2013 (II) ILR - CUT- 517

SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

R. M. LODHA, J. & SUDHANSU JYOTI MUKHOPADHAYA, J.

Civil Appeal Nos. 4561, 4562 & 4563 of 2013 (Dt.10.05.2013)
(Arising out of SLP(C) Nos. 31593, 31957 & 32040 of 2010)

GEOMIN MINERALS & MARKETING (P) LTD. & ANR. ……..Appellants

.Vrs.

STATE OF ORISSA & ORS. ……..Respondents

MINES AND MINERALS (D & R) ACT, 1957- Ss. 5 & 11

Applications for grant of Prospecting licence and Mining lease – Preferential right of an applicant – Question is whether pre amended or amended section 11 of the Act, 1957 is applicable – State Government cannot grant reconnaissance permit, prospective licence or mining lease to any person without obtaining previous approval of the Central Government U/s 5 of the act, 1957 – Until Central Government passed an order either granting or refusing approval U/s 5 (1) and Section 11 (5) of the Act, it would not be permissible for any person to file writ petition and any such petition if filed would be premature – Under the amended proviso to Section 11 (2) even those applications received prior to the publication but had not been disposed of, shall be deemed to have been received on the same day for the purpose of assigning priority under the said sub-section.

Held, it is well settled that no applicant has statutory or fundamental right to obtain prospecting licence or mining lease – High Court committed grave error of law in deciding the case on merits and deciding the question of legality of the recommendation made by the State Government – It was not for the High Court to sit in appeal to decide who amongst all is more meritorious and is entitled for preferential right – The impugned judgment passed by the Division Bench of the Orissa High Court (Reported in 2010(II) ILR- CUT- 251) is set aside – Matter remitted to the Central Government to consider the question of approval U/s 5 (1) taking into consideration the recommendation made by the State Government.

(Paras 34, 35, 36)

Case Laws Referred to

1. (1955) AIR SC-661 : (Bengal Immunity Co. Ltd.-V-State of Bihar)
2. (2010) 13 SCC 1 : (Sandur Manganese & Iron Ores Ltd.-V-State of Karnataka)
3. (1981) 2 SCC 205 : (State of Tamilnadu-V-Hind Stone)
4. (2012) 11 SCC 1 : (Monnet Ispat and Energy Ltd.-V-Union of India & Ors.)

SUDHANSU JYOTI MUKHOPADHAYA, J.

Leave Granted.

2. These appeals by special leave have been preferred against the order of Division Bench of Orissa High Court, Cuttack dated 14th July, 2010 in W.P.(C) No.23 of 2009 whereby the writ petition preferred by Geomin Minerals & Marketing (P) Ltd. was allowed and the recommendation made by the State Government dated 9th January, 2009 in favour of POSCO India (P) Ltd. was set aside with a direction to the State Government to take a fresh decision in terms of order dated 27th September, 2007 passed by the Revisional Authority in Revision Application File No.22 (41)/2007-RC-1 by giving the Geomin Minerals & Marketing (P) Ltd. the preferential right of consideration. The Division Bench further observed that in the event the State Government decides to invoke the provisions of Section 11(5) of the Mines and Minerals (Development and Regulation Act, 1957 (hereafter referred to as the "MM(D&R) Act") "Special reasons" for the same in terms of guidelines dated 24th June, 2009 issued by the Ministry of Mines, Government of India be recorded in writing. The state Government was directed to complete the entire exercise within specified period.

3. The factual matrix of the case is as follows :

The availability of two sets of land for fresh grant of lease was notified by the State of Orissa vide Notification dated 20th August, 1991 issued under Rule 59(1) of the Mineral Concession Rules, 1960. The first set comprised of 85.60 acres of land in Village Kansar and Village Gokhurang of Balangir District which had earlier been granted on lease in favour of Shri S.K. Padhi and Sri B.K. Agarwal. These leases were subsequently surrendered to the State Government and were, therefore, available for re-grant. The State Government vide notification dated 20th August, 1991 notified the availability w.e.f 24th October, 1991. The second set of land comprised of 183,06 square miles in Horomoto Guali Block, Malangtoli Block, Khandadhar-Pahar in Block Keonjhar and Sundargarh districts, Taldihi Toda Block, Sundargarh District and Dubna Block I and III which was

declared to reserved for public sector corporations vide Notification dated 05.06.1962 and 06.12.1962. The State Government decided to de-reserve the said mineral bearing areas and the availability of the said area was notified vide Notification dated 23rd August, 1991. The date of availability for re-grant was on and from 29th October, 1991. The dispute in the case of Geomin's SLP No.31593/2010 is regarding 186 hectares of land located in village Rantha District Sundergarh. Although, the recommendation made in favour of POSCO covers and area of 2500 hectares, thus Geomin's interest is limited to a fraction of the land recommended for POSCO.

