91’ nevertheless, considering the mental trauma, which he underwent and the fact that, had immediate remedial measures been taken by the Board on the application of the petitioner for re-addition/rechecking of marks in the said paper, he would have got a scope to get admission to a college of high repute for prosecuting further study, it is required that the petitioner should be compensated. I, therefore, dispose of this writ petition directing that the Board shall pay a cost of Rs.5000/- (Rupees five thousand) to the petitioner within a period of two weeks from today. The cost paid by the Board shall be recovered from the erring officials.

GIRIJA SANKAR DASH -V- SECRETARY, B. S. E. ORISSA

Urgent certified copy of this order be granted as per rules.

A copy of this order will be furnished to Mr. Mohapatra, learned counsel for the Board for implementation of the directions issued above.

Writ petition disposed of.

2010 (II) ILR – CUT- 322

M.M.DAS, J.

W.P.(C) No.3315 of 2010 (Decided on 23.6.2010)

DR. (MISS) RITUPURNA DASH …… Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226.

Green Card issued infavour of the mother of the petitioner – Clause-4 provides reservation of 5% seats in Engineering, Medical Polytechnic and I.T.I. institutions for admission of Children of the Card holder – Petitioner appeared in P.G. Entrance Examination, 2010 – She filed this writ petition challenging the action of the authorities for non-inclusion of a Clause in the information brochure reserving 5% seats in the P.G. Medical Course.

A welfare State can not go back from its promise and deny the holder of the Green Card from such benefits – Since the admission process in P.G. Medical Admission 2010 is on the verge of completion no benefit can be given to the petitioner this year – Held, Direction issued to the Opp.parties to make provision for reservation of 5% of

the total number of seats meant for P.G. Medical Course in the State for the child of persons holding Green Card from the next year.

Case law Referred to:-

(2010) 1 SCC 477 : (Prakash (Dr.) & Ors. -V-State of Haryana & Ors.).

For Petitioner -Shyamanada Mohapatra.

For Opp.Parties –R.C.Mohanty.

Heard learned counsel for the petitioner and Mr. R.C.Mohanty, learned counsel appearing for the Opp.Parties.

The petitioner in this writ petition has made a prayer for a direction to the Opp.Party no.2 to consider her case under the reserved category of 5% seats of the total number of seats for P.G. Medical Course in the selection process on the basis that the parents of the petitioner hold a green card. The petitioner appeared in the P.G. Entrance Examination, 2010. In the information brochure, there was no reservation provided for the children of green card holders.

Learned counsel for the petitioner draws the attention of the Court to the assurance given to a person, who undergoes tubectomy operation, in the green card issued to such person, to the effect that reservation of 5% seats in Engineer, Medical, Polytechnic and I.T.I. institutions will be made for

admission of children of these families. It is therefore, submitted that non-inclusion of clause in the information brochure reserving 5% seats in the P.G. Medical Course for candidates, whose parents hold a green card, is contrary to the promise given by the State under the Green Card itself and even though a condition was not included in the information brochure the petitioner is entitled to be considered for admission to P.G. Medical Course within the said 5% seats of the total number of seats.

Mr. R.C.Mohanty, learned counsel for the opp.parties on the contrary, relying upon the counter affidavit filed by him, submits that admission to P.G. Medical Course is always in accordance with the guidelines of the M.C.I. which do not prescribe any reservation for children of Green Card holders. He further submits that admittedly no reservation has been made in the prospectus for P.G. Medical Selection, 2010 for children of Green Card Holders, and, therefore, there is no scope to consider the petitioner under any such imaginary reserved category. According to Mr. Mohanty, the clause contained in the Green Card with regard to reservation of 5% seats for Medical Course can only mean for MBBS and not P.G. Medical Course which is a specialized course and, where merits should be the only consideration, though some provision is made for preservation of seats for SC/ST Candidates as per the guidelines of the M.C.I. Hence, it is submitted by him that no direction can be issued to the State Government to reserve 5% of the seats for family members of Green Card holders. He further rely

upon the decision in the case of Gulsan Prakash (Dr) and others v. State of Haryana and others, (2010) 1 SCC 477 submits that the power to make reservation under Article 15(4) of the Constitution is discriminatory and not mandatory and, it is for the State Government to decide the said question where Court should not interfere by issuing directions to make reservation.

Clause -4 in the Green Card issued in favour of the mother of the petitioner, which is relevant for the purpose, is as follows:-

> "1 to 3 xx xx xx
>
> 4. Reservation of 5% seats in Engineering, Medical Polytechnic and I.T.I. institutions will be made for admission of children of these families.
>
> Xx xx xx"

Purpose of giving such incentive to Green Card holders is to encourage citizens to undergo operations for family planning keeping in view the population explosion in the country. Persons being attracted by such incentive will be encouraged to undergo such operation. A Welfare State can not go back from its promise and deny the holder of the Green Card from such benefits. It is an admitted case that the petitioner did not take admission into MBBS Course under the Green Card quota. Therefore, it was incumbent upon the State to make provision for reservation for reservation of

5% of the seats in the P.G. Medical Course for children of persons holding Green Card.

However, as the admission process in P.G. Medical Admission, 2010 is on the verge of completion, no benefit can be given to the petitioner this year. The opp.parties are directed to make provision for reservation of 5% of the total number of seats meant for P.G. Medical Course in the State for the children of persons holding Green Card from the next year.

With the aforesaid observation and direction, the writ petition is disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT- 325

M.M.DAS, J.

W.P.(C) NO.10686 OF 2009 (Decided on 22.6.2010)

PURUSHOTAM INSTITUTE OF ENGINEERING & TECHNOLOGY, ROURKELA & ANR. ……. Petitioner

.Vrs.

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

ORISSA PROFESSIONAL EDUCATIONAL INSTITUTIONS (REGULATION OF ADMISSION & FIXATION OF FEE) ACT, 2007 – SEC.4(10) & 14.

Petitioner-institution charged certain amount from one student for purchase of LAPTOP – Policy planning Body recommended Govt. to impose fine – Govt. while imposing fine decided U/s.14 read with Sec.4(10) that the institution be debarred from admitting fresh students from the academic session 2009-10 – Petitioner deposited the fine but challenged the rest portion of the order.

As per Section 4 (8) (9) & (10) the policy planning body to recommend to the Govt. for imposing fine on deciding a complaint – Section 14 does not contemplate any power or jurisdiction of the Govt.

to pass an order debarring an institution from giving admission to students in a particular session – Held, such direction of the Govt. is contrary to the provisions of the Act and such portion of the order is liable to be quashed. (Para 6 & 7)

Case laws Referred to:-

1.AIR 2003 SC 3734 : (Islamic Academy of Education & Ors.-V-State of Karnataka).
2.AIR 2005 SC 3226 : (P.A.Inamdar & Ors. -V-State of Maharashtra).

For Petitioner - M/s. A.Patnaik & B.Baisakh.
For Opp.Parties – Addl. Standing Counsel (for O.P.No.1)
M/s. R.K.Dash & S.Pattnaik (for O.Ps 2 & 3)
M/s. S.Palit, A.Kajariwal, A.Mahalik, D.Pattnaik & A.Mishra (for O.P.4)
Mr. Yeeshan Mohanty (for O.P.No.5)

M.M. DAS, J. The petitioner no.1 is a professional institution imparting courses in Engineering and Technology. It is revealed from the facts of the case that the petitioner no. 1 charged certain amounts from one of the students for purchase of a LAPTOP to be provided to her**.** The Policy

Planning Body constituted under the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (for short, 'the Act') coming to know about the same, issued a notice as contemplated under section 5 (2) of the Act, calling upon the petitioners to appear before the Policy Planning Body and show cause to the complaint received by it. Upon hearing the same, after filing of the show cause by the petitioners, a recommendation was made by the Policy Planning Body to the Government as per its resolution in the proceeding dated 27.5.2009 for imposing a fine of five times the fees charged by the petitioner no. 1 – institution which comes to Rs. 5.40 lakhs. The Policy Planning Body further decided to recommend to the Government to give compensation of Rs. 1.08 lakhs to the candidates out of the fine, as compensation for the lost of one year and to meet the expenditure of her study. On such recommendation being made, the Government in its Industries Department passed an order on 24.7.2009 (Annexure-1), the operative part of which reads as follows:-

" xxx xxx xxx

Whereas, after hearing both the parties and after going through the written statement of both the parties, the Policy Planning Body vide its proceeding dtd. 27.5.2009 came to the conclusion that the

Management of Purushottam Institute of Engineering and Technology, Rourkela have contravened the provisions of the sub-section -1 of section 5 of the said Act and recommended to Government for imposing a fine of 5 times the fee charged by the institution which comes to Rs. 5.40 lakhs. The Policy Planning Body further recommended for a compensation of Rs. 1.08 lakhs to the candidate out of the above fines as a compensation for the loss of one academic year and to meet the expenditure of her further study.

After careful consideration of the recommendation of the PPB Government have been pleased to order that the Management of Purushottam Institute of Engineering & Technology, Rourkela is to pay a fine of Rs. 5.40 lakhs out of which Rs. 1.08 lakh is to be paid to the candidate as compensation for the lost of one academic year and to meet the expenditure of her future study. Further Government have also decided in pursuance of their power u/s 14 read with section 4 (10) that the institution be debarred from admitting fresh students from the academic Session 2009-10."

2. It is submitted at the Bar that the petitioners have already paid the amount of Rs. 5.40 lakhs, which is not disputed and is on record. The grievance of the petitioners is with regard to the portion of the order where the Government decided that in pursuance of their power under section 14

read with section 4 (10), the institution is debarred from admitting students from the academic session 2009-10.

Pursuant to the interim order passed by this Court on 29.7.2009, the petitioner no. 1 – institution was permitted to take part in the counselling and admitted students for the session 2009-2010.

3. Mr. Patnaik, learned counsel for the petitioners vehemently submits that the said portion of the order, as stated above, passed by the Government, is wholly without jurisdiction and contrary to the provisions of the Act. He submits that section 14 of the Act does not contemplate imposition of such a bar on any institution by the Government and the only provision under which such fine/penalty can be imposed has been made in section 4 of the Act.

4. Mr. Senapati, learned counsel for the state, on the contrary, submits that the Preamble of the Act clearly states that taking into consideration the decision in the case of ***Islamic Academy of Education and others v. State of Karnataka,*** AIR 2003 SC 3734 and ***P.A. Inamdar and others v. State of Maharastra , AIR 2005 SC 3226***, the Act was legislated for regulatory measures aimed at protecting the interest of the student community as a whole and in maintaining required standards of professional

education on non-exploitative terms and to prevent mal practice by any institute. He further submits that as held by the apex Court in the aforesaid cases, the Act has been legislated to prevent charge of capitation fees directly or indirectly or in any form and to check charging of such capitation fees and profiteering. Section 4 of the Act deals with constitution of the Policy Planning Body and its powers. The relevant clauses of Section 4 for the purpose of this care are Clauses - 8, 9 and 10, which are as follows:-

> "4. (1) The Government shall constitute a body to be known as the Policy Planning Body consisting of following members nominated by it, namely;-
>
> (a) to (h) xx xx
>
> (2) to (7) xx xx xx
>
> (8) The Policy Planning Body may hear complaints with regard to admission in contravention of the provisions of this Act or rules or orders or guidelines made thereunder and if the Policy Planning Body after making enquiry, in the manner prescribed, finds that there has been any such contravention in admission on the part of any private professional educational institution, it shall make appropriate recommendations to the Government for imposing fine on such institution and the Government may on receipt of such recommendation, impose fine not exceeding rupees ten lakhs on such institution in case of each such contravention.

> (9) The Government shall collect the fine along with the interest thereon in such manner and subject to such conditions as may be prescribed.
>
> (10) In addition to the penalty that may be imposed under sub-section (8), the Policy Planning Body may also –
>
> (a) declare the admission made in respect of any or all seats in a particular professional educational institution to be invalid;
>
> (b) recommend to the University or Statutory body concerned for withdrawal of affiliation or recognition, as the case may be of such institution".

Section 14 of the Act provides as follows:-

> "14.(1) The Government may give such directions to any private professional educational institution as in its opinion are necessary or expedient for carrying out the purpose of this Act or give effect to any

of the provisions contained therein or in any rules or orders made thereunder and the management of such institution shall comply with every such direction.

(2) The Government may also give such directions to the officers or authorities under its control which in its opinion are necessary or expedient for carrying out the purpose of this Act."

5. A bare reading of the section 4 (8) (9) and (10) of the Act clearly shows that it is for the Policy Planning Body to recommend to the Government for imposing fine on deciding a complaint. The complaint filed, if any, is to be dealt with as provided under section 5 (2) of the Act.

6. Reading of section 14 of the Act discloses that Government is authorized to issue direction to any private professional educational institution as in its opinion are necessary or expedient for carrying out the purpose of the Act or to give effect to any of the provisions contained in the Act or the Rules framed thereunder or Orders made thereunder which the Management of the institution is to comply. Section 14 does not contemplate any power or jurisdiction of the Government to pass an order debarring an institution from giving admission to students in a particular session where the institution is an approved institution of the AICTE and is authorized to give admission to students. Debarring an approved institution from giving admission to students is definitely a penal measure and cannot be termed as a regulatory measure.

7. It is, therefore, clear that the direction of the Government in the impugned order debarring the petitioner no.1 – institution from giving admission to the students for the academic session 2009-2010 is contrary to the provisions of the Act and, hence, is found to be wholly without jurisdiction. The said portion of the order is, therefore, liable to be quashed. Admission of the students for the session 2009-2010 pursuant to the interim order shall be held to be legal and valid for all purposes.

8. In view of the above, the portion of the impugned order dated 24.7.2009 under Annexure-1 to the effect that "further Government have also decided in pursuance of their power under section 14 with section 4(10) that the institution be debarred from admitting fresh students from the academic session 2009-2010" is quashed.

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

Writ petititon allowed.

2010 (II) ILR – CUT- 330

M.M.DAS, J.

BLAPL NO.5690 OF 2009 (Decided on 29.6.2010)

PRASANT KUMAR SAHOO …….. Petitioner

.Vrs.

STATE OF ORISSA ……... Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.439.

Bail – Earlier application rejected – Second bail application – Offence U/s.364(A), 302, 201, 120-B I.P.C. and Section 25 & 27 of the Arms Act – Finding of a prima facie case as the petitioner has been implicated by the witnesses examined during investigation – Since Sessions trial is in progess it would not be appropriate for this Court to appreciate the evidence adduced before the Court below when other prosecution witnesses are yet to be examined – No changed circumstance except the fact that the petitioner was released on

interim bail twice which can not be a consideration to grant bail to the petitioner – Held, prayer for bail is rejected.

(Para 10 & 11)

Case laws Referred to:-

1.AIR 1988 SC 1883 : (Kehar Singh & Ors. -V-The State (Delhi Admn.)
2.(2007) 12 SCC 364 : (Kumari Suman Pandy -V- State of Uttar Pradesh & Anr.).
3.(2002) 3 SCC 598 : (Rama Govind Upadhyay -V- Sudarshan Singh).
4.(2006) 12 SCC 131 : (Gajanand Agarwal -V- State of Orissa).
5.2008 (II) OLR 161 : (Sri Braja Bhai -V- State of Orissa).
6.(2005) 2 SCC 42 : (Kalyan Chandra Sarkar -V- Rajesh Ranjan @ Pappu Yadav & Anr.).

For Petitioner - M/s. J.Patnaik, J.K.Panda & S.Panigrahi.
For Opp.Party – Mr. Goutam Mishra, Addl.Standing Counsel.

M.M. DAS, J. The petitioner in this application under section 439 Cr.P.C. has approached this Court for the second time for grant of bail. He is a co-accused in C.T. Case No. 1 of 2009 corresponding to G.R. Case No. 1991 of 2007 arising out of Saheednagar P.S. Case No. 155 of 2007 now pending trial in the court of the learned Sessions Judge, Khurda at Bhubaneswar. Accusation of commission of offence under sections 364(A)/302/201/120-B IPC read with sections 25 and 27 of the Arms Act has been made against the accused persons.

PRASANT KUMAR SAHOO -V- STATE OF ORISSA [*M.M. DAS, J.*]

2. This Court earlier, while dealing with the prayer for bail made by the petitioner in BLAPL No. 5766 of 2008, by order dated 18.6.2008 taking note of the allegations made by the prosecution recorded as follows:-

> "The offence is a very heinous one involving kidnap of two persons and murder of at least one of them. The whereabouts of Rasmi Ranjan is not yet known nor it is known whether he is dead or alive. Contrary to the assertion of the learned counsel for the petitioner, the present petitioner has been named not only by witness Pravat Nath, but also witness Prasant Kumar Mohapatra and Pradip Kumar Mohapatra, who are none other than the brothers of Rasmi Ranjan.
>
> Having regard to the nature and gravity of the offence I do not feel to grant bail to the petitioner and accordingly the BLAPL is rejected."

Subsequent to rejection of the prayer for bail made by the petitioner, he again approached this Court in BLAPL No. 16440 of 2008 making a prayer to release him on interim bail. By orders passed in the said bail application on 10.12.2008, the petitioner was released on interim bail for a period of 60

days and again in Misc. Case No. 265 of 2009 filed in the said bail application, the petitioner was released for a further period of 60 days on bail.

3. Mr. J. Patnaik, learned senior counsel appearing for the petitioner vehemently urged that the petitioner has remained in custody since more than two years as alleged by the petitioner. He further submitted that in connection with the self-same offence, another case was lodged in Bolangir Town Police Station, registered as G.R. Case No. 33 of 2008, in which, the witness Prabhat Nath, who is alleged to have implicated the petitioner in this case, gave a statement under section 164 Cr.P.C. before the Magistrate on 28.10.2007 where, he has not implicated the petitioner and the petitioner has been granted bail in the said case. Mr. Patnaik further submitted that other cogent grounds for passing an order in favour of the petitioner by releasing him on bail are that in the meantime, the three witnesses, whose statements were relied upon for rejecting the previous prayer for bail made by the petitioner in order dated 18.6.2008 in BLAPL No. 5766 of 2008, i.e., Prabhat Nath, Prasant Kumar Mohapatra and Pradip Kumar Mohapatra, have been examined in the meantime during the course of trial of the sessions case. The said witnesses have not implicated the petitioner with the alleged offence in any manner. The other ground canvassed on behalf of the petitioner is that, three of the co-accused persons, namely, Amit Kumar Choudhury, Gayatri Biswal and Jajati Keshari Biswal have been directed to be released on bail by this Court in BLAPL Nos. 9569 of 2008, 4670 of 2009 and 275 of 2009 respectively.

4. The prosecution has alleged that on 28.5.2007, the complainant Babu @ Dilip Kumar Behera lodged an information before the I.I.C., Saheednagar Police Station stating that on 25.5.2007 at about 2.30 P.M., his brother-in-law Chinu @ Rashmi Ranjan Mohapatra and his driver - Naba Kishore Mohanta have been kidnapped from Bhubaneswar with their INNOVA Car while they were coming to Bhubaneswar for purchasing marble from Sri Ram Marbles situated at Cuttack-Puri road, Bhubaneswar. It was further stated in the F.I.R. that in the same night at 10.00 P.M. the kidnappers made a call demanding a ransom from the family members of Rashmi Ranjan amounting to Rs. 2.00 crores for their release, who also cautioned that this should not be informed to the police. On the basis of the said report, the I.I.C. Saheednagar Police Station registered a case for commission of alleged offence under section 364 (A) IPC. During the course of investigation, the INNOVA Car was recovered from Dhanbad Railway Station and on the next day, the dead body of the driver Naba Kishore Mohanta was also recovered by the OIC of Sonahat Police Station, Ranchi and a case was registered in the said Police Station under sections 302/201/364(A)/120-B IPC read with

sections 25 and 27 of the Arms Act. Thereafter, on completion of the investigation, the police has submitted a charge sheet against the petitioner and the other co-accused persons for the commission of the above alleged offences. By now, it has been established that said Rashmi Ranjan was also murdered. In the meantime, the case has been committed and is being tried by the learned Sessions Judge, Khurda at Bhubaneswar.