4. POSCO had made an application for prospecting licence for an area of 6828.54 hectares. Initially a recommendation was made to the Central Government in favour of POSCO for an area of 6204.352 hectares by the State Government on 19.12.2006. The recommendation was challenged by Kudremukh Iron Ore Company (hereinafter referred to as the "Kudremukh Company") by means of a writ petition being W.P. No. 1775 of 2007. The High Court refrained from exercising its discretion since the matter was pending before the Central Government and directed that representation of Kudremukh Company may be treated as revisional application. The recommendation of the State Government was set aside vide order dated 27th September, 2007 by the Revisional Authority as all mineral concession applications were not considered simultaneously and no orders were passed on those applications. It was directed that all pending applications be considered simultaneously and inter se merit be examined and then order be passed as per law after affording an opportunity of hearing to all the applicants. Earlier the Central Government by its letter dated 16.07.2007 had informed the State Government that the recommendation of favour of POSCO could not be processed as the process of hearing in respect of 203 applicants was still not complete. It was noted that the recommendation in favour of POSCO was for an area which was partially notified and partially non-notified and, hence, the applications should be considered accordingly as per law.

5. The Order passed by the Revisional Authority dated 27th September, 2007 was challenged by one 'Dhananjay Kumar Dagara' before the Orissa High Court in a Writ Petition being W.P.(C) No. 15315 of 2007. It was challenged on the ground that the directions for simultaneous consideration of all applications affects the preferential rights for simultaneous consideration of all applications affects the preferential rights of the first day applicants under Section 11(2) of the MM(D&R) Act. In the said Writ Petition No. 15315 of 2007, Gemin Minerals & Marketing (P) Ltd. filed an application for intervention. The intervention application was dismissed by the Orissa

High Court on 22nd February, 2008 with the observation that Geomin Minerals & Marketing (P) Ltd. may take independent steps in respect of its grievance. On 2nd May 2008 the Orissa High Court by judgement in W.P(C) No. 15315 of 2007 held that there was no preferential right for the applicant. The High Court thus dismissed the writ petition and upheld the order of the Revisional Authority dated 27th September, 2007.

6. Geomin Minearals & Marketing (P) Ltd. filed another Writ Petition being W.P(C) No. 6484 of 2008 praying expeditious disposal of all pending applications for mineral concessions filed by it, based on its right arising from Rule 63-A of the MC Rules. The said writ petition was disposed of on 14th July, 2008 by the Orissa High Court with a direction to the State Government to consider the pending PL/RP applications of Geomin Minearals & Marketing (P) Ltd. preferably within a period of six months without discrimination and in accordance with law.

7. In the meantime, during the pendency of the applications preferred by different persons including Geomin Minerals & Marketing (P) Ltd. for Preferential Licence ('PL' for short) and Mining Licence ('ML' for short), on 20th December, 1999 amendments carried out in Section 11 of MM(D&R) Act became effective. By the amending Act, the first proviso to the Section 11(2) of MM(D&R) Act was inserted as under:

> "11. Preferential right of certain persons.
>
> (2)……
>
> 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 for the purposes of assigning priority under this sub-section.''

The non obstante clause i.e Sub-section (4) of Section 11 was re-numbered as Sub-section (5) and a new Sub-section (4) was introduced, which reads as under:-

> "11.(4) Subject to the provisons of sub-section (1) where the State Government notified 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 in to 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 fir."

8. Pursuant to the order of the Revisional Authority dated 27th Septermber, 2007 passed in the case of Kudremukh Company, the State Government issued a notice to Geomin Minearals & Marketing (P) Ltd. under Rule 12(1) of the MC Rules giving them opportunity of being heard. The officials of the Geomin Minearals & Marketing (P) Ltd. attended the hearing. Thereafter, by a minutes of the meeting, inter se merits of all applicants was prepared by the State of Orissa on 17th October, 2008, but no recommendation was made. Therefore, Geomin Minerals & Marketing (P) Ltd. filed a Writ Petition being W.P(C) No. 23 of 2009 inter alia with following prayer:

> "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."

The Writ petition was filed on 5th January, 2009 by Geomin Minearals & Marketing (P) Ltd. and just after few days on 9th January, 2009,k the State Government made impugned recommendation to the Central Government in favour of POSCO under Section 11(3) and (5) of the MM(D&R) Act. The said recommendation was challenged by Geomin Minerals & Marketing (P) Ltd. by filing a petition for amendment.

9. On hearing the parties, the High Court framed the following issues 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 ?