5. Mr. G.Mishra, learned counsel for the State submitted that it is not correct on the part of the petitioner to state that the three witnesses named in the order of rejection of bail by this Court earlier, have not implicated the petitioner. He further submitted that the co-accused persons stand on different footing altogether and with regard to the allegation of conspiracy, Mr. Mishra submitted that as laid down by the Supreme Court in the case of ***Kehar Singh and others v. The State (Delhi Admn.)*** AIR 1988 SC 1883, conspiracy is always hatched in secrecy, which can only be revealed on examination of the prosecution witnesses during trial of a case, thus establishing the commission of the said offence by the accused persons. Mr. Mishra further submitted that this Court having rejected the prayer for bail of the petitioner earlier on the ground that the petitioner has been implicated in commission of the alleged offence by the witnesses examined during investigation, which, in other words, amounts to finding of a prima facie case against the petitioner, it would not be appropriate for this Court to appreciate the evidence adduced by those three witnesses during the course of trial to find out as to whether the petitioner has been implicated with the alleged offence, as this would influence the trial of the sessions case. He further contended that even considering the statements of the said

three witnesses, it would be seen that the petitioner has been directly implicated. The copies of the depositions of the above named three witnesses were produced before this Court.

6. On perusal of the evidence of Pradip Kumar Barik adduced before the learned Sessions Judge, it appears, prima facie, that he has named the petitioner to have been involved in commission of the alleged offence. The petitioner has also been named by the witness Parsuram Samal. The witness Prabhat Nath in his deposition before the learned Sessions Judge has also implicated the petitioner. Therefore, the contention that the said witnesses have not named the petitioner is not at all correct. Further, as contended by Mr. G. Mishra, learned counsel for the State, this Court is of the view that at this juncture when the sessions trial is in progress, it would not be appropriate for this Court to appreciate the evidence adduced before the court below and, more so, when the other prosecution witnesses are yet to be examined, for considering an application for bail which was earlier rejected by this Court.

7. With regard to the statement recorded under section 164 Cr.P.C. of the said Prabhat Nath, in the case registered at Bolangir, this Court is of the view that the said Prabhat Nath has not been confronted with the said statement recorded under section 164 Cr.P.C. during his cross-examination in the present session trial, and, therefore, the said statement has no bearing on this case for consideration of the prayer for bail.

8. Mr. Mishra, learned counsel for the State relied upon the judgment in the case of ***Kumari Suman Pandey v. State of Uttar Pradesh and another,*** (2007)12 SCC 364 and submitted that the Supreme Court in the said case has laid down the guidelines with regard to the facts, which are to be considered by a court hearing an application for bail. In the said case, the Supreme Court held that a court granting bail to an accused should indicate in the order the reasons for prima facie concluding why bail is being granted, particularly where an accused is charged of having committed a serious offence and it is necessary for the courts dealing with application for bail to consider among other circumstances, the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; reasonable apprehension of tampering of the witness or apprehension of threat to the complaint and prima facie satisfaction of the court in support of the charge. The Supreme Court also indicated that any order dehors such reasons suffers from non-application of mind as was noted by it in the cases of ***Rama Govind Upadhyay v. Sudarshan Singh*** (2002)3 SCC 598 and ***Gajanand Agarwal v. State of Orissa***,(2006)12 SCC 131.

9. Law with regard to dealing with second bail application or consecutive bail applications was vividly dealt with by this Court, referring to

various judgments of the apex Court, in the case of ***Sri Braja Bhai v. state of Orissa,*** 2008 (II) OLR 161. It would be profitable to mention here that though an argument was advanced on behalf of the petitioner that grant of bail to other co-accused persons is a ground for considering a second bail application of an accused as it is found that the said co-accused persons, who have been released on bail clearly stand on different footing than the petitioner, this Court is not inclined to consider the said contention in the present case. The Supreme Court has categorically laid down in the case of ***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another*** (2005) 2 SCC 42 that even though there is room for filing of a subsequent bail application in cases where earlier bail applications have been rejected, the same can be done, if there is a change in the fact situation or in law, which requires the earlier view to be interfered with or where the earlier finding has become obsolete. In the said case, the Supreme Court finding that in a previous order, by which the prayer for bail was rejected, it having been held that there was existence of prima facie

case against the respondent concluded that there is no scope for re-agitating the said point on the part of the respondent while contending that there is no prima facie case made out against him.

10. In the order of rejection of bail passed by this Court earlier, in the case of the petitioner, though not specifically stated, this Court found that a prima facie case exists against the petitioner, and, therefore, in this application, it cannot be contended that there is no prima facie case made out against the petitioner.

11. Hence, this Court finds that none of the grounds canvassed by Mr. Patnaik in support of the prayer for grant of bail can be considered to be either changed circumstances or such, that it requires the earlier view of this Court to be interfered with. Except the fact that the petitioner was released on interim bail twice in the interregnum, this Court does not find any changed circumstance inasmuch as releasing the petitioner on interim bail cannot be a consideration for granting bail to the petitioner.

12. In view of the above findings, this Court is not inclined to grant the prayer for bail to the petitioner, which is accordingly rejected.

13. The BLAPL is accordingly dismissed.

Application dismissed.

2010 (II) ILR – CUT- 335

R.N.BISWAL, J.

W.P.(C) NO.13570 OF 2008(Decided on 23.06.2010)

BIDYUTLATA NAYAK …….. Petitioner.

.Vrs.

SMT. SUCHETA SAMANTA …….. Opp.Party.

(A) ORISSA GRAMA PANCHAYAT ACT, 1964 (ACT NO.1 OF 1965) – SEC.32.

Election Petition – Necessary parties – No personal allegation against the Election Officer – Not required to be made a party – Held, finding of the appellate Court that Election Petition is bad for non-joinder of the Election Officer can not stand. (Para 9)

(B) ORISSA GRAMA PANCHAYAT ACT, 1964 (ACT NO.1 OF 1965) – SEC.31 (1).

Election Petition – To be presented within 15 days after publication of result – Failure to present such petition in time can be condoned if sufficient cause is shown to the satisfaction of the Tribunal.

In the present case petitioner filed Election Petition along with a petition U/s.5 of the Limitation Act –Tribunal was satisfied that she was suffering from illness for which the petition could not be filed in time – Held, the finding of the appellate Court that there is no provision in the G.P.Act for condonation of delay can not stand. (Para 10

(C) ORISSA GRAMA PANCHAYAT ACT, 1964 (ACT NO.1 OF 1965) –SEC.10

Office of Sarpanch reserved for O.B.C (women) – Admittedly Opp.Party belongs to "Kshyatriya" Caste – The Caste "Agnikula Kshyatriya" has been specified in the list of socially and Educationally Back ward Class as notified by the State Goverment and it is impermissible to hold that the term "Kshyatriya" is synonymous to the term "Agnikula Kshyatriya" as available in the list of SEBC.– Held, the Appellate Court committed an error in holding that the Caste "Kshyatriya " is within the ambit of the Caste "Agnikula Kshyatriya". (Para 12)

(D) ORISSA GRAMA PANCHAYAT ACT, 1964 – SEC.40.

Office of Sarpanch reserved for OBC (women) – Nomination of Opp.Party should not have been accepted – There were five candidates including Opp.Party in the election fray – Had the nomination of Opp.Party not been accepted, the votes secured by her would have been distributed amongst the remaining candidates and in that event it is difficult to say who would have secured the highest number of votes

– Held, the Trial Court ought not have declared the petitioner to have been duly elected as Sarpanch of Digambarpur G.P. which is hereby set aside – The competent authorities are directed to conduct fresh election in respect of the office of Sarpanch Digambarpur Gram Panchayat. (Para 12 & 13)

For Petitioner - M/s. susanta Ku. Dash, A.K.Otta & B.P.Dhal.

For Opp.Party – M/s. M.R.Mohapatra, B.S.Samal, R.R.Samantaray, P.K.Behera & P.K.Mohapatra.

R.N.BISWAL,J. The petitioner calls in question the judgment dated 10.9.2008 passed by learned District Judge, Dhenkanl in F.A.O.No.26 of 2007 reversing the judgment dated 18.8.2007 passed by learned Civil Judge(Jr.Ddivision) Dhenkanal in Election Petition No.24 of 2007 declaring the election of opp.party to the office of Sarpanch of Digambarpur G.P. as

null and void and consequentially declaring the petitioner as duly elected Sarpanch in her place.

2. The petitioner, sole opp.party and three others contested for the office of Sarpanch of Digambarpur G.P. under Gondia Block in the district of Dhenkanal held on 19.2.2007.Since the opp.party polled the highest number of votes, she was declared elected to the said office on 22.2.2007.

3. Being aggrieved with the declaration of the said result, the petitioner filed Election Petition No.24 of 2007 before learned Civil Judge (Jr.Division) Dhenkanal (hereinafter referred to as 'Election Tribunal') along with a petition for condonation of delay in filing it, mainly on the ground that the office of Sarpanch of the aforesaid G.P. was reserved for Other Backward Class (women),the opposite party does not belong to the said class, as her caste was Kshyatriya. During the time of filing of nomination by the opp.party, the petitioner challenged her candidature before the Returning Officer and requested him not to accept her nomination, but still then ,he accepted it. It is the further case of the petitioner that she secured the second highest number of votes.

4. Opp.party in her counter admitted that she was born in a Kshyatriya family. Her husband is also Kshayatrya by caste. But according to her, the caste Agnikula Kshyatriya having been notified as Socially and Educationally Backward Class, the caste Kshyatriya will come under it. It is her specific case that Ext.7 was issued by the Addl. Tahasildar, Gondia, certifying that she is a member of Socially and Educationally Backward class. Moreover, no body challenged her candidature before the Returning Officer while filing the nomination. It is her further case that even though opp.party was quite heal and hearty, still then she did not file the Election Petition within the statutory period and manufactured some documents to fit into her plea that she was ill from 28.2.2007 to 19.3.2007.

5. On the above pleadings of the parties, the Election Tribunal framed three issues .In order to prove her case, while the petitioner examined two witnesses including herself, as P.W.1, opp.party examined three witnesses to prove her stand.

6. After assessing the evidence on record, the Election Tribunal allowed the Election Petition and declared the election of the opp.party as null and void on the ground that she does not come under Socially and Educationally Backward class and further declared the Election Petitioner to have been duly elected as Sarpanch of Digambarpur G.P.

7. Being aggrieved with the said judgment, the opp.party preferred F.A.O.No.26 of 2007 before the learned District Judge, Dhenkanal, who set aside the judgment passed by the Election Tribunal on the grounds; that the Election Officer was not made a party in the Election Petition; that an

Election Petition cannot be accepted beyond the period prescribed therefore and that the opp.party being Kshyatriya by caste is included within Agnikula Kshyatriya.

8. Learned counsel appearing for the petitioner submitted that the Election Officer is neither a necessary nor a proper party in an Election Petition. Section 32 of the Orissa Gram Panchayat Act,1964 (hereinafter referred to as 'G.P.Act') describes the persons, who are to be made parties in an Election Petition. There is nothing to show that the Election Officer is required to be made a party in such a petition. He further submits that learned District Judge, Dhenkanal committed gross error in holding that in no circumstance an Election Petition can be filed beyond the prescribed limit. As envisaged under the 2nd proviso to Section 31(1) of the G.P.Act, if the petition satisfies the Election Tribunal that sufficient cause existed for his/her failure to present the petition within the period prescribed, it may condone the delay and accept the petition. He further submitted that the caste Agnikula Kshyatriya cannot include the caste Kshyatriya within its ambit. So, according to the learned counsel for the petitioner, the writ petition deserves to be allowed.

9. On the contrary, learned counsel for the opp.party contended that the certificate under Ext.7 certifying that opp.party comes under Socially and Educationally Backward caste having not been set aside by any higher forum, the appellate court rightly held that opp.party comes under Socially and Educationally Backward Class. He further submitted that the result of the election was declared on 22.2.2007.So, as per the mandate contained under Section 31(1)of the G.P. Act, the Election Petition ought to have been filed within 15 days thereafter i.e. on 9.3.2007, but, the same having been filed on 21.3.2007,learned Election Tribunal ought not to have entertained it. Furthermore, he submitted that the petitioner could not prove satisfactorily that she was suffering from illness from 20.2.2007 to 19.3.2007

In view of the rival submissions of learned counsel for the parties, it would be profitable to quote Section 32 of the G.P.Act, which reads as follows:

> "32.Parties to the petition-(1)The petition may be presented by any person who has filed his nomination.
>
> (2)A person whose election is questioned and where the petition is to the effect that any other candidate is to be declared elected in place of such person, every unsuccessful candidate who has polled more votes than such candidate shall be made opposite party to the petition."

In the case at hand, prayer of the petitioner before the Election Tribunal was to declare the election of the opp.party as null and void and to declare her (petitioner) as the duly elected Sarpanch of Digambarpur G.P. There is no dispute that she secured the second highest number of votes.So, she was

required to make the returned candidate as the sole opp.party, which she has done. Moreover, there is no personal allegation against the Election Officer. So, he was not required to be made a party. Accordingly, the finding of the appellate court that the Election Petition is bad for non-joinder of the Election Officer cannot stand.

10. As per Section 31(1) of the G.P.Act, the Election Petition is required to be filed within 15 days after the date on which the name of the person elected, is published. But, the 2nd provision to it, reads as follows:

> Provided further that if the petitioner satisfies the Civil Judge (Jr.Division)that sufficient cause existed for the failure to present the petition within the period aforesaid, the Civil Judge(Jr.Division) may in his discretion condone such failure"

In the instant case, along with the Election Petition, the petitioner filed a petition under section 5 of the Limitation Act to condone the delay. As per the said petition, she suffered illness from 20.2.2007 to 19.3.2007. She proved it through the doctor, P.W.2, under whom she was undergoing treatment. She also proved Ext.2, the medical certificate issued by P.W.2 and also the prescriptions Annexure-3 and Annexure 3/3. The Election Tribunal was satisfied that she was suffering from serious illness from 20.2.2007 to 19.3.2007 and could not file the Election Petition within time. So the finding of the appellate court that there is no provision in the G.P. Act for condonation of delay in filing the Election Petition cannot stand.

11. As stated eaerlier, opp.party was born and brought up in a Kshyatriya family. She married to a person belonging to Kshyatriya caste. Ext.7, the caste certificate issued by the Addl.Tahasildar, Gondia also shows that her caste is Kshyatriya. Of course, it further shows that she belongs to Socially and Educationally Backward class. The additional Tahasildar was of the view that the caste Agnikula Kshayatriya includes

Kshyatriya and issued the certificate under Ext.7. As per the submission of learned counsel for the opp.party, when the correctness of the said certificate has not been challenged and it stands as it is, it can safely be held that opp.party comes under Socially and Educationally Backward Class.

12. As stated above, Ext.7 shows that opp.party is Kshyatriya by caste, but Addl.Tahasildar issued the certificate showing that she belongs to Socially and Educationally Backward Class which is not correct. Even if Ext.7 is not challenged in any higher forum, it cannot be said that opp.party comes under Socially and Educationally Backward Class. Ext.5, issued by the State Election Commission, Orissa, to all the Collectors of the State, shows that the list of Socially and Educationally Backward Classes notified by the Govt. of Orissa from time to time shall be adopted for the purpose of

filling up the seats/offices reserved for Backward class of citizens. The State list of Socially and Educationally Backward classes furnished by the Minorities and Backward Classes Welfare Department, Govt. of Orissa reflects that the caste Agnikula Kshyatriya comes under Socially and Educationally Backward class. So, a person belonging to that caste can file nomination to contest the election reserved for Back Ward Classes. The apex court, time and again have held that it is not permissible to say that a tribe, sub-tribe or part of or group of any tribe is synonymous to the one mentioned in the scheduled tribe order, if they are not specifically mentioned in it. So, when as per the aforesaid notification the caste Agnikula Kshyatriya has been specified as Socially and Educationally Backward class, the caste Kshyatriya cannot be included in it. The trial court committed an error in holding that the caste Kshyatriya is within the ambit of the caste Agnikula Kshyatriya. Since the office of Sarpanch was reserved for O.B.C.(women,) the nomination of opposite party ought not to have been accepted. Admittedly, there are five candidates including opp.party in the election fray. Had the nomination of the opp.party not been accepted, the votes secured by her would have been distributed amongst the remaining candidates; in that event it is difficult to say who would have secured the highest number of votes. So, the trial court ought not have declared the petitioner to have been duly election as the Sarpanch of Digambarpur Grama Panchayat.

13. Under such circumstances, the writ petition is allowed, the judgment passed by the appellate court is set aside and the judgment of the trial court is confirmed to the extent that election of the opp.party is null and void. So far the order declaring the petitioner to have been duly elected as Sarpanch of Digambarpur G.P. is hereby set aside. The competent authorities are directed to conduct fresh election in respect of the office of Sarpanch of Digaambarpur G.P. expeditiously. No cost

2010 (II) ILR – CUT- 340

R.N.BISWAL, J.

ELECTION PETITION Nos. 4 & 6 of 2009 (Decided on 23.6.2010)

RANEDRA PRATAP SWAIN & ANR. …… Petitioners.

.Vrs.

RAMESH ROUT ……. Respondent.

REPRESENTATION OF PEOPLE ACT, 1951 (ACT NO.43 OF1951) – SEC,36 (5).

Rejection of nomination paper – Ground is non-submission of Original Form-A and Form-B duly signed by ink by the authorised

person – In such event Returning Officer to mention the same in the bottom of the check list and directed to file the original – No such endorsement in the check list – Admittedly nomination papers of all the Candidates were Xeroxed outside so chance of missing of the original copy can not be ruled out – Notification in Form-3A by the Returning Officer Shows the Election Petitioner Sri Swain is the nominee of BJD which shows he must have verified Form-A and Form-B – Objection raised only by the Returning Officer but not by any of the Candidates – Rejection made without giving opportunity of hearing and by that the Election Petitioner is prejudiced.

Held, Election Petitioner Sri Swain had filed Original Form-A & Form-B duly signed by ink by the authorised person and the Returning Officer improperly rejected his nomination paper – The Election of respondent No.1 is declared null and void and there by a casual vacancy is created relating to 89–Athagarh Assembly Constituency – Further direction issued to the appropriate Authority to conduct fresh election in respect of the said constituency. (Para14 to 21)

Case laws Referred to:-

1.AIR 1983 SC. P-684: (State of Bihar -V- Sri Radha Krishna Singh & Ors)
2.AIR 2004 SC 1657 : (Ram Phal Kundu -V- Kamal Sharma).
3.AIR 1999 SC 935 : (Rakesh Kumar -V- Sunil Kumar)
4.AIR 1978 SC 597 : (Smt. Menaka Gandhi -V- Union of India)
5.AIR 1989 SC 475 : (Jagannath Ramachandra Nunekar -V- Jenugovinda Kadam & Ors.).
6.(1996)3 SCC 364 : (State Bank of Patialla & Ors.-V-S.K.Sharma).
7.(2000) 7 SCC 529 : (Aligarh Muslim University & Ors-V-Mansoor Alli Khan).
8.AIR 1991 SC 1406 : A.N.Sehgal -V-Raje Ram Sheoram)

RANEDRA PRATAP SWAIN -V- RAMESH ROUT [*R.N.BISWAL,J.*]

9.AIR 1991 SC 1538 : (Tribhorandas Haribhai Tamboli -V- Gujrat Revenue Tribunal & Ors.).
10.AIR 1985 SC 582 : (S.Sundaram Pillai -V- V.R.Pattabhiraman).

For Petitioner – M/s. Bidyadhar Mishra, G.Agarwal, A.K.Mishra, P.K.Nayak, S.Satapathy.
For Respondent – M/s. Subir Palit, A.K.Mohapatra, A.K.Mishra S.K.Satpathy, A.K.Mahana, A.Dey, B.Biswal, A.Mishra, H.K.Ratsingh, D.N.Patnaik,A.Kejriwal.
For Petitioner – M/s. Pitambar Acharya, P.K.Ray, B.Bhadra, J .R.Chhotray, S.Rath.
For Respondent – M/s.Subir Palit, a.K.Mohapatra, A.K.Mishra, S.K.Satpathy, a.K.Mahana, A.Dey, D.Biswal, A.Mishra, H.K.Ratsingh, D.N.Patnaik, A.Kejriwal.

R.N.BISWAL,J. The petitioner, in Election Petition No.4 of 2009 challenges the declaration of result dated 16.05.2009 declaring the sole Respondent, Ramesh Rout, to have been elected as Member of the Orissa Legislative Assembly from 89-Athagarh Assembly Constituency on the ground that rejection of his nomination by the Returning Officer is illegal and improper. He has prayed to:

i) declare the election of the respondent to be void;
ii) declare that a casual vacancy has been created so far as it relates to 89-Athagarh Assembly Constituency and
iii) direct the appropriate authority to conduct election with respect of 89-Athagarh Assembly Constituency within the time specified/prescribed under law and other ancillary reliefs.

In Election Petition No.6 of 2009, Rabindra Nath Rout has also challenged the said election on the same ground substantially with the same prayer. So, both the election petitions were heard analogously and as such a common judgment is passed there under.

2. The schedule of election relating to 89-Athagarh Assembly Constituency is as follows:

28.3.2009 to 04.04.2009	Period prescribed for filing of "NOMINATIONS"
06.04.2009 :	Date fixed FOR SCRUTINY OF NOMINATIONS
08.04.2009: :	Last date for WITHDRAWAL OF NOMINATIONS
23.04.2009 :	Date of POLLING
16.05.2009 :	Date of COUNTING OF VOTES
28.05.2009 :	Date before which the Election shall be completed

During the period prescribed, eight candidates including the petitioner in E.P. No.4 of 2009, Sri Ranendra Pratap Swain filed their respective nominations. As per the election petitions on 4.4.2009 at 11.25 A.M., Sri Ranendra Pratap Swain presented four sets of Nomination along with the required documents before the Returning Officer. In the 1st set of Nomination, he filed the original Form-A and Form-B, signed by the authorized person in ink, showing that he had been set up by Biju Janata Dal to contest as party nominee, whereas with the other three sets of Nomination, he filed three sets of Xerox copies of the original of Forms-A and Form-B duly authenticated by notary, Shri Ambika Prasad Ray, Advocate. The Returning Officer carried out preliminary examination of the Nomination and all accompanying documents then and there and granted Check List in token of receipt of the four sets of Nomination including the required documents at 11.45 A.M. on the same date. According to the

election petitioners, if any of the documents was not filed along with the Nomination, it was obligatory on the part of the Returning Officer to mention the same in the bottom of the Check List, indicating the time limit by which, it would be submitted. No such endorsement was made in the Check List granted to the petitioner. On the date of scrutiny, no objection was raised by any of the contesting candidates or any person on their behalf that Form-A and Form-B filed by Sri Ranendra Pratap Swain with his first set of Nomination, were not in original, containing the signature of the authorized person in ink. The complain was raised by the Returning Officer himself that Forms-A and Form-B were two Xerox copies and that the same were not signed in ink by the authorized person. The representative of the election petitioner, Sri Ranendra Pratap Swain requested the Returning Officer in writing to allow some time to rebut the allegation regarding non-submission of the original Form-A and Form-B, containing the signatures of the authorized person in ink, but, he rejected the same illegally. Due to the illegality committed by the Returning Officer, the Petitioner could not contest the election. The result of the election was declared on 16.05.2009 and respondent was declared elected. Thereafter, within the statutory period, the petitioner filed the present election petition with the prayer as here-in-before stated.

3. The respondent in his written statement denied the averments of the petitioners that election petitioner, Sri Ranendra Pratap Swain filed Form-A and Form-B in original in his first set of Nomination. According to him, at the stage of filing the Nomination along with other documents, Returning Officer is required only to make a preliminary examination of the same; detailed scrutiny is not required at that stage. All that is required at that stage is disclosure by the candidate as to what documents he has filed. A Check List is issued to the candidate by the Returning Officer as a proof of the fact that

the documents disclosed by the candidate have been filed along with the Nomination. It can not prove the genuineness or the correctness of the documents referred to in it. Non-filing of original Form-A and Form-B signed in ink being a defect of substantial nature, the Returning Officer has rightly rejected the Nomination of Sri Ranendra Pratap Swain. Since it is the case of the election petitioner that he had filed the original Form-A and Form-B, the question of granting him opportunity, to rebut the objection raised by the Returning Officer, did not arise. The Respondent has also taken the plea that the election petitions are bad for non-joinder of necessary party. According to him, eight candidates contested the election for 89-Athagarh Assembly Constituency, out of whom, petitioners only chose the respondent to array him as a party**.** As such election petitions are bad for non-joinder of necessary party. Furthermore, he has taken the plea that the election petitions are not maintainable.

4. On the basis of above pleadings of the parties, the following issues are framed.

1) Whether the Election Petition is maintainable?

2) Whether it is bad for non-joinder of necessary parties?

3) Whether the Returning Officer improperly rejected the Nomination of the Election Petitioner in violation of the statutory provisions and rules?

4) Relief if any, the Election Petitioner is entitled to?

5) Whether the Returning Officer improperly rejected the Nomination of Sri Ranendra Pratap Swain, the official candidate of Biju Janata Dal in violation of the instructions issued by the Election Commission of India in exercising of its constitutional powers and the principles of natural justice or not ?

As per the pleadings of the petitioners, election petitioner, Sri Ranendra Pratap Swain, filed original Forms-A and Form-B being duly signed by ink by the authorized person with his 1st set of Nomination, which is denied by the respondent. The parties led evidence to establish their stands in this regard, but no specific issue has been framed there under. So it would be just and proper to add the following issue as issue no.6.

Issue No.6

Whether the Election Petitioner Sri Ranendra Pratap Swain filed the original Form-A and Form-B being duly signed in ink by the authorized person with the 1st set of his Nomination?

5. In order to establish their case, the petitioners examined three witnesses- P.W.1 is election petitioner in E.P. No.6 of 2009 and also the

proposer of Sri Ranendra Pratap Swain in the 1st set of Nomination, P.W.2 is Sri Ranendra Pratap Swain and P.W.3 is his authorized agent to the scrutiny of his Nomination along with the required documents. Respondent examined 4 witnesses- R.W.1 is the respondent himself, R.W.2 is a witness to a scooter accident, caused by Ranendra Pratap Swain, on the date of filing Nomination, R.W.3 is a witness to the filing of Nomination by Sri Ranendra Pratap Swain and R.W.4 is a witness who heard the Returning Officer enquiring about B.J.D. Party ticket. The Returning Officer was examined as Court Witness No.1.

6. Issue No.6. For the sake of convenience, issue no.6 is taken up for consideration first. It transpires from the evidence of P.Ws.1 and 2 that on 04.04.2009 at 11.25 A.M. the Election Petitioner, Sri Ranendra Pratap Swain submitted four sets of Nomination along with the required documents including original Form-A and Form-B signed in ink, by Shri Nabeen

Patanaik, President, Biju Janata Dal, who was the authorized signatory to sign such forms on behalf of Biju Janata Dal, before the Returning Officer. All the four sets of Nomination together with accompanying documents were thoroughly verified by the Returning Officer in their presence and in presence of others whereafter he granted the Check List to the election petitioner, Sri Ranendra Pratap Swain at 11.45 a.m. on 04.04.2009.

7. It further transpires from their evidence that while handing over the Check List to Sri Ranendra Pratap Swain, the Returning Officer said "what ever original Forms and documents that you have given/submitted and I have received from you, have been clearly mentioned by me in this "Check List, You preserve this Check List with you". No suggestion was given to P.W.1 that the original Form A and and Form B singed in ink by Shri Nabeen Patanaik, President of Biju Janata Dal were not filed in the 1st set of Nomination. On perusal of the evidence of witness no.1 for the Respondent (Respondent himself), it is found that he has specifically stated on oath that he was not present in the office room of the Returning Officer while Sri Ranendra Pratap Swain filed his Nomination. As such, he could not say whether he filed the 1st set of Nomination along with other original documents, including Form-A and Form-B. Similarly, Court witness No.1, the Returning Officer in his evidence, could not positively say that Ranendra Pratap Swain did not file original Forms A and Form B signed in ink. He specifically stated that in case it had come to his notice that Form A and Form B were not signed by the authorized signatory in ink, he would have endorsed it on the bottom of the Check List and asked the candidate to file the original ink signed copy of the said forms within time. Admittedly, there was no such endorsement in both the Check Lists-original and the duplicate, marked as Exhibits 11 and 22. Of course, in his evidence, Court witness No.1 has stated that he examined the Nomination along with the required

documents from technical stand point only. It was not his duty to examine the correctness or validity of the documents at the time of filing the same. On 6.4.2009, during scrutiny of the Nomination along with other required documents, he came to know that Sri Ranendra Pratap Swain did not file the original Form-A and Form-B signed in ink, instead he filed the Xerox copies thereof. Since he had filed the Nomination along with all required documents, he did not endorse in the Check List indicating that he was required to file any document.

8. Learned senior counsel, Sri B.Mishra appearing for the Election Petitioner, Ranendra Pratap Swain submitted that as found from the evidence of P.W.1, the proposer of Ranendra Pratap Swain, with respect to first set of Nomination, since his signature in the Nomination was partially effaced by coming in contact with sweat while handling the documents, the Returning Officer asked him to put another signature and accordingly, he

put his second signature. When confronted to the Court Witness No.1, he failed to recollect the same. But the Nomination in Ext.4 shows that P.W.1, Rabindra Rout has put two signatures in the space meant for signature of proposer and that one of the signatures has been partially effaced. This shows that the Returning Officer meticulously examined the Nomination and the accompanying documents. The Returning Officer has specifically stated in his evidence that he can distinguish between a original document and the Xerox copy thereof. According to Mr. Mishra the Returning Officer did not make any endorsement in the Check Lists, marked Exts.11 and 22 because Form A and Form B were filed in original.

9. Mr. Mishra further submitted that as per para 22, Chapter-V of the Hand Book of Returning Officer, after 3 P.M. on each day between the date of notification and the last date for making nominations, the Returning Officer is required to publish on his notice board a notice of the Nomination Papers presented before him on that date in Form 3-A. In the instant case, on 4.4.2009, the Returning Officer duly notified the same in Form-3 A (Ext.42/f) indicating under column No.6 thereof that the election petitioner, Ranendra Pratap Swain is the nominee of Biju Janata Dal. So, he must have verified Form-A and Form-B.

10. Mr. Mishra further submitted that again as required under para-29.1 Chapter-V of the Hand Book of Returning Officer and the instruction issued by the Election Commission of India, immediately after the last date and time fixed for filing Nomination Papers, the Returning Officer is duty bound to submit the consolidated "List of Nominated Candidates-Checks If", in the prescribed formant to the Chief Electoral Officer of the State and other Statutory Authorities including Election Commission of India. In the case at hand, the Returning Officer submitted the consolidated "List of Nominated Candidates-Checks If", (Ext-44), to the Chief Electoral Officer of Orissa and

other Statutory Authorities, where at Column No.4 against the name of Shri Ranendra Pratap Swain, the symbol "Conch" has been mentioned. With regard to political party affiliation, the Returning Officer mentioned in column no.5 of Ext.44/f that he was set up by "Biju Janata Dal". He has also endorsed in Column No.6 thereof as "Yes" meaning thereby that he received Form A and Form B from Ranendra Pratap Swain by 3.00 P.M. dated 4.4.2009. He has also endorsed as "Main Candidate" in column No.7 of the said document, thereby indicating that Shri Ranendra Pratap Swain was the main candidate set up by Biju Janata Dal. According to Mr. Mishra, the Returning Officer must have verified Form A and Form B, before he filled up column Nos.4 to 7 of the consolidated List of Nominated Candidates-Checks If". So, according to him, it is clearly established that after verifying Form A and Form B of the Election Petitioner, Ranendra Pratap Swain carefully and being satisfied that he submitted the original Form A and

Form B, duly signed in ink by the authorized signatory of Biju Janata Dal, the Returning Officer mentioned the details in the above Statutory Form and submitted the same to the Statutory Authorities. He further submitted that Exts 11,22 and 42/f,43 and 44 are all statutorily maintained documents being prepared by a public officer in due discharge of his public duty. So their probative value is very high. In support of his submission, he relied on the decision **State of Bihar Vs. Sri Radha Krishna Singh & Others**, AIR 1983 SC, page-684.

11. Mr. Palit, learned counsel appearing for the sole Respondent contended that at the stage of filing of Nomination Papers, the Returning Officer is required to only make a preliminary examination of the same and no detailed scrutiny is required at that stage. All that is required at that stage, is the disclosure by the candidate of the documents he has filed. Check List is issued to a candidate as proof of the documents disclosed by him to have been filed along with the Nomination papers. It does not prove the genuineness and correctness of the documents referred to in it. Had it been the intention of the Legislature requiring the Returning Officer to conduct a detailed enquiry at the stage of filing of the Nomination papers, then there was no need of inserting Section 36 to the Representation of the People Act, 1951 which envisages about scrutiny of such documents. In the instant case, the Returning Officer has rightly stated on oath before this court that he did not verify the validity or genuineness of the documents accompanied with the Nomination at the stage of filing of the same. So according to learned counsel for the Respondent, only because the Check List was issued showing receipt of documents filed by the election petitioner, Ranendra Pratap Swain without any endorsement below it, it would not confirm that original ink signed Form A and Form B were filed. Similarly, the information given in Form 3A, marked as Ext 42/f and the consolidated "List

of Nominated Candidates-Checks If" marked as Ext 44 cannot confirm that original Form A and Form B signed in ink were filed. He further submitted that no averment was made in either of the election petitions with regard to Form 3A and the Consolidated "List of Nominated candidates-Checks If". So, in absence of such averment in the pleadings, the evidence with regard to form 3A and the consolidated "List of Nominated Candidates-Checks If", cannot be relied upon.

12. Learned counsel appearing for the sole respondent further submitted that P Ws 1 and 2 in their evidence in affidavit stated that, while handing over the Check List on 4.4.2009 at 11.45 A.M. to Shri Ranendra Pratap Swain, the Returning Officer said that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List, you preserve the Check

List with you." But there is no pleading to that effect. So, the same cannot be relied upon.

13. As found from the evidence of P.Ws 1 and 2, the latter filed four sets of Nomination along with other accompanying documents. In the 1st set of Nomination Papers, he filed original ink signed Form A and Form B. Accordingly, the Returning Officer issued the Check List to Sri Ranendra Pratap Swan. They further deposed that while handing over the Check List, the Returning Officer stated that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List. You preserve the Check List with you. If in fact the Returning Officer had stated so, it being a material fact, the same should have been averred in the election petition. In absence of pleading this part of evidence of P.Ws 1 and 2 cannot be relied upon. According to the evidence of Returning Officer, on examining the documents on technical stand point, he found the election petitioner, Sri Ranendra Pratap Swain to have filed all required documents and accordingly he issued the Check List marked Ext 22 to him. He fairly admitted in his evidence that he can distinguish a Xerox copy from its original. He further deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form A and Form B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. Again on 4.4.2009 after the time fixed for filing the Nomination Papers was over, he prepared copy of those documents in Form 3A to publish in the notice board. At that time also he could not detect the filing of Xerox copies of the original ink signed Form A and Form B. Furthermore, when he prepared the consolidated "List of Nominated Candidates-Checks If", he could not detect the so called defect. He mentioned the symbol "Conch" in the appropriate column of the said form so also the name of political party, which set up the candidate, Sri Ranendra Pratap Swain. Since the signature of P.W.1 the

proposer of Ranendra Pratap Swain, partially got effaced, the Returning Officer asked him to put another signature and accordingly he did it. When the Returning Officer was alive to find out an effaced signature in the Nomination, it appears some what fishy how he failed to detect the Xerox copies of the original ink signed Form A and Form B, if filed. The contention of learned counsel for the respondent that there was no pleading with regard to Form 3A and consolidated "List of Nominated Candidates-Checks If" in either of the election petitions and as such the same cannot be relied upon cannot be accepted. It is the fundamental rule of pleadings that pleading must contain a statement of the material facts, but not the evidence by which they are to be proved. In the present case, it has been averred in the election petitions that Shri Ranendra Pratap Swain filed the Nomination along with required documents including original Form A and Form B ink

signed, before the Returning Officer. Moreover, Form 3A and consolidated "List of Nominated Candidates-Checks If" have been admitted as Exts.42/f and 44 respectively without objection. So their validity cannot be questioned. As per the decision State of Orissa and others (supra) their probative value is also very high. Even if those documents were not referred to in the election petitions, the evidence led in that respect can be accepted.

14. No doubt at the time of filing of Nomination, the Returning Officer is not required to scrutinize the Nomination and the accompanying documents in minor details, but he is duty bound to examine the same on technical stand point. Now the pertinent question is whether he was expected to examine whether the original ink signed Form A and Form B were filed, while examining the Nomination Paper along with the accompanying documents, on technical stand point. In my considered opinion, he had to do so, particularly when he deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form-A and Form-B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. At this stage Mr. Palit, learned counsel for the respondent submitted that unless, an election petitioner fully established his case, it would not be proper to set aside the election. In support of his submission, he relied on the decision in the case of ***Ram Phal Kundu vs. Kamal Sharma***, AIR 2004 Supreme Court 1657, where the apex Court held as follows:-

> "Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant."

As found from the evidence of P.Ws. 1 and 2 the latter filed the original ink signed Form A and Form B in his 1st set of Nomination. This part of their evidence could not be shaken. Even no suggestion was given to P.W.1 that P.W.2 did not file original ink signed Form A and Form B in his 1st

set of Nomination. So, the above decision is not applicable to the present case.

The Returning Officer has admitted in his evidence that the Nominations along with all the accompanying documents of all the eight candidates were Xeroxed outside in Anand Xerox of Athagarh. He has also admitted that on 4.4.2009 all the four sets of Nomination papers of Sri Ranendra Pratap Swain were xeroxed to display the same in his Notice Board. The possibility that, in the process the original ink signed form A and Form B were inadvertently exchanged for the Xerox copies thereof, cannot be ruled out. Under such premises, in my considered opinion, Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorized person with the 1st set of his Nomination. Accordingly, issue no.6 is answered in affirmative.

15. **Issue Nos.3 and 5.** It transpires from the evidence of P.Ws 1 and 3 that the latter was authorized by the election petitioner, Sri Ranendra Pratap Swain, in writing as per Ext.46 to represent him at the time of scrutiny of his Nomination Papers. Scrutiny of Nomination Papers in respect of 89-Athagarh Assembly Constituency continued from 1.45 P.M. to 2 P.M. on 6.4.2009. No objection was raised to the Nomination of election petitioner, Ranendra Pratap Swain, by any of the candidates or their proposers or agents. The Returning Officer himself raised suo-motu objection that the original ink signed Form A and Form B were not filed by Shri Ranendra Pratap Swain.P.W.3 showed the duplicate Check List, Ext.22 to the Returning Officer stating that he (Returning Officer) personally received the said forms and acknowledged receipt of the same. Both P.Ws. 1 and 3 requested the Returning Officer to show them those two documents, but, he did not allow them to see the same. So, P.W.3 filed an application for time (Ext.47) to rebut the objection, but it was turn down. Then the Returning Officer rejected all the four sets of Nominations of Sri Ranendra Pratap Swain. Learned senior counsel Sri B.Mishra submitted that as required under the proviso to section 36(5) of the Representation of the People Act, 1951, the Returning Officer was duty bound to give an opportunity to rebut the allegation that Form A and Form B were not the original ink signed documents. But despite the application made by P.W.3 to give such an opportunity, the Returning Officer turned it down whereby the election petitioner,Ranendra Pratap Swain was highly prejudiced and on this ground alone, the election petition should be allowed. In support of his submission he relied on the decision **Rakesh Kumar** Vs**. Sunil Kumar**, AIR 1999 SC page 935.**Smt.Menaka Gandhi** vs. **Union of India**, AIR 1978 SC 597, **Jagannath Ramachandra Nunekar** vs**. JenuGovinda Kadam and others** AIR 1989 SC 475. Per contra, learned counsel appearing for the sole

Respondent contended that as per the evidence of Returning Officer, he did not grant time since date of filing the Form A and Form B had already been over. Even if time had been allowed, the election petitioner, Ranendra Pratap Swain or his agent could not have legally filed the original ink signed Form A and Form B on the date of scrutiny, as such, there was no violation of natural justice causing prejudice to any one. In support of his submission he relied on the decisions, **State Bank of Patialla and others** Vs**. S.K.Sharma** (1996) 3 SCC 364 and **Aligarh Muslim Unversity and others** Vs**. Mansoor Alli Khan**,(2000)7 SCC 529.

16. Admittedly, the date for filing Nomination along with other relevant documents including Form A and Form B was fixed to 4.4.2009. If the original ink signed Form A and Form B had not been filed on 4.4.2009, the

same could not have been legally filed on the date of scrutiny i.e. on 6.4.2009, which was fairly conceded to by Mr. B. Mishra. But he submitted that, had he been given a chance, the election petitioner, Sri Ranendra Pratap Swain could have requested the Returning Officer to search for the original Form A and Form B or he would have rebutted the objection by adducing evidence. As no time was granted he was highly prejudiced.

In the decision Rakesh Kumar (supra), the apex court held as follows:-

> "Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time "not later than the next day". This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of the proviso to Section 36 (5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play".

17. In the decision Mrs. Maneka Gandhi (supra) the question was whether passport of a person can be impounded without giving him/her an opportunity of being heard. There is no express provision in the passports Act, 1967, which requires that the audi alteram partem Rule should be followed before impounding a passport. But, still then, the apex Court held that before impounding the passport, the person concerned must be given a

chance of being heard. In the case of Jagannath Ramchandra Nunekar (supra) a candidate seeking election from a constituency, other than one, in which he was registered as a voter, applied to the Electoral Registration Officer of the Assembly Constituency, in which, he was registered as a voter, for a certified copy of the relevant entry in the electoral roll containing his name for producing it before the Returning Officer along with his nomination paper in respect of Assembly election of the State of Maharastra to be held in 1986. The Registration Officer gave him a certificate on the basis of the electoral roll of the year 1984. The Returning Officer did not accept it as it was not the certified copy from the latest electoral Roll. So the candidate (appellant) again applied for a certified copy

of the relevant entry from the latest electoral roll published. The certified copy was granted at 5.00 P.M. dated 10.1.1986, i.e., the last date fixed for filing Nomination. He produced it before the Returning Officer on the next date, i.e., the date fixed for scrutiny of the Nomination Papers. But the Returning Officer stated that he had already rejected his Nomination. The apex Court held that the order of rejection of the Nomination Paper of the candidate was illegal. In the decision State Bank of Patiala and others (supra) cited on behalf of the respondent, it was alleged by the respondent, an employee of State Bank of Patiala, that he was prejudiced in a departmental proceeding, since he was not supplied with copies of statements of witnesses and documents, as required under the Regulation, 1968. Even though, the Regulation mandates that the delinquent shall be supplied with copies of statement of witnesses, if any, recorded earlier, not later than three days before commencement of examination of witnesses by the Enquiring authority, in fact, this provision was not complied with in strict sense. But the delinquent was allowed to go through the statement of witnesses and other documents. By the time the witnesses were examined, more than three days had been already expired, since the date on which the delinquent went through the statement of the witnesses and other documents. So, the apex Court held that even though there was violation of the Regulation, still then, as no prejudice was caused to the delinquent, he could not take advantage of mere violation of the Regulation. In the case of Aligarh Muslim University and others (supra), the apex Court held that even though opportunity was not given to the respondent to show cause, still then, since no other conclusion was possible on indisputable facts, his removal from service was found to be correct.

18. In the case at hand, it is the constant stand of the election petitioners that Sri Ranendra pratap Swain filed the original ink singed Form A Form B in the 1st set of Nomination papers. Admittedly, Nomination papers of all the contesting candidates of 89-Athagarh Assembly Constituency were xeroxed outside. So, in the process, the original ink signed Form A and Form B might

have been misplaced and had the election petitioner, Ranendra Pratap Swain got an opportunity, he could have requested the Returning Officer to search for those documents or he could have adduced evidence to show that in fact he had filed the same. Since no such opportunity was given, he was thereby prejudiced. The decisions cited on behalf of the respondent would not be applicable to the present case.

19. Learned counsel for the respondent further submitted that as per the proviso to Section 36(5) of the Representation of People Act, the Returning Officer may or may not allow time to rebut any objection. In other words, he is not bound to grant time. In support of his submission he relied on the decisions **A.N.Sehgal –vrs- Raje Ram Sheoram**, AIR 1991 SC 1406,

Tribhorandas Haribhai Tamboli –vrs- Gujrat Revenue Tribunal and others, AIR 1991 SC 1538, **S.Sundaram Pillai –vrs- V.R.Pattabhiraman**, AIR 1985 SC 582.

In the case at hand, none of the candidates or their representatives challenged the validity of the Nomination Papers of Sri Ranendra Pratap Swain. Suo motu objection was raised by the Returning Officer himself only. P.W.3 filed an application to grant time to rebut the objection. As per the decision, in the case of Rakesh Kumar, the Returning Officer ought have granted time to rebut the objection, eve in absence of any application to that effect. So, the decisions cited on behalf of the respondent are not applicable to the present case. I have already held that Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorized person. Again, he was highly prejudiced as he was not given time to rebut the objection. So, it is held that the Returning Officer improperly rejected the nomination of Sri Ranendra Pratap Swain and accordingly issue Nos. 3 and 5 are answered in affirmative.

20. **Issue No.2.** Section 82 of the Representation of the People Act, 1951 which deals with the parties to an election petition reads as follows:

> "82. **Parties of the petition-** A petitioner shall join as respondents to his petition-
>
> (a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and
>
> (b) any other candidate against whom allegations of any corrupt practice are made in the petition."

Section 82 Clause (a) as quoted above requires the election petitioner to join as respondents in his petition, all the contesting candidates, where in addition to claiming a declaration that the election of all or any of the returned candidates is void, he claims further declaration that he himself or any other candidate has been duly elected. But in absence of such further prayer, he had to join the returned candidate/candidates only. In the present case, the election petitioners do not claim a declaration that Sri Ranendra Pratap Swain or any body else has been duly elected. So, the election petitioners have rightly impleaded the returned candidate alone as respondent. Accordingly, the issue is answered in favour of the election petitioner.

21. **Issue Nos.1 and 4** In view of the discussion made above, the election petitions are maintainable.

In the result, both the election petitions are allowed. It is declared that the election of respondent No.1 is null and void and that a casual vacancy is created relating to 89-Athagarh Assembly Constitution thereby. The appropriate authorities are directed to conduct fresh election in respect of the said Constituency in accordance with law. No cost.

List of witnesses examined on behalf of the petitioner

P.W.1 – Rabindra Rout
P.W.2 – Ranendra Pratap Swain
P.W.3 – Taranikanta Biswal

List of witnesses examined on behalf of the respondent

O.P.W.1 – Ramesh Rout
O.P.W.2 – Maguni Charan Rout
O.P.W.3 – Dibakar Sahoo
O.P.W.4 – Rabindra Kumar Jena

Court Witness

Sri Rajesh Pravakar Patil

List of Exhibits filed on behalf of the petitioner

Exhibit-1 Election photo identity card of Sri Rabindranath Rout

Exhibit-2 Certified copy of the application filed by P.W.1 Rabindranatah Rout dated 02.04.2009 before the Returning Officer 89-Athagarh Assembly Constituency-cum-Sub Collector, Athagarh Sub- Division for supply of nomination papers for the General Assembly Election-2009 together with acknowledgement receipt.

Exhibit-3 Certified copy of the receipt bearing No.775152 dated 02.04.2009 showing security deposit of Rs.5000/-.

Exhibit-4 Certified copies of first set of Nomination paper duly filled in and signed by the proposer Rabindranath Rout as well as the

Election Petitioner Ranendra Pratap Swain together with accompanying documents.

Exhibit-5 Certified copies of second set of Nomination paper duly filled in and signed by the proposer as well as the election petitioner- Ranendra Pratap Swain together with accompanying documents.

Exhibit-6 Certified copies of third set of Nomination paper duly filled in and signed by the proposer as well as the election petitioner together with accompanying documents.

Exhibit-7 Certified copies of fourth set of Nomination papers duly filled in and signed by the proposer as well as the election petitioner together with accompanying documents.

Exhibit-8 Original "certificate for receipt of oath" in prescribed form.

Exhibit-9 Original "certificate for receipt of Nomination paper and notice of scrutiny" granted by Returning Officer from Part-VI of the Nomination form.

Exhibit-10 Copy of the circular number 57613/2009/SDR dated 10.2.2009 issued by the Election Commission of India.

Exhibit-11 Original "Check List" granted by the Returning Officer of 89-Athagarh Constituency on 4.4.2009 showing receipt of documents.

Exhibit-12 Certified copies of Form 3A relating to "Notice of Nominations" in respect of 87-Baramba Assembly Constituency from dated 28.3.2009 to 4.4.2009.

Exhibit-13 Certified copies of Form 3A relating to "Notice of Nomination" in respect of 89-Athagarh Assembly Constituency from dated 28.3.2009 to 4.4.2009.

Exhibit-14 Certified copy of the forwarding letter sent by the Returning Officer to the Chief Electoral Officer, Orissa with copy to District Election Officer, Cuttack and to the Director of Printing, Stationary and Publication, Orissa, Cuttack-10 in respect of Consolidated "List of nominated candidates–Checks if" for 87-Baramba Assembly Constituency.

Exhibit-15 Certified copy of forwarding letter sent by the Returning Officer to the Chief Electoral Officer, Orissa with copy to the District Election Officer, Cuttack and to the Director of Printing, Stationary and Publication, Orissa, Cuttack-10 in respect of Consolidated "List of Nominated candidates-Check if" together with the certified copies of the Consolidated "List of Nominated candidates-Check if" for 89-Athagarh Assembly Constituency.

Exhibit-16 Certified copy of the authorization letter of the Election petitioner, Sri Ranendra Pratap Swain in favour of Sri Tarani Kanta Biswal to attend the scrutiny of his behalf.

Exhibit 17 Certified copy of the "Time petition to rebut the objection" filed by Sri Tarani Kanta Biswal, Authorized Agent of the election petitioner, before the Returning officer and the order passed by the Returning Officer in the body of the same time petition.

Exhibit-18 First set of Nomination papers filed by the election petitioner before the Returning officer.

Exhibit- 19 Second set of Nomination papers filed by the Election petitioner before the R.O.

Exhibit-20 Third set of Nomination papers filed by the petitioner before the R.O.
Exhibit-21 Fourth set of Nomination papers filed by the petitioner before the R.O.
Exhibit-22 Check List prepared by the Returning officer in the presence of petitioner.
Exhibit-23 Form 'A' filed by Sri Surendra Kumar Nanda
Exhibit-24 Form 'B' filed by Sri Surendra Kumar Nanda
Exhibit-25 Check list of Sri Surendra Kumar Nanda
Exhibit-26 Form 'A' filed by Sri Debi Prasad Mishra
Exhibit-27 Form "B" filed by Sri Debi Prasad Mishra
Exhibit-28 Check list of Sri Debi Prasad Mishra
Exhibit-29 Form 'A' filed by Sri Bhaskar Dalei
Exhibit-30 Form 'B' filed by Sri Bhaskar Dalei
Exhibit-31 Check List of Sri Bhaskar Dalei
Exhibit-32 Form 'A' filed by Sri Saroj Kumar Rana
Exhibit-33 Form 'B' filed by Sri Saroj Kumar Rana
Exhibit-34 Check List of Sri Saroj Kumar Rana
Exhibit-35 Form 'A' filed by Sri Subash Mohanty
Exhibit-36 Form 'B' filed by Sri Subash Mohanty
Exhibit-37 Check List of Sri Subash Mohanty
Exhibit-38 Form 'A' filed by Sri Rama Narayan Mohanty
Exhibit-39 Form 'B' filed by Sri Rama Narayan Mohanty
Exhibit-40 Check list of Sri Rama Narayan Mohanty
Exhibit-41 Form 3A dated 29.3.2009 of 87-Baramba
Exhibit-41/a Form 3A dated 29.3.2009 of 87-Baramba
Exhibit-41/b Form 3A dated 30.3.2009 of 87-Baramba
Exhibit-41/c Form 3A dated 31.3.2009 of 87-Baramba
Exhibit-41/d Form 3A dated 02.04.2009 of 87-Baramba
Exhibit-41/e Form 3A dated 03.04.2009 of 87-Baramba
Exhibit-41/f Form 3A dated 04.04.2009 of 87-Baramba
Exhibit-42 Form 3A dated 28.03.2009 of 89-Athagarh
Exhibit-42/a Form 3A dated 29.03.2009 of 89-Athagarh
Exhibit-42/b Form 3A dated 30.03.2009 of 89-Athagarh

Exhibit-42/c Form 3A dated 31.03.2009 of 89-Athagarh
Exhibit-42/d Form 3A dated 02.04.2009 of 89-Athagarh
Exhibit-42/e Form 3A dated 03.04.2009 of 89-Athagarh
Exhibit-42/f Form 3A dated 04.04.2009 of 89-Athagarh
Exhibit-43 Letter of Sub-Collector Athagarh to the Chief Electoral Officer, Orissa
Exhibit-43/a List of nominated candidates of 87, Baramba
Exhibit-44 List of nominated candidates of 89-Athagarh

Exhibit-45 xerox copies of Form 2-B
Exhibit-46 Authorization letter of Sri Ranendra Pratap Swain
Exhibit-47 Time petition of Sri Tarani Kanta Biswal
Exhibit-48 Certified copy of order rejecting the nomination paper of the petitioner, Ranendra Pratap Swain
Exhibit-48/a Certified copy of order rejecting the nomination paper of the petitioner, Ranendra Pratap Swain
Exhibit-48/b Certified copy of order rejecting the nomination paper of the petitioner, Ranendra Pratap Swain
Exhibit-48/c Certified copy of order rejecting the nomination paper of the petitioner, Ranendra Pratap Swain
Exhibit-49 Appeal Petition of the petitioner to the Hon'ble C.E.O. in original
Exhibit-50 Appeal Petition of the petitioner to the Hon'ble C.E.O. in original
Exhibit-51 Authorization to attend scrutiny of nomination filed by Respondent-1
Exhibit-52 Certified copy of letter No.1548 dated 6.3.2009 of Sub-Collector, Athagarh.
Exhibit-53 Check List in original of Sri Anukul Chandra Sahoo
Exhibit-54 Check List in original of Sri Bijay Kumar Biswal
Exhibit-55 Check List in duplicate of Janaki Rout
Exhibit-56 Money receipt showing payment to Anand Xerox
Exhibit-57 Requisition letter (Xerox copy obtained under the R.T.I. Act)

List of M.Os

M.O.I - Videograph
M.O.II- Videograph

Election Petitions allowed.

2010 (II) ILR – CUT- 357

INDRAJIT MAHANTY, J.

CRLMC. NO.1725 OF 2007. (Decided on 13.08.2010).

AMULYA @ KALIA BEHERA & ORS. ……. Petitioners.

.Vrs.

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

(A) CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF1974) - SEC.468

Limitation for taking cognizance – Held, in order to compute the period of limitation, the date of filing of the complaint or initiation of Criminal Proceeding should be the relevant date but not the date of the order of taking cognizance. (Para 4)

(B) CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.482,468 (2)

Quashing of cognizance – Complainant has complained of two distinct occurrences i.e. Dt. 01.09.2002 and Dt. 15.05.2004 – Complaint petition filed on 10.06.2004 and order of cognizance passed on 14.11.2006 for the offence U/s.341 & 294 I.P.C.

Alleged offences are punishable with imprisonment for a term not exceeding one year and the period of limitation prescribed U/s.468(2) is one year from the date of the alleged offence – Held, since the alleged offence took place on 1.9.2002 and the complaint was filed on 10.6.2004 the same was barred by limitation. (Para 3)

(C) PENAL CODE, 1860 (ACT NO. 45 OF 1860) – SEC.294.

Complainant alleged that petitioner 3 abused him – Exact words uttered by Petitioner No.3 has not been disclosed in the complaint petition – No Evidence on record that the alleged abuse created annoyance to the Complainant – Mere allegation of use of obsence words without mentioning that the words uttered resulted in annoyance to the complainant can not attract a charge U/s.294 I.P.C. – Held, impugned order taking cognizance is quashed.

(Para.4)

Case laws Referred to:-

1. (2007) 38 OCR (SC) 309 : (Japani Sahoo -V- Chandra Sekhar Mohanty).
2. (1994) 7 OCR 168 : (Chakradhar Swain -V- Maheswar Barik).
3. (2008)41 OCR 484 : (State of Orissa -V- Apoa Rao).
4. (1994) 2 Crimes 67 : (V.Dhasiah -V- The State).

For Petitioners - M/s.Sangam Kumar Sahoo, G.Sahoo, S.N.Parida, M.K.Mallick, D.P.Pattnaik, & J.R.Sahoo.
For Opp.Party No.1 : Additional Government Advocate.
For Opp.Party No.2 : M/s. J.K.Mohapatra, A.K.Dora & S.C.Dash.

I.MAHANTY, J. In the present application under Section 482 of the Code of Criminal Procedure, the petitioners have sought to challenge the order dated 14.11.2006 passed by the learned J.M.F.C., Pipili in 1.C.C. Case

No.16 of 2004 taking cognizance of offences under Sections 341 and 294 read with Section 34 of the Indian Penal Code.

2. On a perusal of the complaint filed by Opposite Party No.2-Bishnu Chandra Behera, it appears therefrom that, the complainant has complained of two distinct occurrences which allegedly occurred on 1.9.2002 at Gudia Pokhari Chhak and on 15.5.2004 at Kausalyagang Out Post.

Insofar as the alleged incidence which occurred on 1.9.2002 is concerned, it is alleged that the petitioners obstructed the complainant while he was traveling on the road and Petitioner No.3-Bamadev Mahanty, who was on the relevant time posted as A.S.I. of Police at Kauslyagang Out Post threatened the complainant to withdraw the civil case filed by him against the father of Petitioner Nos. 1 and 2 and when the complainant did not agree for such withdrawal, Petitioner No.3 asked the other petitioners to assault him, in course of which, the complainant and his son, namely, Saroj, were assaulted by fist blows and stick and further that when the younger son of the complainant came to the spot, he was also assaulted by means of an iron rod by Petitioner No.1. It is further alleged that Petitioner No.3 took away the motorcycle belonging to the son of the complainant and kept the same at the Out Post. As a consequence of which, the complainant was compelled to agree with the compromise of the civil suit filed by him against the father of Petitioner Nos.1 and 2.

Insofar as the second incident is concerned, it is alleged to have occurred on 15.5.2004. It is stated that Petitioner No.3 misbehaved with Opposite Party No.2 in the Kausalyagang Out Post and asked him to sign on a blank paper. When the complainant did not agree to the same, he was abused and given a push. It is further alleged that since several cases had been instituted against the complainant and since he was expecting the Petitioner No.3 to return the vehicle (motorcycle) to the son of the complainant, since an amicable settlement had been arrived at by the concerned parties, he did not file the complaint at any earlier point of time.

3. Learned counsel for the petitioners submitted that insofar as the first occurrence on 1.9.2002 is concerned, since the complaint petition was filed on 10.6.2004 and order of cognizance was passed thereon on 14.11.2006, it is submitted that the learned Magistrate ought not to have passed the

impugned orders of cognizance, so far as it is related to the first incident, since the same was barred by limitation.

While Section 341 I.P.C. prescribes punishment for simple imprisonment for one month or fine of Rs.5000/- or both, Section 294 I.P.C. prescribes punishment for imprisonment of three months or fine or both. Therefore, in terms of Section 468(2) Cr.P.C. since the alleged offences were punishable with imprisonment for term not exceeding one year, the period of limitation prescribed under Section 468(2) Cr.P.C. is one year from

the date of the alleged offence. Therefore, since the alleged offence took place on 1.9.2002, limitation for the same occurred one year therefrom and since the complaint was filed on 10.6.2004, the same was barred by limitation.

The alleged second incident has been occurred on 15.5.2004. It is submitted on behalf of the petitioners that while it is alleged that Petitioner No.3, abused the complainant and given two pushes, the exact words uttered by Petitioner No.3 has not been disclosed in the complaint petition and further that, there is no material on record to evidence the fact that the alleged abuse created annoyance to the complainant.

4. Considering the aforesaid facts, insofar as the first part of the alleged occurrence is concerned i.e. on 1.9.2002, it is well settled by the Hon'ble Supreme Court in the case of **Japani Sahoo v. Chandra Sekhar Mohanty**, (2007) 38 OCR (SC) 309. that the relevant date for computing, the period of limitation must be the date of filing of the complaint or initiating the complain proceeding but not the date of the order of taking cognizance.

Therefore, clearly, insofar as the alleged offence under Sections 341 and 294 I.P.C. is concerned punishment for a period of three months is prescribed and, therefore, covered under Section 468(2) Cr.P.C. and period of limitation prescribed, is a period of one year from the date of occurrence. The alleged occurrence took place on 1.9.2002 and the complaint came to be filed on 10.6.2004. Therefore, I am in complete agreement with the contention advanced on behalf of the petitioner and held that, this part of the alleged offence which is stated to have occurred on 1.9.2002 in the complaint petition was clearly barred by limitation prescribed under the Cr.P.C.

Insofar as the second part of the alleged occurrence is concerned, i.e. 15.5.2004 and on a reading of the complaint, it is clear therefrom that the complainant has not stated any of the words that was allegedly uttered by the Petitioner No.3. In the complaint petition, there is no material to substantiate the relevant fact that such abuse created annoyance to the complainant. In the case of **Chakradhar Swain v. Maheswar Barik,** (1994) 7 OCR 168, it was held that, the sine qua non for application of Section 294 I.P.C. is annoyance. The alleged abuse ought to have caused annoyance to

the complainant and in the absence of any such assertion such act is not covered under Section 294 I.P.C. Therefore, a mere allegation of use of obscene words without mentioning that the words uttered and without complaining that the same has resulted in the annoyance to the complainant, cannot attract a charge under section 294 I.P.C,. as is held in the case of **State of Orissa v. Apoa Rao**, (2008) 41 OCR 484 and also in the case of **V.Dhasiah v. The State**, (1994) 2 Crimes 67.

5. In view of the aforesaid facts as noted hereinabove, I am of the considered view that the order of cognizance in the present case ought not to have passed since the same was barred by limitation as well as do not satisfy the mandate of law.

6. Accordingly, the CRLMC is allowed and the impugned order dated 14.11.2006 passed by the learned J.M.F.C., Pipili in 1.C.C. Case No.16 of 2004 is quashed.

Application allowed.

2010 (II) ILR – CUT- 361

SANJU PANDA, J.

W.P.(C) NO.10359 OF 2007. (Decided on 05.07.2010)

MADHUSUDAN SAHU & ANR. …….. Petitioners

.Vrs.

PABANI BEHERA & ANR. …….. Opp.Parties.

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

Amendment of plaint – Court must not refuse bonafide, legitimate, honest and necessary amendments and should never permit malafide, worthless and dishonest amendments.

In the present case there is no malafide intention on the part of the plaintiffs in filing the amendment application – Rather they explained that they are rustic and illiterate villagers and their advocate did not draft the plaint as per their instruction – Moreover in every suit the whole of the claim in respect of the cause of action is to be included and if the plaintiff failed to include the whole claim he will be precluded from raising those claims after wards.

Held, the amendment is necessary for proper adjudication of the dispute between the parties – This Court feels that if the amendment is not incorporated in the plaint, the plaintiffs will be prejudiced.

(Para 12,13 & 14)

Case laws Referred to:-

1.2006(II) OLR (SC) 628 : (Baldev Singh & Ors. Etc.-V-Manohar Singh & Anr. Etc.).
2.(2009)3 SCC 467 : (Alkapuri Cooperative Housing Society Ltd.-V-Jayantibhai Naginbhai (deceased) through LRs.)
3.(2009) 10 SCC 84 : (Revajeetu Builders & Developers -V-Narayanaswami & sons & Ors.).
4.AIR 1983 SC 462 : (Panchdeo Narain Srivastava -V- Km.Jyoti Sahay & Anr.)
5.AIR 1974 Orissa 36 : (Gobinda Sahoo -V- Ram Chandra Nanda).
6.56 (1983) CLT 400 : (Hundari Bewa -V- Keluni Dei & Ors.).
7.AIR 1922 PC 249 : (Ma Shwe Mya -V-Maung Mo Hnaung).

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

For Opp.Parties – M/s. S.P.Mishra, S.Mishra, S.Nanda, Miss.

S.Mishra, A.K.Dash, B.Mohanty & S.S.Kashap.

S. PANDA, J. In this writ petition, the petitioners have challenged the order dated 23.7.2007 passed by the learned Civil Judge (Junior Division), Nimapara in Civil Suit No.189 of 2007 allowing the application filed by the plaintiffs for amendment of the plaint.

2. The facts, as narrated in writ petition, are as follows:

The opposite parties as plaintiffs filed the suit for permanent injunction restraining the defendants from interfering with the peaceful possession of the plaintiffs over the suit plot in any manner to which the plaintiffs are entitled on the basis that the parties are Hindus and governed under Mitrakhar School of law. The disputed properties appertaining to Sabik Plot No.4762 under Khata No.135 was recorded in the name of one Uchhaba Behera son of Parami Behera. Nitai Behera is the son of Panchu Behera. Parami and Panchu are brothers. Uchhaba had two sons, namely, Nata and Bhajani. Plaintiff No.1 is the son of Nata and plaintiff no.2 is the only daughter of Bhajani. They further pleaded that though the suit plot was recorded as Ac.0.10 decimals, the recorded tenants were possessing Ac.0.12 decimals of land. Nitai died issueless and before his death, he had sold away Ac.0.05 decimals on the eastern side out of the said land. During consolidation operation, the aforesaid plot was renumbered as Plot No.6893 measuring an area of Ac.0.06 decimals under Khata No.1103 and Plot No.6893/9459 measuring an area of Ac.0.06 decimals under Khata No.1032. The suit property in respect of Khata No.1103 has been recorded in the name of the plaintiffs and the land under Plot No.6893/9459 has been recorded in the name of Narayan, son of Uchhab. Both the plots are well demarcated. The defendants are sons of Narayan. Plot No.6902 measuring an area of Ac.0.06 decimals corresponding to Sabik Khata No.4763 belongs to them. Both the plots are situated in a compact area having residential house over some portions of the suit plot and rest being used as Bari. Defendants have no right, title, interest and possession over the suit plot. Their grand- father purchased only Ac.0.05 decimals of land. However, the consolidation authorities recorded the area in favour of the defendants is Ac.0.06 decimals. Taking advantage of the said recording by the consolidation authorities, they interfered with the peaceful possession of the plaintiffs for which the suit has been filed.

3. The defendants filed their written statements traversing the plaint allegations. They pleaded that the dispute with regard to the title between the parties is pending before the Consolidation Officer, Gop-Kakatpur in Remand Revision Case No.5429 of 2000. Plaintiffs have no title or possession in respect of Plot No.6893. Therefore, the suit should be dismissed in respect of the said plot. Thereafter, the defendants filed an

application for amendment of the written statement by incorporating the facts relating to development of the consolidation proceeding. The said application was resisted by the plaintiffs by filing objection. The plaintiffs filed an application for amendment of the plaint on the same date. The defendants filed their objection. Both the applications were taken up for hearing and on 23.7.2007 the learned Civil Judge (Senior Division), Nimapara came to the conclusion that the amendment sought by both parties, if carried out, would

not change the nature of the suit and would not cause irreparable loss to the other side. Hence, he allowed both the petitions subject to payment of cost of Rs.50/- to each of the parties. The defendants challenged the said order in respect of amendment of the plaint. However, the plaintiffs did not challenge the amendment sought by the defendants.

4. Learned counsel for the petitioners-defendants submitted that the order passed by the court below is a cryptic one and it has not taken into consideration the fact that by way of amendment, plaintiffs have changed the nature and character of the suit from suit for permanent injunction to suit for declaration. In support of his contention, he cited the decisions reported in **2006 (II) OLR (SC) 628** (Baldev Singh and others, etc. v. Manohar Singh and another, etc.), **(2009) 3 SCC 467** (Alkapuri Cooperative Housing Society Limited v. Jayantibhai Naginbhai (deceased) through LRs), **(2009) 10 SCC 84** (Revajeetu Builders and Developers v. Narayanaswami and sons and others) wherein the apex Court has held that if by way of amendment the nature and character of the suit will be changed, such amendment is not to be allowed.

5. Learned counsel appearing for the opposite parties submitted that the plaintiffs are illiterate rustic villagers and in the amendment application they specifically stated that they instructed their counsel to incorporate all those facts while filing the suit. However, the counsel did not draft the same in accordance with their instructions. However, the said fact came to their knowledge when they were ready for hearing of the suit through another advocate. Therefore, they filed an application for amendment of the plaint to avoid multiplicity of litigations. They had no knowledge about the sale deed till May, 2007 and when it came to their knowledge, they took steps to amend the plaint immediately in the month of June, 2007. Therefore, there was no mala fide intention of the plaintiffs to file application for amendment and the amendment application should be considered liberally. Therefore, the court below has rightly allowed their application. Hence, the impugned order need not be interfered with. In support of his contention, he cited the decisions reported in **AIR 1983 SC 462** (Panchdeo Narain Srivastava v. Km. Jyoti Sahay and anothers), **AIR 1974 Orissa 36** (Gobinda Sahoo v. ram Chandra Nanda) and **56 (1983) CLT 400** (Hundari Bewa v. Keluni Dei and others) wherein the Court allowed the application for amendment taking into

consideration that the same was necessary for proper adjudication of the dispute between the parties.

6. The apex Court in Baldev Singh's case (supra) held that the amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or

substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement.

7. Submission of the learned counsel for the petitioners that in view of the said position, the amendment sought by the plaintiffs-opposite parties by changing the "suit for permanent injunction" to "suit for declaration of right, title, interest and permanent injunction" is not to be allowed.

8. However, in a decision reported in **AIR 1922 PC 249 (Ma Shwe Mya v. Maung Mo Hnaung)** it has been held that the Court should be extremely liberal in granting prayer for amendment of the pleadings unless serious injustice or irreparable loss is caused to the other side.

9. In the present case, the plaintiffs elaborately explained how the property was purchased fraudulently without consideration and without the content of the sale deed being read over and explained to the vendor who is an illiterate man. Therefore, the same is not binding on the plaintiffs. Suit Sabik Plot of Ac.0.10 decimals of land is the only undivided ancestral residential dwelling house of the plaintiffs which was never partitioned between Nitei and Uchhab and the purchaser Uchhab is a stranger to the family of the plaintiffs. The consolidation authorities without due inquiry wrongly recorded the plot in the name of the defendants on the basis of the said fraudulent sale deed.

10. From the above, it seems that the plaintiffs challenged the sale deed executed in favour of the defendants though initially plaintiffs filed the suit for permanent injunction with an impression that since the property belongs to them, it is not necessary to declare their title over the suit property. After filing of the written statement and at the time of hearing of the suit when the plaintiffs changed the advocate they came to know about the fact that the plaint had not been drafted as per their instructions. They being rustic villagers and plaintiff no.2 being a lady aged about 70 years, after knowing the fact that the relief of declaration of their right is to be incorporated in the plaint, they took steps to file a petition for amendment as per the advice of the newly engaged counsel. Accordingly, the application for amendment was filed.

11. Law is well settled that to avoid multiplicity of proceedings, if the amendment is necessary for proper adjudication of the dispute between the

parties, the Court can consider the same liberally. The merit of the case should not be gone into while considering the application for amendment.

12. The apex Court in Revajeetu Builders's case (supra) has held that while deciding application for amendments, the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments. The basic test which must govern grant or refusal of amendment is whether such amendment is

necessary for determination of real question in controversy or for proper and effective adjudication of the case. The other important condition which should govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side by the amendment. Amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money. The Court is to take into account whether the proposed amendment constitutionally or fundamentally changes the nature and character of the suit.

13. In the present case, there is no mala fide intention on the part of the plaintiffs in filing the amendment application. Rather, they explained that they are rustic and illiterate villagers and their advocate did not draft the plaint as per their instructions. When the said fact came to their knowledge being pointed out by the other counsel who was engaged by them at the time when the suit was ready for hearing, they immediately took steps for amendment. Therefore, the amendment is necessary for proper adjudication of the dispute between the parties.

14. From the impugned order, it appears that the court below has not discussed anything and in a cryptic manner allowed the application. However, this Court, as discussed above, feels that if the amendment is not incorporated in the plaint, the plaintiffs will be prejudiced as the same is a bar as provided under Order 2 Rule 2 of the Civil Procedure Code. In every suit, the whole of the claim is to be included in respect of cause of action and if the plaintiff has not included the whole claims he will be precluded from raising those claims afterwards in respect of his said claim regarding the same suit property. In the case at hand, there was no mala fide intention on behalf of the plaintiffs-opposite parties in filing the application for amendment.

15. Since substantial justice has been done by the court below in allowing application for amendment, this Court is not inclined to interfere with the impugned order in exercise of the jurisdiction under Article 227 of the Constitution of India.

Accordingly, the writ petition is disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT- 366

SANJU PANDA, J.

W.P.(C) NO.1666 OF 2010 (Decided on 11.08.2010).

M/S. AGARWAL STRIPS PVT. LTD. ……. Petitioner.

.Vrs.

DEPUTY GENERAL MANAGER (Elct.)
CESCO, ANGUL ELECTRICAL DIVN.,
ANGUL & ORS. ……... Opp.Parties.

ORISSA ELECTRICITY REGULATORY COMMISSION DISTRIBUTION (CONDITIONS OF SUPPLY) CODE 2004 – CLAUSE 10 & 13 (10) (b).

Electricity – Petitioner purchased the Unit in a public auction – He applied for electric connection – Prayer refused on the ground that there was outstanding dues against the previous owner – Hence the writ petition.

Petitioner being the purchaser of the Unit on an advertisement made by O.P.3 is in no way connected with the previous owner of the premises – The petitioner also did not apply for transfer of service connection from the name of a person to the name of another consumer – Rather, it was one for fresh connection – Moreover at the time of purchase there was no electricity in the Unit and he being the auction purchaser can not consume electricity without entering into a new contract and he is in no way connected with the previous occupier – Held, the demand against the petitioner to clear the arrear dues in respect of the premises is arbitrary and illegal – Impugned letters are quashed and direction issued to the Opp.Parties to provide electricity to the petitioner within seven days.

(Para 12, 18 & 19)

Case laws Referred to:-

1.AIR 2010 Orissa 10 : (Anshuman Behera -V- Orissa State Financial Corporation & Ors.).
2.AIR 2007 Orissa 37 : (Ajay Kumar Agrawal -V- O.S.F.C. & Ors.).
3.(2006) 13 SCC 101 : (Dakshin Haryana Bijli Vitran Nigam Ltd. -V- Paramount Polymers (p) Ltd.).

For Petitioner – M/s. M.Agarwal &T.K.Mishra
For Opp.Parties- M/s. B.K.Nayak 1&2

S. PANDA, J. The petitioner has filed this writ petition challenging the letter dated 21.10.2009 issued by the Dy. General (Elect.), A.E.D., Angul and the letter dated 23.10.2009 issued by the Junior Manager, (Electrical) No.1,

CESU, Angul directing the petitioner to pay the outstanding arrear electricity dues.

2. Maa Budhi Roller Flour Mills (Pvt.) Limited for setting up of the unit at Panchamahal, Angul took a loan from the State Bank of India. The said unit mortgaged and hypothecated the movable and immovable of its assets as security for payment of the loan. As Maa Budhi Roller Flour Mills (Pvt.) Limited failed to repay the loan amount, Authorised Officer and Chief

Manager, State Bank of India, Angul, opposite party no.3, seized the said unit for default in payment of the dues of the Bank and took over possession of the said unit. Thereafter, all the part and parcel of the property in the name of Maa Budhi Roller Flour Mills (Pvt.) Limited consisting of land and building was offered for sale by calling for public auction by opposite party no.3 in exercise of power conferred under Section 13(4) of the Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (In short, "SRFAESI Act, 2002") read with rule 8(6) of the Security Interest (Enforcement) Rules, 2002. In pursuance of the said public auction, the petitioner participated and being the highest bidder purchased the said land and building. After taking over the assets of the unit, the petitioner made efforts to capitalize its entire entrepreneurial activities and for that purpose it approached opposite party no.2 for supply of electricity. The petitioner applied in the prescribed format for fresh connection of electricity to its plot. Opposite parties 1 and 2 by letters dated 21.10.2009 and 23.10.2009 rejected the application of the petitioner for fresh power supply to the land of the petitioner on the ground that there was an outstanding arrear dues against the erstwhile company. Hence this writ petition.

3. It is submitted by the learned counsel for the petitioner that as per the Electricity Act, 2003, on an application made by the owner or occupier of any premises, the authority has to supply electricity within one month from the date of receipt of the application. If a licencee fails to supply electricity within the stipulated time, he shall be liable to a penalty which may extend to one thousand rupees for each day of default. The regulation made under the above Act is known as "OERC Distribution (Conditions of Supply) Code, 2004" to govern distribution and supply of electricity and procedures thereof etc. Clause-13.5 of the said Code provides that the power supply shall be provided within a period of 90 days in case of 33 KV Supply. Though the petitioner submitted its application for providing power supply, opposite parties by letters dated 21.10.2009 and 23.10.2009 rejected the application of the petitioner. Therefore, the petitioner has filed this writ petition for redressal of its grievance. He further submitted that demand of the opposite parties 1 and 2 to clear the arrear electricity dues of the previous company is illegal and is not sustainable in the eye of law. Hence, the letters dated 21.10.2009 and 23.10.2009 issued by opposite parties 1 and 2 in favour of

the petitioner is liable to be quashed. In support of his contention, he cited the decisions of this Court in the case of **Anshuman Behera v. Orissa State Financial Corporation & others** reported in AIR 2010 Orissa 10 and **Ajay Kumar Agrawal v. O.S.F.C. & others** reported in AIR 2007 Orissa 37.

4. In pursuance of the notice, opposite parties appeared through counsel, filed counter affidavit and argued the matter on merits.

5. Mr.B.K.Nayak, learned appearing on behalf of the opposite parties 1 and 2, submitted that in **Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers (P) Ltd.** reported in (2006) 13 SCC 101, the apex Court has held that in cases where a consumer had defaulted in paying electrical charges and there had been consequent disconnection of supply, no fresh connection in respect of the premises would be given to a purchaser unless the purchaser cleared the amount that was left in arrears by the consumer whose undertaking had been purchased. In view of the said decision, the plea taken by the present petitioner is liable to be rejected and since it has not cleared the arrear electricity dues in respect of the premises, no fresh connection can be provided and the writ petition is liable to be rejected.

6. The learned counsel for the opposite parties further submitted that under sub-clause 10(b) of Clause 13 of Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (in short, "OER Code"), the service connection from the name of a person to the name of another consumer shall not be transferred unless the arrear charges pending against the previous occupier are cleared. Therefore, the petitioner is liable to clear the arrear charges.

7. In reply to the above, learned counsel for the petitioner submitted that as per Clause-10 of the OER Code the petitioner is not coming under the expression, "the applicant in respect of an earlier agreement executed in his name or in the name of his spouse etc.". Therefore, the question of the petitioner clearing the arrear dues as per the provision of Sub-clause 10(b) of Clause 13 of the OER Code, as contended by the opposite parties, does not arise.

8. From the above submissions of the parties and after going through the records, it appears that the petitioner has purchased the unit in the auction sale in pursuance of the advertisement published therefor and on payment of the consideration amount, sale was confirmed and possession of the unit was handed over to the petitioner. Admittedly, as stated above, as per the terms and conditions of the sale, the purchaser shall not be liable for payment of any dues relating to the Maa Budhi Roller Flour Mills (Pvt.) Ltd. which was put to auction for non-payment of loan amount to the Bank or before handing over the possession in pursuance of confirmation of the sale.

9. Having regard to the contention of the parties, in the present case it is to be considered by this Court, whether Clause-10 or Sub-clause 10(b) of Clause-13 of the OER Code is applicable to the petitioner.

10. For better appreciation, the said provisions of the OER Code are extracted below:

"**10**. If the applicant in respect of an earlier agreement executed in his name or in the name of his spouse, parents or in the name of a firm or company with which he was associated either as a partner, director or managing director, is in arrears of electricity dues or other dues for the same premises payable to the licensee, the application for supply shall not be allowed by the engineer until the arrears are paid in full.

13. Licensee's obligation to supply and power to recover expenditure – (1) to (9) xxx xxx xxx

(10) Transfer of service connection –

(a) xxx xxx xxx

(b) The service connection from the name of a person to the name of another consumer shall not be transferred unless the arrear charges pending against the previous occupier are cleared.

Provided that this shall not be applicable when the ownership of the premises is transferred under the provisions of the State Financial Corporation Act."

11. On a plain reading of the above provisions, it is crystal clear that the petitioner being the purchaser of the unit on an advertisement made by opposite party no.3 is in no way connected with the previous owner of the premises as the petitioner purchased the unit from auction sale made by the State Bank of India. Therefore, Clause-10 is not applicable to the petitioner.

12. So far as Sub-clause 10(b) of Clause-13 is concerned, the petitioner did not apply for transfer of service connection from the name of a person to the name of another consumer. Rather, it was one for fresh connection to the petitioner-unit after it purchased the same from opposite party no.3. As per the terms and conditions of the sale, the present petitioner is not liable to clear any arrear dues of the erstwhile owner. The dues are not levied against the premises; rather it is levied against the person and the ownership of the premises is transferred under the provisions of the Companies Act. The opposite parties have also not contended that there was an agreement between the opposite parties and erstwhile owner of the premises that in case the premises in question would be transferred, the transferee has to clear all the arrear electricity dues.

13. So far as the decision cited by the learned counsel for the opposite parties in Dakshin Haryana Bijli Vitran Nigam Ltd.'s case (supra) is concerned, therein the licencee incorporated Clause 21-A on 22.11.2001 in the terms and conditions of supply of electrical energy and after that date the consumer applied for electrical connection. In view of the said clause, the

apex Court observed that the purchaser was liable to clear the arrears in respect of the premises. However, whether that clause violates any fundamental rights of the parties was not considered by the High Court for which the matter was remanded. Therefore, the said decision is not applicable to the facts and circumstances of the present case.

14. Therefore, it is open to CESCO to take such steps as may be just and proper in consonance with the law for realization of the arrear dues, if any, from the consumer who has taken the electric connection from the persons who are liable to clear the dues on behalf of the Maa Budhi Roller Flour Mills (Pvt.) Ltd.

15. This Court in Anshuman Behera's case (supra) has held that for grant of fresh connection, outstanding electricity dues of erstwhile owner cannot be recovered from the purchaser of premises in the auction held by the Financial Corporation under Section 29 of the SFC Act, 1951. Outstanding of electricity dues does not amount to charge on premises and in absence of such charge, subsequent occupier cannot be asked to pay the outstanding dues of the erstwhile occupier.

16. In Ajay Kumar Agrawal's case (supra), this Court after perusing clause 9 made it clear that by not referring the name of its erstwhile consumer, namely, M/s. Maa Bhawani Rice Industries, WESCO in clause-9 of the agreement referred to the earlier agreement dated 24.12.1992 presumably with M/s. Maa Bhawani Rice Industries which provided that all arrears and liabilities under the old and superseded agreement shall be treated as arrears and liabilities under the present agreement held that WESCO has no such power under the statute to treat arrears under the superseded agreement as arrears under the present agreement. Therefore, the said clause on the face of it ultra vires the provision of Section 43 of the said Act which fastens an obligation on WESCO to supply electricity to a consumer.

3. In the case at hand, it appears from the auction notice that opposite party no.3 neither mentioned about the arrear dues nor disclosed the said fact at the time of confirmation of sale or transfer of the property in the name of the petitioner. Therefore, due to the suppression of the said fact, the petitioner is not liable to pay the said amount as he is the auction purchaser. At the time of purchase, there was no electricity in the unit. He being the auction purchaser cannot consume electricity without entering into a new

contract and he is in no way connected with the previous occupier/company/industry/unit.

18. In view of the above position of law and the fact that the opposite parties had not mentioned before that the petitioner has to clear the arrear

dues in respect of the premises, their demand against the petitioner to clear the arrear dues is arbitrary and illegal.

19. Considering the above background of facts, this Court quashes the letters dated 21.10.2009 and 23.10.2009 issued by the opposite parties and directs them to provide electricity to the petitioner-unit within a period of seven days from today. The petitioner is directed to pay the current dues and other deposit to supply fresh connection of electric line.

The writ petition is accordingly allowed.

Writ petition allowed.

2010 (II) ILR – CUT- 372

B.K.PATEL, J.

Criminal Revision No. 8 of 2002. (Decided on 23.06.2010)

BATA KRUSHNA SAHOO …… Petitioner.

.Vrs.

STATE OF ORISSA ……. Opp.Party.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – SEC.376.

Rape – No corroboration to the evidence of the victim (P.W.5) – No medical evidence to suggest recent sexual intercourse – Chemical examination of P.W.5's wearing apparels did not indicate the presence of semen – P.W.3 the (father-in-law of P.W.5) deposed in Court that he found the petitioner lying over P.W.5 but that fact was not stated before the I.O. – The circumstance that the petitioner committed rape on P.W.5 by gagging her mouth with one hand and lifting her saree with another appears to be improbable – P.W.5 admits that the napkin with which the petitioner had gagged her mouth was lying on the spot but the same was not seized by police.

Failure on the part of both the learned Courts below to take note of such improbabilities has occasioned in miscarriage of justice – Held, petitioner's conviction and sentence U/s.450 I.P.C. are confirmed – His conviction U/s.376 is set aside, instead he is convicted U/s.376 read with Section 511 I.P.C. (Para 7)

Case laws Referred to:-

1.AIR 1978 SC 1 : (Thakur Das -V- State of Madhya Pradesh & Anr.)
2.AIR 1975 SC 1960 : (Duli Chand -V- Delhi Administration).
3.1989(II) OLR 548 : (Rabindra Sethi -V- Premalata Sethi.)
4.1987 CRI.L.J.655 : (Smt. Rachita Rout -V- Basanta Kumar Rout).

For Petitioner - Mr.D.Sarangi.
For Opp.Parties – Mr.T.Rath, (Addl.Standing Counsel).

B.K. PATEL, J. This revision is directed against judgment dated 2.5.2002 passed by Additional Sessions Judge, Fast Track Court II, Cuttack in Criminal Appeal No.22 of 2000 confirming the judgment dated 26.4.2000 passed by Additional C.J.M.(Spl.)-Cum- Asst. Sessions Judge, Cuttack in S.T. Case No.276/48 of 1998 by which the petitioner was convicted under Sections 450 and 376 of the Indian Penal Code (for short 'I.P.C.') and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for six months, under Section 450 of the I.P.C., and to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for six months, under Section 376 of the I.P.C.

BATA KRUSHNA SAHOO -V- STATE [*B.K. PATEL, J.*]

2. Petitioner and victim-informant P.W.5 are co-villagers. During the period of occurrence P.W.5's husband was employed and residing at Surat. Petitioner was a student of +2 Second Year Arts. Prosecution case is that

the occurrence took place in the night on 4.10.1996 in the house of P.W.5 when she was sleeping in a room. Her father-in-law P.W.3 was sleeping in another room whereas P.W.5's mother-in-law was sleeping in the verandah. The house which had half constructed walls having no doors and windows was open from all sides. Petitioner trespassed into P.W. 5's room, gagged her mouth by means of a napkin, threatened her not to shout, raised her saree and forcibly raped her. P.W.5 could, however, manage to scream. Her parents-in-law rushed to the place of occurrence. Seeing them, petitioner started running away. P.W.5 caught hold of petitioner's banyan as a result of which a portion of the banyan was torn and remained with P.W.5. P.W.3 and P.W.5's mother-in-law also tried to catch hold of the petitioner. However, he could manage to escape from their clutches. In the process P.W.5's parents-in-law sustained injuries. P.W.3 as well as P.W.6, who happens to be P.W.5's husband's elder brother, chased the petitioner who ran away and entered inside his house. P.W.3 informed the villagers including P.W.2, who also happens to be brother of P.W.5's husband, regarding the occurrence. Despite reports submitted at Japakuda Out Post and Salipur Police Station no action was taken by police. In such circumstances, Director General of Police was apprised regarding the occurrence. As directed, P.W.8, the Circle Inspector of Police, Salipur visited the spot and received First Information Report Ext.1 from P.W.5. In course of investigation, witnesses were examined and P.W.5 was medically examined on police requisition by P.W.4. Seizures were affected. Subsequently, P.W.8's successor-in-office P.W.7 took charge of investigation and submitted charge-sheet against the petitioner. Petitioner took the plea of false implication. In order to substantiate the allegations, prosecution examined eight witnesses of whom P.Ws.2 to 8 have already been introduced. P.W.1, a resident of occurrence village, did not support the case of the prosecution. Prosecution also relied upon documents marked Exts.1 to 9. Petitioner examined D.W.1 and relied upon document marked Ext. A. On appraisal of evidence on record, learned trial court convicted and sentenced the petitioner as stated supra.

3. In assailing the impugned judgments, it was contended by the learned counsel for the petitioner that both the courts bellow have utterly failed to appreciate the evidence on record. It was argued that there was inordinate delay in lodging the First Information Report and the explanation offered by prosecution is not acceptable. Prosecution witnesses developed the prosecution story at different stages. Though it was asserted that a torn piece of petitioner's banyan was retained with P.W.5, the same was not

produced in course of trial. Medical report does not support the allegation of rape. It was further argued that prosecution case militates against probability factors inasmuch as the allegation that the petitioner committed rape on

P.W.5 when she was sleeping in her house being surrounded by other inmates is incredible.

4. In reply, it was submitted by the learned counsel for the State that on a threadbare analysis on the evidence on record both the courts below have come to the concurrent finding that the petitioner committed rape on P.W.5. There is absolutely no scope for re-appreciation of evidence while exercising revisional jurisdiction.

5. Scope and ambit of a revision and an appeal are different. The revisional court is not a court of appeal. Placing reliance upon **Thakur Das v. State of Madhya Pradesh and another:** AIR 1978 SC 1 and **Duli Chand v. Delhi Administration:** AIR 1975 SC 1960, it has been pointed out by this Court in **Rabindra Sethi v. Premalata Sethi**: 1989 (II) OLR 548 that the established principle of law is that the revisional jurisdiction is not to be ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record. If the revisional court on appreciation of the evidence on record and re-appraisal of the evidence, takes a view different from and contrary to the view taken by the lower court, then also it cannot be a ground for interfering in revision. In **Smt. Rachita Rout v. Basanta Kumar Rout** : 1987 CRI.L.J. 655, it has been pointed out by this Court that it is only when the trial court has not kept in view the correct position of law and has failed to appreciate the evidence in its true perspective, it would be within the jurisdiction of the revisional court to appraise the evidence and come to a conclusion as to whether the conclusion of the trial court was justified or not. Where the conclusion of a court is grossly and palpably unjust or is based upon a manifestly erroneous approach and erroneous appraisal of the evidence, and further the court has misconceived the evidence and has come to an obviously wrong conclusion the revisional court would be fully justified to go into the facts and correct the error that has cropped into the judgment of the trial court. In such a case, the revisional Court is not interfering on the ground of inadequacy of evidence, but on the ground that there has been a clear case of miscarriage of justice.

5. On a close scrutiny of the impugned judgments and evidence on record, keeping in view the limited scope for interference while exercising the revisional jurisdiction, it is observed that from the very beginning there has been cogent explanation for delay in lodging the First Information Report. Occurrence took place in the night of 4.10.1996. It is in the evidence of P.W.5 as well as P.Ws.2,3 and 6 that report was lodged not only on 5.10.1996 at Japakuda Out Post but also on 9.10.1996 at Salipur Police

Station. As there was no response to such reports, grievance was made in the office of Director General of Police at Cuttack on 14.10.1996. In the First Information Report Ext.1 itself it has been alleged that no action was taken in

spite of reports lodged at Japakuda Out Post and Salipur Police Station on 5.10.1996 and 9.10.1996 respectively. First Information Report Ext.1 was received and investigation was taken up only when P.W.8 the C.I. of Police, Salipur was directed over telephone from the office of the Director General of Police, Cuttack to visit the spot and take legal action. Evidence of P.W.8 corroborates the assertions. Therefore, there appears no infirmity in the finding recorded by both the learned courts below to the effect that reason for delay in lodging First Information Report has been cogently explained.

7. Evidence of P.W.5 regarding petitioner's trespassing into her room in the mid-night also stands corroborated by the evidence of P.Ws.2,3 and 6. There is no infirmity in the finding that hearing alarm raised by P.W.5, P.W.3, P.W.6 and P.W.5's mother-in-law rushed towards the spot and found the petitioner running away. They made an attempt to obstruct the petitioner in vain. However, as regards the allegation of commission of rape by the petitioner on P.W.5, there appears no corroboration to P.W.5's evidence. P.W.5 alleges that petitioner gagged her mouth by a napkin with one hand, raised her wearing saree with the other hand and forcibly raped her. However, she affirms that she could manage to raise shout when the petitioner's hand slipped off from her mouth. P.W.4, who was an Associate Professor of the Department of F.M.T., S.C.B. Medical College and Hospital, Cuttack deposes to have found no medical evidence to suggest recent sexual intercourse on P.W.5 when she was examined on 15.10.1996. Chemical examination of P.W.5's wearing apparels also did not indicate the presence of semen and any other incriminating substance. P.W.5's father-in-law P.W.3 deposes in court that when he rushed to the spot he found the petitioner lying over P.W.5 who was catching hold of petitioner's banyan. However, police statement of P.W.3 marked Ext.A reveals that P.W.3 had not stated before the Investigating Officer to have seen the petitioner lying over P.W.5. Both the learned courts below have failed to take note of such material omission on the part of P.W.3 to disclose regarding a vital allegation in his police statement. Obviously, P.W.3 has made an attempt to improve upon his earlier statement made before the Investigating Police Officer. Considering the totality of circumstances in the case, allegation with regard to petitioner entering into the P.W.5's room and making an attempt for sexual assault when she was sleeping cannot be disbelieved. However, evidently P.W.5 was in a position to raise, and in fact raised, alarm. Therefore, the circumstance of petitioner committing rape on P.W.5 by gagging her mouth with one hand and lifting her saree with another when her parents-in-law also were sleeping in the house appears to be improbable. In fact, P.W.5

deposes in her cross-examination that the petitioner caught hold of her saree for half an hour. She also admits in her cross-examination that the napkin with which the petitioner had gagged her mouth lying on the spot was not

seized by police. Failure on the part of both the learned courts below to take note of such improbabilities has occasioned in miscarriage of justice. On the face of such improbabilities it would not be prudent to hold that the petitioner committed rape on P.W.5. On the contrary, circumstances conclusively prove that the petitioner made an attempt to commit rape after gaining illegal entry into the room in which P.W.5 was sleeping. He is liable to be convicted under Section 450 and Section 376 read with Section 511 of the I.P.C.

8. Accordingly, petitioner's conviction and sentence under Section 450 of the I.P.C. are confirmed. Conviction of petitioner under Section 376 of the I.P.C. and sentences awarded thereunder are set aside. Instead he is convicted under Section 376 read with Section 511 of the I.P.C. Considering the status of the petitioner and the fact that petitioner was in custody as an under trial prisoner from 2.3.1998 to 12.8.1999, he is sentenced under Section 376 read with Section 511 of the I.P.C. to undergo the period already undergone as an under trial prisoner.

With the aforesaid modification, the revision is allowed in part.

Revision allowed in part.

2010 (II) ILR – CUT- 377

B.K.NAYAK, J.

CRLMC. NO.4115 OF 2009 (Decided on 29.06.2010).

JAYANTI PRADHAN & ORS. ……. Petitioners.

.Vrs.

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

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

Quashing of Criminal Proceeding – Offence U/s.341, 323, 343, 365, 417, 379, 506 & 34 I.P.C. –Opp. Party No.2 informant filed affidavit saying that she does not want to proceed with the prosecution as she is already married and continuance of Criminal Proceeding would adversely affect her marital life and social reputation – The statement of O.P.2 was also recorded U/s.164 Cr.P.C. before the learned J.M.F.C.

In view of the statement and the affidavit of the informant there is little chance of conviction of the petitioners in the G.R.Case – No useful purpose will be served if the trial proceeds which would be nothing but an abuse of the process of the Court – Held, G.R.Case pending against the petitioners is quashed. (Para 5,6 & 7)

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Case laws Referred to:-

1.1988 (1) SCC 692 : (Madhavrao Jiwajirao Scindia -V- Sambhajirao Chandrajirao Angre).

2.2003(II) OLR (SC) 101 : (B.S.Joshi & Ors. -V-State of Haryana & Anr.).

3.2004(II) OLR 642 : (Tasoraj Mahamad & Ors.-V- State of Orissa & Anr.).

4.(2005) 31 OCR 45 : (Pragyandipta Panda & Ors.-V-State of Orissa & Anr.).

For Petitioner -Suryakanta Das

For Opp.Parties –T.Mishra

Heard learned counsel for all parties. Perused the record.

2. In this application under Section 482, Cr.P.C., the petitioners challenge the continuance of the criminal proceeding in G.R. Case No.283 of 2005 pending in the court of learned J.M.F.C., Pattamundai and pray for quashing the order of cognizance and the said proceeding.

3. In the aforesaid G.R. Case the petitioners are facing prosecution for alleged commission of offences under Sections 341/323/343/365/417/379/506/34 of the I.P.C., for which the learned J.M.F.C. has taken cognizance. The said case was initiated on the basis of the F.I.R. lodged by the present opposite party no.2 alleging inter alia that petitioner no.4, with the promise of marriage, had kept physical relationship with her. He was also trying to disturb other marriage proposals of the informant. On 12.07.2005, the marriage of the informant was settled at

Dandisahi, but on the same day petitioner nos. 1 and 2, who are the parents of petitioner no.4, took the informant to their house giving assurance that

they would perform her marriage with petitioner no.4 and on such assurance she went to the house of the petitioners with her ornaments and cash of Rs.39,000/-. On her arrival in the house of the petitioners, the informant was offered "sarbet" and after taking the same she became unconscious. Whenever she regained consciousness, she was offered that drink again and again. It is also alleged that she was kept tied. On 15.07.2005 in the night, on regaining consciousness and having found that she had been untied, she escaped and came back to her parents' house. On investigation, the police submitted charge-sheet against the petitioners.

4. It is contended on behalf of the petitioners that they have been entangled in the case falsely by the informant and in the meantime the informant has married elsewhere and she admits that due to some family and property dispute and under ill advice of some persons, she had lodged the F.I.R., and in the meantime the dispute has been mutually resolved and she is not willing to proceed further with the prosecution of the petitioners.

5. Opposite party no.2, the informant appeared in this case and filed an affidavit to the effect that due to some dispute between the two families she had lodged F.I.R. against the petitioners on the ill advice of some persons and that the dispute has in the meantime been resolved and she has married to one Hemanta Ku. Mohanta and in the event of continuance of the criminal proceeding against the petitioners her marital life and social reputation would be adversely affected. It is further stated in the affidavit that she does not want to proceed with the prosecution. In view of such affidavit, this Court by order dated 18.1.2010 directed opposite party no.2 to appear before the learned J.M.F.C., Pattamundai for recording of her statement and to send the statement for perusal of this Court. Accordingly, opposite party no.2 appeared before the learned J.M.F.C., Pattamundai on 03.02.2010 and her statement was recorded by the learned J.M.F.C. under Section 164, Cr.P.C. which has been received in this Court and forms part of record. The said statement fully supports the stand taken by opposite party no.2 in her affidavit filed in this court to the effect that the dispute has been amicably settled and opposite party no.2 has already gone on marriage to another village and, therefore, she does not intend to proceed further with the prosecution of the petitioners.

6. It is well settled that in exercise of power under Section 482, Cr.P.C., the High Court is empowered to quash the proceeding, if it comes to the conclusion that the interest of justice so requires. Referring to its earlier decision in the case of **Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrajirao Angre;** 1988 (1) SCC 692, the Supreme Court in the case of **B.S. Joshi and others v. State of Haryana and another**; 2003 (II) OLR

(SC) 101 held that where the opinion of the court is that the chance of conviction is bleak and, therefore, no useful purpose is likely to be served by

allowing the criminal prosecution to continue, the court may while taking into consideration, the special facts of a case, quash the proceeding. Following the aforesaid decision of the Supreme Court, this Court in the case of **Tasoraj Mahamad and others v. State of Orissa and another**; 2004 (II) OLR 642, quashed the cognizance as the parties have sorted out their difference and the informant herself requested for quashing of the cognizance taken against the accused-petitioner holding that the continuance of the criminal proceedings will benefit none. The case of B.S.Joshi (supra) has also been relied upon in the case of **Pragyandipta Panda and others v. State of Orissa and another;** (2005) 31 OCR 45 and proceeding was quashed on similar grounds.

7. In view of the statement and the affidavit of the informant (opposite party no.2), there is little chance of conviction of the petitioners in the G.R.Case. No useful purpose will be served, if the trial proceeds, which would be nothing but an abuse of process of the court. It would not be in the interest of justice to allow the G.R.Case to proceed further. Therefore, this criminal misc. case is allowed and G.R.Case No.283 of 2005 pending in the court of learned J.M.F.C., Pattamundai against the petitioners is quashed.

This order be communicated to the learned trial court.

Application allowed.

2010 (II) ILR – CUT- 380

S.K.MISHRA, J.

SECOND APPEAL NO.132 OF 1982.(Decided on 18.05.2010

KASINATH PANDA & ORS …….Appellants

.Vrs.

RAGHUNATH PANDA (DELETED) ……Respondents
BASUDEB PANDA & ORS.

SHRI JAGANNATH TEMPLE ACT, 1955 (ACT NO.11 OF 1955) – SEC.4(d-1).

Sebayati right – Whether it can be transferred and whether the Civil Court can decide the disputes regarding sebayati rights.

Held, any transfer of Sebayati rights is opposed to public policy and that can not be accepted by the Court – However transfer of sebayati rights through sanad issued by the Raja of Puri is not against such public policy – Civil Courts do not lack jurisdiction to decide any dispute regarding the sebayati rights.

(Para 23,29)

Case laws Referred to:-

1.AIR 1974 SC 1932 : (Kali Kinkor Ganguly -V- Panna Banerjee & Ors)
2.AIR 1974 Calcutta 333 : (Nemai Chakrabarty -V- Bansidhar Chakravarty & Ors.)
3.75(1993) CLT.637 : (Biswanath Chowdhury & Ors.-V-Shyam Sundar Chowdhury & after him Narayan Chowdhury & Ors)
4.96 (2003) CLT. 29 : (Shri Jagannath Temple Management Committee Puri -V- Narayana Mohapatra).
5.31(1965)CLT.533 : (Bairagi Das -V- Sri Dandas Mohapurus & Ors.)
6.34(1968) CLT.580 : (Sri Lachu Das & Ors.-V-Sri Jagannath Temple Committee, Puri.)
7.41(1975)CLT. 526(F.B) : (Mangulu Jal & Ors.-V-Bhagaban Rai & Ors)

For Appellants – Mr.Bijan Ray, Sr.Advocate & Associates.
For Respondents – Mr.Ramakanta Mohanty, Sr.Advocate & Associates.

S.K.MISHRA, J. The following substantial questions of law are formulated at the time of admission of the Second Appeal;

(i) Whether the Sebaiti right can be transferred for consideration ?

(ii) Whether the Record of Rights prepared under the Jagannath Temple Act would be final; and whether the same can be challenged in the Civil Court ?

2. In course of hearing of the Second Appeal, Sri Bijan Ray, learned Senior Advocate appearing for the appellants also raised another moot question regarding nonjoinder of necessary party. He contended that the judgment rendered by the courts of original jurisdiction and first appellate jurisdiction are null and void as the Temple Administrator of Jagannath temple has not been arrayed as defendant in this case.

3. The plaintiffs, respondents before this Court, filed the Original Suit bearing no.7/30 of 1971-I in the court of Additional Munsif, Puri praying for declaration of their right over 131 days of Sebapali in the temple of Bimala Thakurani situated inside the Lord Jagannth Temple premises including 60 days of Sebapali in Jaysinghghara Bedha. The plaintiffs plead that they and the defendants are the Sebayats in the temple of deity of Bimala Thakurani. The right to perform Seba Puja belongs to four branches known as Bedhas. The four branches are Mohapatraghara Bedha, Pandaghara Bedha, Padhiarighara Bedha and Jaisinghghara Bedha. The plaintiffs and defendants 10 to 13 belong to Padhiarighara Bedha, defendants 1 to 9 belong to Pandaghar Bedha and defendants 14 to 28 belong to Mahapatraghar Bedha. The other branch belonging to Jayasinghghar Bedha became extinct as Jayasingh Panda died issueless.

Since the four branches were performing Sebapuja equally, each branch has right to perform Pali for 90 days, subject to increase or decrease of number of days in a month, as the month was calculated from Sankranti to Sankranti (solar month). In accordance with the prevailing custom, the Palis were transferable by way of sale or mortgage. Each branch of Sebayats used to maintain their respective Bedha-patras indicating the number of days of Sevapali enjoyed by them. So far as 90 days Pali of Jaisinghghara Bedha is concerned, 84 days had been alienated long since in favour of Padhiarighar or Pandaghar and in the process of alienation, Padhairighar was performing 162 days, Pandaghar was performing 108 days and Mahapatraghar was performing 84 days, whereas Jayasinghghar was performing only 6 days of Seba Puja.

4. Some disputes arose between the Sabaits in respect of performance of their Palis, the matter was referred to arbitration and the Arbitrator submitted a Bedha-patra to the Raja showing Sevapalis performed by Sebaits in each Bedha. In course of time, Jaisinghghar Bedha became extinct and Raja Mukund Dev who was the Superintendent of Lord Jagannath granted a Sanand to Ananta Panda, the ancestor of the plaintiffs to perform the Sevapuja of Bimala Thakurani in respect of 6 days Pali, which was being performed by the Jayasingh Bedha.

It is further pleaded that out of 162 days of Seva puja being performed by Padharighar Bedha, the plaintiffs' ancestor Chandra Panda had 48 days. On the basis of Sanand, he acquired another 12 days and on the basis of

three sale deeds, he acquired the right to perform Sevapuja for 37 days. Then the Raja granted a Sanand in respect of six days. In 1926 or 1930, the Temple Authorities recorded the Sevapalis discharged by each Sevait and there it was found that the plaintiffs had performed 8 Pali 9 Biswas or 103 days and the aforesaid record was signed by Bhobani, father of the defendants 2 to 4 acknowledging the correctness of the same. Subsequent to the said Record of Rights, the plaintiffs acquired 27 days Sevapali and they performed 130 days of Seva Puja including 6 days of Jayasinghghar Bedha.

5. In 1952, before the Special Officer appointed by the Government to prepare the Record of Rights, the plaintiffs had filed the Bedha Patra and it has been so recorded in the Bedha Patra that plaintiffs have 130 days of Pali. In1968, Bhobani, father of defendants 2 to 4 threatened to interfere with the plaintiffs' right in respect of the Sevapalis they were performing belonging to Jyasinghghar Bedha. As the temple authorities attached some days of Bedhapali of the plaintiffs, they filed the suit for the aforestated relief.

6. The defendants No. 1 to 4 contested the suit by filing the written statement denying all averments made in the plaint. They raised the plea of maintainability of the suit for non-joinder of parties, the suit being barred by the provisions of the JagannathTemple Administration Act, limitation and being hit by principles of res judicata. They also denied the assertion that the Sevapuja was transferable by way of sale or mortgage. The plaintiffs' claim of purchase of Sabapali relating to Jayasinghghara Bedha was denied.

7. The defendants have pleaded that neither Jayasingh Panda's branch did become extinct nor Raja Mukunda Dev granted any Sanad in favour of Ananta Panda, the ancestor of the plaintiff. It is further pleaded that in 1926 or 1930, the plaintiffs were not performing 8 Pali 9 Biswas or 103 days as alleged nor have they acquired another 27 days of subsequent to the alleged record. The dispute between the Pandas and its reference to arbitration was also denied. The defendants' positive case was that they are successors in interest of Jayasinghghar and were performing entire 90 days of Pali belonging to Jayasinghghar Bedha, which their ancestors Chhakadi alias Ganesh Panda was performing. In addition, they also claimed to be enjoying the Sevapali out of Pandaghara Bedha. The defendants, therefore, prayed to dismiss the suit.

8. The minor defendants filed written statement almost in the same line as that of the contesting defendants. Some of the defendants were set ex parte.

9. The learned trial court came to the conclusion that the Sanads Exts. 14 and 16 are genuine and genealogies given by the plaintiffs are correct, in other words, the defendants' case that they are the descendants of Jayasinghghar Bedha was not accepted by the learned trial court. It is

further held that in 1809, Jayasinghghar Bedha had no heirs and his branch became extint and ancestors of the plaintiffs were allowed by the then Raja to perform 6 days of Sevapali.

Learned trial court further held that the Seva Pali in the temple of Bimala Thakurani is transferable. It is also held that the plaintiffs have 59 days of Sevapali, which is to be increased according to the number of days in a year in Jayasingh Bedha. Thus, the learned trial court decreed the suit of the plaintiff declaring their right over 131 days of Sevapali in the temple of Bimala Thakurani, as per the judgment and decree dated 8.9.1978.

10. Defendants 2, 3 and 4 preferred an appeal bearing Title Appeal No.99 of 1978. Learned Addl. District Judge, Puri vide his order dated 15.07.1979 remanded the entire suit to the trial court after framing the additional issue regarding custom of transferability of Sevapali.

11. The said order was challenged by the plaintiff before this Court in Appeal bearing Misc. Appeal No.40 of 1979. This Court, as per its order dated 14.01.1981 remanded the suit to the trial court to decide the additional issue and further directed that the appeal be kept pending till the additional issue is decided by the learned trial court. Accordingly, the learned trial court framed the additional issue and allowed the parties to lead evidence on such issue.

12. The learned trial court after remand having carefully gone through the evidence led and taking into considerations the various instances of transfer of Sevapali in the temple of Goddes Bimala and also Lord Jagannath by way of sale or mortgage for consideration, held that there was prevailing practice and custom of transfer of Sevapalli in the temple of Goddes Bimala for consideration and such practice was existing since long.

13. Upon consideration of such findings on the additional issue, the learned Ist Appellate Court after hearing the parties, dismissed the Appeal and confirmed all the findings recorded by the learned trial court vide his judgment and decree dated 12.02.1982. Such judgment and decree has been challenged by the defendants 2, 3 and 4 before this Court in this Second Appeal.

14. During the pendency of the Second Appeal, it was contended before this Court that defendant no.9 (Ka), who was respondent no.16 in the appeal, died during the pendency of the same. It was further contended that since the legal representatives have not been substituted, the Appeal abated against him and the whole appeal also abated. This Court vide the judgment dated 12.03.1993 dismissed the Second Appeal as the same had abated in its entirety. The said judgment was challenged before the Hon'ble Supreme Court of India in Civil Appeal No. 16831 of 1996.The Hon'ble Supreme Court vide order dated 02.12.1996, disposed of the Civil Appeal with the observation that so far as the original defendant no.9 is concerned, the

decree will be taken as final and will be subject to the statement made by the learned counsel for the appellants and accordingly this Court's judgment dated 12.03.1993 was set aside. The Hon'ble Supreme Court thereafter remanded the Second Appeal for disposal.

15. In course of hearing of the appeal, learned counsel for the appellant submitted that the finding that the Sevapallis are transferable is incorrect and illegal. Secondly, it is submitted that the Record of Rights which has been prepared in pursuance of the provisions of Jagannath Temple Administration Act, 1952, cannot be interfered with by the Civil Court and since the Chief Administrator of Jagannath Temple has not been made a party to the suit, the judgment rendered by the learned court of original jurisdiction and first appellate jurisdiction are nullity. Therefore, the learned counsel for the appellants prayed that the appeal be allowed and the judgment and decree passed by the courts below be set aside.

16. Learned counsel appearing for the respondents, on the other hand, submitted that since there has been concurrent finding of facts, this Court has no reason to interfere with the same. Further, the learned counsel contended that there was a special custom of transfer of Sevapali of Goddes Bimala for pecuniary considerations and hence, the transfers are valid and the plaintiff is entitled to the reliefs claimed. It is also contended that the plaintiff never assailed the correctness of the Record of Rights. They have only prayed for declaration of a right to perform Sevapalis for 131 days. Hence, the bar created under the Shri Jagannath Temple Act, 1955 read with the Puri Shri Jagannath Temple (Administration) Act, 1952 is not applicable to this case. The learned counsel submitted that since the dispute was initially referred to before the Temple Administrator of Shri Jagannath Temple and the Administrator himself advised the parties to approach the Civil Court, the Civil Suit is maintainable. It is further argued that the Administrator himself has referred this case to the Civil Court. He is not a necessary party nor any relief has been claimed against him. Thus, the learned counsel for the respondents submitted that the appeal is without any merit and the same be dismissed.

17. The most important question in this case is, whether there was a valid custom of transferring Sevapalis of Goddess Bimala amongest the Sebayats for pecuniary considerations. Before holding that there was a custom, the Court must be satisfied about the four requirements; (i) it must be immemorial; (ii) it must be reasonable, (iii) it must have continued without interruption since its origin (iv) it must be certain in respect of its nature in general as well as in respect of the locality, where it is alleged to obtain and the persons whom it is alleged to effect. Additionally, such custom should not offend public policy.

18. Admittedly, none of the statutes prohibits such alienations. However,

learned counsel for the appellants relied upon the reported cases of ***Kali Kinkor Ganguly v. Panna Banerjee and others,*** AIR 1974 S.C. 1932; ***Nemai Chakrabarty v. Banshidhar Chakravarty and others,*** AIR 1974 Calcutta 333; ***Biswanath Chowdhury and others v. Shyam Sundar Chowdhury and after him Narayan Chowdhury and others,*** 75 (1993) C.L.T. 637 and ***Shri Jagannath Temple Management Committee, Puri v. Narayana Mohapatra***, 96 (2003) C.L.T. 29 and argued that the Sebait rights cannot be transferred. Learned counsel for the respondents, on the other hand contended that such rules have certain exceptions as indicated in ***Kali Kinkor Ganguly****'s case (supra).*

Whenever a religious institution is founded, the founder becomes the Sebait of the Deity and the Sebaitship vests in him until the same is disposed of by any arrangement made by the founder by which a different mode of devolution of the said right is possible. If the sebatiship remains undisposed of, it is heritable like any other property and descends to his heirs and successors in due course. The right of appointing shebaits or directing a different mode of devolution of the sebaitship is limited to founder only and is not available to be exercised either by the sebaits or their successors. In this case, the Puri Gajapati has founded the temple and has created the sebaiti rights and obligations. Normally, the arrangement made by the Gajapati shall follow, but it appears that in recent times, the Hindu Law of religious endowment has recognised certain exceptions to the same. In order words, it has been recognised that in certain circumstances, sebaiti rights can be transferred. The Hon'ble Supreme Court in ***Kali Kinkor Ganguly****'s case (supra)* has relied upon the Tagore Law Lectures delivered by Dr. B.K.Mukherjea, which is published by the Hindu Law of Religious and Charitable Trusts First Edition. The Supreme Court took note of the fact that although sebait right is heritable like any other property, it lacks the other incident of proprietary right viz. capacity of being freely transferred by the person in whom it is vested. The reason is that the personal proprietary interest, which the sebait has got is ancillary to and inseparable from his duties as a ministrant of the deity, and a manager of its temporalities. As the personal interest cannot be detached from the duties the transfer of sebaitship would mean a delegation of the duties of the transferor which would not only be contrary to the express intentions of the founder but would contravene the policy of law. A transfer of shebaitship or for the matter of that of any religious office has nowhere been countenanced by Hindu Lawyers.

19. The Supreme Court further observed at paragraph 17 at page no. 1935 that the rule against alienation of shebaiti right has been relaxed by reason of certain special circumstances. These are classified by Dr. B.K.Mukherjea as follows:

> "The first case is where transfer is not for any pecuniary benefit and the transferee is the next heir of the transferor or stands in the line of succession of shebaits and suffers from no disqualification regarding the performance of the duties. Second, when the transfer is made in the interests of the deity itself and to meet some pressing necessity. Third, when a valid custom is proved sanctioning alienation of shebaiti right within a limited circle of purchasers who are actual and potential shebaits of the deity or otherwise connected with the family."

The ratio decided in this case has been relied upon by the division Bench of this court in the case of ***Biswanath Chowdhury and others v. Shyam Sundar Chowdhury and after him Narayan Chowdhury and others*** (supra).

20. The learned Addl. Munsif on remand has come to a finding that there was prevailing practice and custom of transfer of Sevapalis in the temple of Goddes Bimala and such practice was existing since long. The findings do not reveal that such custom is prevalent from time immemorial. There is also no clear cut finding that such custom is being followed continuously since its inception. However, such custom appears to be certain with regard to the persons who can sell and purchase such Sevapalis.

21. The Division Bench of this Court in ***Biswanath Chowdhury***'s case (supra) has held that the scope of this exception is limited in the sense that the custom of alienation of Sebait right should be proved to be reasonable and not opposed to public policy. There are, however, authorities which have taken the view that the alienation of Sebayati right for consideration amounts to traffic of relegious office, and therefore, against the pulbic policy and that cannot be sustained even several such instances are proved. The Division Bench of this Court in an earlier decision in ***Bairagi Das v Sri Dandas Mohapurus and others***, 31(1965) C.L.T. 533 also expressed similar view, which has been quoted with approval by the Division Bench in ***Biswanath Chowdhury***'s case.

22. Having given anxious thought to the facts of the case, this Court is of the opinion that there is no material on record to come to a conclusion that the custom of alienation of Sebayati right amongst the Sebayats for pecuniary consideration is continuous and uninterrupted from time immemorial though there are several instances of such transfers between the Sevayats.

23. Sebayati rights are in fact obligations and duties. Sebayats are given the duty of performing Sevapuja, in return they are given certain benefits like share in the offerings and Bhoga. The performance of Sevapuja is an obligation, whereas the right to share in the offering is the right of the Sebait. The obligations and duties are sacrosant in the sense that they are given

such duties by the founder of the temple because of the Sevayat's special means of knowledge or training or expertise and belonging to a particular community. Thus, any transfer of Sevayat rights is opposed to public policy and that cannot be accepted by the Court. However, transfer of Sebait rights through Sanad issued by the Raja of Puri is not against such public policy. Those transfers are valid transfers. To that extent, the findings of the learned Addl. Munisif and the judgment of the appellate court are incorrect.

24. Sri Bijan Ray, learned Senior Advocate has placed emphasis on the contention that the Civil Court has no jurisdiction to entertain a suit of this nature. First it is contended by quoting the case of ***Sri Lachu Das and others v. Sri Jagannath Temple Managing Committee, Puri,*** 34 (1968) C.L.T. 580 that the Record of Rights prepared under the Jagannath Temple Act and the Puri Sri Jagannath Temple (Administration) Act, 1952 cannot be questioned in any Civil court. However, it is seen that the petitioner has not challenged the preparation of Record of Rights. Rather, as dispute arose between the Sebaits regarding Sebapalis, the matter was referred to the Administrator of the Puri Temple who directed them to approach the Civil Court. In this background, the case has to be examined.

25. Section 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as "Code") provides that the Courts shall, subject to the provisions therein contained in the Code, have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In Explanation I, it has been provided that a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. Explanation II provides that for the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place. This provision was taken note of by the Full Bench in ***Mangulu Jal and others v. Bhagaban Rai and others***, 41(1975) C.L.T. 526 (F.B.). The Full Bench of this Court has held that the ouster of jurisdiction of the Civil Court is not readily inferable. The jurisdiction of the Civil Court to decide an issue is excluded only when it is barred either expressly or by necessary implications by virtue of provisions of a statute.

26. In this view of the settled law, it is necessary to examine the statute governing administration of Sri Jagannath Temple to decide whether such statutes bar the jurisdiction of the Civil Court to entertain a suit of this nature. The Puri Shri Jagannath Temple (Administration) Act, 1952 (hereinafter referred to as the "Act of 1952") has been enacted to provide for the administration of Puri Shri Jagannath Temple, preventing mismanagement of the temple and its endowments by consolidation of the rights and duties of Sevaks, Pujaris and such other persons connected with the Seva Puja and

management thereof. Section 3 of the Act provides for appointment of Special Officer. Under sub-section (1) it is provided that the State Government may, by notification, appoint a Special Officer with prescribed qualifications and professing the Hindu religion for the preparation of a record comprised in such parts and containing such forms as may be prescribed consolidating the rights and duties of the different Sevaks and Pujaris and such other persons connected with the Seva, Puja or management of the Temple and its endowments and may appoint one or more officers with prescribed qualifications to assist him for the purpose. Section 4 provides for powers of the Special Officer. Section 5 provides for publication of record of rights. Section 6 provides for hearing of objections of any person aggrieved by any entry in the record or a part thereof. Under sub-section (1) of Section 6, 1952 Act further provides that any such aggrieved person may within the period prescribed prefer objections before the District Judge exercising jurisdiction in the district of Puri.

27. Shri Jagannath Temple Act, 1955 was enacted to provide for better administration and governance of Shri Jagannath Temple at Puri and its endowments. Section 3 of the 1955 Act provides that the Puri Shri Jagannath Temple (Administration) Act, 1952 shall be deemed to be a part of the 1955 Act and all or any of the powers and the functions of the State Government under the said Act shall be exercisable by the Committee under this Act from such date or dates as the State Government may by notification direct. The Committee has been defined at Section 4 (1) (a). It means, the Shri Jagannath Temple Managing Committee constituted under the 1955 Act. The Act has provided for the powers and duties of the Committee as well as its constituent etc. Section 15-B provides for revision of record of rights and appeal against order for revision. Sub-section (1) provides that the Administrator may on an application made in that behalf by any Sevak, other than the Raja of Puri, and after making an enquiry in the prescribed manner, make an order effecting any change in any entry made in the record-of rights on all or any of the following grounds, namely: (a) that such change is necessary in view of any new materials which have come to notice; (b) that any entry therein bears no relationship to the existing facts, or (c) that any such entry is incomplete or incorrect; provided that no order under this sub-section shall be made without giving the parties concerned a reasonable opportunity of being heard.

Sub-section (2) of Section 15-B provides that any person aggrieved by an order sub-section (1) may, within thirty days from the date of communication of the order to him, prefer an appeal before the State Government and thereupon the state Government may, after making such enquiry as may be necessary and after giving the parties concerned an opportunity of being heard, make such order as they deem fit. Sub-section

(3) provides that no order under sub-section (1) or under sub-section (2) shall debar any person aggrieved thereby from establishing his right, if any, in a Court of competent jurisdiction but no court shall have power to stay the operation of the said order pending the final disposal of the proceedings before such court or of any appeal or application arising therefrom or in relation thereto.

28. Thus, it is clear from the aforesaid provisions that the Record of Rights prepared by the Special Officer attains finality and it can only be challenged before the District Judge exercising jurisdiction with respect to Puri district. The Record of Rights can be revised by the Administration under section 15-B, provided either of the three points is satisfied. Sub-section (3) very clearly provides that no order made under sub-section (1) or sub-section (2) shall debar any person aggrieved thereby from establishing his right, if any, in a court of competent jurisdiction. Thus, it is very clear that even orders passed by the Administrator, which is appealable before the State "Government can be challenged in any court of competent jurisdiction. However, this case does not relate to revision of the Record of Rights. Rather, this is a case where there are some disputes between the Sebaits with respect to Shebapalis, for which a case was initiated before the administrator of the Lord Jagannath Temple. The entire case record has been exhibited as Ext.23. It was registered as Misc. Case No.27 of 1968. Order dated 24.09.1970 passed in that Misc. Case is quoted below for proper appreciation:

> "This is a dispute on account of somedays of Seva in the Bimala Devi Temple of Shri Jagannath Temple, Puri. The petition was filed by Sri Bhubani Panda against Basudev Panda and others.
>
> Both the parties have adduced evidence both oral and documentary. The evidences have been gone through. I am convinced that the dispute is purely Civil in nature and their relative rights should be determined through a civil court. The parties are therefore advised to approach civil court. Pending decision of the civil court the Seva on the disputed dates in the Bimala Devi Temple is hereby attached and the Temple Commander is directed to arrange the Seva through a third person on the disputed dates and after giving the usual share out of the income of these dates to the third party the balance will be deposited in the Temple fund till either the parties produce decision of the civil court regarding their relative rights."

29. Thus, it is clear from the discussion in the preceding paragraphs that the Civil Courts do not lack jurisdiction to decide any dispute regarding the

sebait rights. In fact, the Administrator has advised the parties to approach this Civil Court. This Court is in opinion that the Civil Court has jurisdiction to decide the case.

30. Learned counsel for the appellants has also contended that the suit is barred for non-joinder of necessary parties. It is contended that the Administrator of the Puri Jagannath Temple is a necessary party. However, it is seen that the plaintiffs have not claimed any relief against the Administrator of the Jagannath Temple. Secondly, the Administrator discharging a quashi-judicial function has advised the parties to approach the Civil Court for appropriate decision regarding the disputed facts. He also made an interim arrangement of the disputed Sevapalis, which is to continue till either of the parties produce the decision of the Civil Court regarding their relevant rights. So any order passed by the Civil Court, who has jurisdiction to decide the suit, shall have a binding effect of the Administrator of Shri Jagannath Temple, Puri. Therefore, the suti is not bad for non-joinder of necessary parties.

31. The appellants have not challenged the factual and concurrent findings that the Jaisinghghara became extinct. There is also no reason to differ with that concurrent finding of facts. The appellants also do not dispute in the Second Appeal that as per the compromise in O.S. No. 427 of 1932, six days of Sevapalis were transferred to the plaintiffs' ancestors. It is also the concurrent findings of facts that as per Exts. 13 and 14, the Sanad, issued by the Raja of Puri, twelve days of Sevapalis were transferred to the ancestors of the plaintiffs. Similarly as per Ext.16, the Sanad issued by the Raja, six days of Sevapali to Jaisinghghar is transferred in favour of the plaintiffs' ancestors. The sum total of such valid transfers of Sevapalis through Sanad is twenty-four days. The plaintifs claim that they have right to perform 48 days of Sevapalis which they have inherited from the ancestors. Thus, they have right to perform Sevapalis for 72 days. To that extent, the judgment and decree passed by the learned trial court and confirmed by the learned first Appellate Court are modified.

Hence, the appeal is allowed in part but without cost.

Appeal allowed in part.

2010 (II) ILR – CUT- 391

C.R.DASH, J.

CRL. REV. NO.412 OF 2002 (Decided on 07.07.2010)

BIJAY NANDA @ BIJAYA KUMAR NANDA …….. Petitioner.

.Vrs.

STATE OF ORISSA. …... …. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.318.

Conviction of petitioner by the Courts below – Petitioner is deaf and dumb – No enquiry conducted by the Courts below to find out whether the petitioner is in a position to understand the proceedings of the Court – Nothing on record to show that in what manner the petitioner was made to understand the questions put to him U/s.313 Cr.P.C. – Held, the petitioner is prejudiced by the manner in which the entire trial has been conducted – Impugned judgments and orders of sentence are set aside. (Para 8&9)

Case law Referred to:-

AIR 1957 Kerala 9 : (Padmnabhan Nair Narayanan Nair, State -V- N.Maktumsab Jatgat AIR 1960 Mysore 315, AIR 1960 Madras in Re: Oomayan).

For Petitioner - M/s. B.S.Mishra-1, K.N.Pattnaik, M.Mishra, P.K.Mohanty, P.R.Mishra, S.Das, S.K.Nanda & V.K.Panigrahi.

For Opp.Party - Addl. Standing Counsel.

C.R. DASH, J. This revision arises out of appellate judgment of the petitioner's conviction under Section 324, I.P.C. and consequent sentence recorded thereunder obliging the petitioner to pay a fine of Rs.600/- (six hundred), in default to suffer S.I. for one month.

The petitioner, in this revision, has challenged the aforesaid judgment of conviction and order of sentence.

2. The petitioner and his wife are admittedly deaf and dumb. The occurrence in this case happened on 31.08.1991. The petitioner is alleged to have assaulted the informant (P.W.4), her husband (P.W.1) and P.W.1's sister (not examined) by means of a 'kati' / knife. In the evening of 30.08.1991 the informant (P.W.4) and her husband (P.W.1) were absent in their house located in the neighbourhood of the petitioner in HAL Township, Sunabeda. At about 6 p.m. on their return to the house they learnt from the

sister of P.W.1 that in their absence the petitioner assaulted her (P.W.1's sister) with slaps and fist blows. In the early morning of the next day, i.e., 31.08.1991, the informant (P.W.4) confronted the matter to the wife of the present petitioner. As the petitioner and his wife are admittedly deaf and dumb, P.W.4 made such confrontation by gesture. The petitioner, who was present there at that time, got annoyed, chased the informant, assaulted her by 'kati' / knife and he also assaulted the informant's husband P.W.1 and his (P.W.1's) sister by the same weapon of offence causing thereby bleeding injuries. On the next day, i.e., 01.09.1991, F.I.R. was lodged by the informant (P.W.4). On completion of the investigation, the I.O. (not examined) filed charge-sheet against the petitioner for offence punishable under Sections 326/324, I.P.C. On consideration of the materials on record, learned Court below confined the conviction of the petitioner to one under Section 324, I.P.C. and sentenced him to pay a fine of Rs.600/- in default to suffer S.I. for one month. He acquitted the petitioner for the offence under Section 326, I.P.C. The petitioner preferred appeal before the learned Sessions Judge. Learned Ad hoc Addl. Sessions Judge, Jeypore on transfer of the matter to him, heard the parties, confirmed the conviction and sentence recorded under Section 324, I.P.C. and dismissed the appeal.

3. Learned counsel for the petitioner assails the impugned judgment on different grounds, both on merit and on procedural lapses. His main ground of challenge is however non-compliance of Section 318, Cr.P.C., as the petitioner is admittedly deaf and dumb and he was not in a position to understand the proceeding. Learned Addl. Govt. Advocate, however, supports the impugned judgment.

4. Section 318, Cr.P.C. reads thus –

> "If the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit."

(Corresponds to Section 341 of old Cr.P.C.)

The Section, as the language in clear terms suggests, applies to persons, who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause. The reference to the High Court under the Section would only arise, where after necessary enquiries and endeavour to find out if the accused can be made to understand the proceedings, the Court concerned comes to

a definite conclusion that the accused does not understand the proceedings. The stage of the reference would come after the trial is over culminating in conviction of an accused referred to in the Section. If, however, the Court concerned on proper enquiry finds that it is possible for the accused to be made to understand the proceedings, the trial has to proceed in the ordinary way and the Court, if the accused is found guilty, convict him and pass sentence without making a reference to the High Court under the Section. (See the case Re: Beda, AIR 1970 Orissa 3).

5. In the enquiry conducted under the section, the Court concerned, if so required may get a medical practitioner examined to find out the physical deficiencies of the accused and to further find out if the accused can be made to understand the proceedings. Friends, and relatives of the accused may be examined to find out as to how the accused usually communicates, and if required, their assistance may be taken during trial to make the accused understand the proceedings, if it is possible for them (friends and relatives) to interpret the proceedings of the Court by means of signs and gestures to the accused. Without such enquiry and endeavour the Court concerned cannot make a reference to the High Court under Section 318 Cr.P.C. routinely on the ground that the accused is deaf and dumb (See AIR 1957 Kerala 9 in re: Padmnabhan Nair Narayanan Nair, State Vs. N. Maktumsab Jatgat AIR 1960 Mysore 315, AIR 1960 Madras in Re: Oomayan).

6. On the basis of rival contentions of the parties, an important question arises as to whether it is the duty of the Court to see if the accused being deaf and dumb can be made to understand the proceedings or a duty is cast on the accused to apply before the Court concerned to the effect that owing to his physical deficiencies or otherwise he is not in a position to understand the proceedings. The answer to the question depends on the knowledge on the part of the Court concerned about the physical deficiencies of the accused or otherwise as referred to in Section 318 Cr.P.C. If the Court concerned, on the basis of the knowledge and information derived from records is of the opinion that the accused brought before it is deaf and dumb, it has to proceed for enquiry in the manner discussed supra to find out whether the accused can be made to understand the proceedings. If, on the other hand, there is nothing on record about deafness and dumbness of the accused concerned and the Court concerned is set to proceed in ordinary manner, a duty is cast on the accused concerned and the prosecution to bring it to the notice of the Court that the accused is deaf and dumb and he is not in a position to understand the proceedings. In other words, the Court concerned may act suo motu on the basis of materials on record or it may act on the basis of motion by the accused concerned or the prosecution.

7. Onerous duty being cast on a Court to do justice between the parties, it becomes imperative on the part of a Court to see that any person brought before it, is in a position to understand the proceedings of the Court. The deficiencies on the part of an accused may be physical or it may be his inability to understand the language of the Court. Whatever be the deficiencies, the Court has a duty at every steps of the enquiry and trial to make the accused understand the proceedings. The scheme of the Criminal Procedure Code shows that the aforesaid duties on the part of a Court is jealously guarded by different procedures enshrined in the Code. If the Court fails in it's duty in this regard, the accused concerned may be deprived of the benefit of principles of natural justice as enshrined in different provisions of the Code. Needless to state here that unless an accused is in a position to understand the proceedings, it cannot be expected of him to put proper defence.

8. In the present case, the petitioner is admittedly deaf and dumb. Such a fact finds mention in the judgments of both the Courts below. The Court is therefore, cognizant of such a fact from the stage of very initiation of the proceeding. In spite of such a fact, no enquiry has been conducted by learned Court below to find out whether the petitioner is in a position to understand the proceedings of the Court. Learned Court below in ordinary manner proceeded to conclude the trial without bothering at any stage about the physical deficiency of the petitioner. I am constrained to make such an observation inasmuch as learned Court below on the bottom of each deposition of prosecution witnesses has appended the certificate to the effect that the deposition was read over to the accused in his language which he admitted to be true. Such a conduct by the learned Court below makes it abundantly clear that learned Court below has proceeded routinely observing ordinary procedures meant for normal accused persons. In course of examination of the petitioner under Section 313, Cr.P.C. learned Court below has tried to satisfy the form and procedures in the same fashion without being alive to the onerous responsibility cast on it. The petitioner was examined under Section 313, Cr.P.C. on 05.01.2000. The accused statement recorded under Section 313, Cr.P.C. shows that at first the learned Magistrate has recorded the answer of the petitioner to each of the questions as 'Michha' (falsehood). Subsequently, on being conscious of the fact that the petitioner is deaf and dumb, she has scored through the aforesaid answers written as 'Michha' in vernacular language and has substituted the answers by writing in English "he posed saying no, (since dumb)". While correcting her own mistakes in recording the accused statement, learned Magistrate has forgotten to bear in mind that the petitioner is deaf also. There is nothing on record (either in the order-sheet or in the accused statement) to show in what manner the petitioner was

made to understand the questions put to him under Section 313, Cr.P.C., he being deaf and dumb. Such conduct by the learned Magistrate is indicative of the fact that provisions of Section 313, Cr.P.C. has not at all been complied with in the present case.

9. The discussion supra makes it clear that learned Magistrate has committed illegality in the decision making process itself and the petitioner is prejudiced by the manner in which the entire trial has been conducted. The impugned judgments become, therefore, vulnerable in revision. Taking into consideration the facts and circumstances as discussed supra the impugned judgments and orders of sentence are set aside.

The Criminal Revision is accordingly allowed.

Revision allowed.