10. In the present case, the second issue is important as the respondents to writ petitions raised the question of maintainability on one of the grounds that the application was pre-mature. The said issue was answered by the High Court in a cryptic manner without any reason, as apparent from its finding which is produced below.

"*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)."

Issue Nos. 6 & 7 relate to preferential right of Geomin Minerals & Marketing (P) Ltd. Under Section 11 of the MM (D&R) Act and validity of

recommendation made by the State Government under Section 11(5) of the said Act in favour of POSCO. Both the issues were determined by the High Court in favour of Geomin Minerals & Marketing (P) Ltd., and against the POSCO. Referring to Section 11(2), (3) and (4) the High Court held that the Geomin Minerals & Marketing (P) Ltd. has preferential right for grant of licence and lease and that the recommendation made by the State Government under Section 11(5) in favour of POSCO is invalid.

11. The judgment aforesaid has been challenged by Geomin Minerals & Marketing (P) Ltd. by filing an appeal as no specific direction has been given for issuance of licence in its favour. The POSCO and the Government of Orissa have also challenged the judgment by filing their respective appeals. No separate appeal has been preferred by Kudremukh Company or Jindal steel and Power Ltd. or any other, but some of them have filed intervention applications and petitions for impleadment. Accordingly, at the time of hearing of the appeals, respondents and interveners were heard and, therefore, we allow the applications for interventional and impleadment.

12. The learned Counsel for the parties argued in detail for few days but in view of the nature of order we intend to pass it is not necessary to discuss each and every submission except the relevant one, as recorded hereunder:

Stand of POSCO India Pvt. Ltd.

13. Learned consul Mr. K.K. Venugopal appearing on behalf of POSCO India Pvt. Ltd. made the following submissions:

13.1 The recommendation in favour of POSCO India has been made in accordance with the provisions contained in Section 11 (2), (3) and (5) of MM(D&R) Act and other relevant provisions of Mineral Concession Rules, 1960.

13.2 The POSCO was found to be the most meritorious applicant and “hence the State Government by exercising its power under Section 11(5) of MM(D&R) Act, 1957 has decided to recommend an extent of 2500 Hectares to Government of India for prior approval for grant of PL in their favour.

13.3 In the present case, there are at least two reasons as to why there cannot be any claim of priority on the part of Geomin. When the area in question was released from reservation and de-notified on 23.08.1991, no outside date before which applications had to be made had been fixed. The Government of India (Revisional Authority), in exercise of its revisional

jurisdiction, vide order 27.9.2007, had directed the State Government to consider all the pending applications simultaneously. This order was challenged by one Dhananjay Kumar Dagara and the Writ petition was dismissed by the High Court. The decision of the Central Government thus became final. If the applications were to be considered simultaneously, which means as if they were received on the same day, the proviso to Section 11(2) of the Act would apply. Indubitably, in any comparison based on the factors set out in the tabulated statements, POSCO would be far ahead of the other applicants, based on its experience, investment, technology used, integrated project, captive use of the iron ore, total employment (direct and direct) and, above all, public interest. Thus, Section 11(3) of the Act wholly applies in POSCO's Favour.

13.4 Apart from Section 11(3), The State Government has made the recommendation also under Section 11(5) for the simple reason that POSCO stood head and shoulders above the other applicants, in respect of public interest. If the gap between POSCO and the other applicants, even in regard to the very considerations specified in Section 11(3) is so vast, then, in such a case, the very same factors, qualitatively and quantitatively, would attract Section 11(5) as well. In any event, in this case, there is one factor which beyond doubt attracts Section 11(5) as well. In any event, in this case, there is one factor which beyond doubt attracts Section 11(5), and that is the sophisticated and advanced finex technology, which not only reduces pollution but is also able to utilize low grade Ore to make steel. Section 11(5) would clearly be attracted on this ground alone, and, in whatever manner one approaches the issue, POSCO has rightly been recommended by the State Government for grant of the Prospecting Licence.

13.5 The recommendation dated 9.1.2009 made in favour of POSCO falls within the parameters of Sections 11(3) and 11(5) of the MM(D&R) Act. The State Government followed the direction of the Revisional Authority (Central Government) dated 27.9.2007, which was upheld by the High Court and had become final, and simultaneously considered the inter se merits of all the applicants whose PL applications were pending disposal before the State Government. It was after a rigorous exercise of calling all the applicants for personal hearing and to make a presentation that the State Government took the considered view to hold that POSCO was the most meritorious applicant.

13.6 Once there was a direction of the Revisional Authority, which was affirmed by the Orissa High Court in the Dagara case (which order attained finality), that the State Government was required to consider all pending applications simultaneously and come to a decision after evaluating the inter

se merits of all the applicants. An inter se comparison of multiple applicants for grant of a mineral concession is envisaged only under Section 11(3) of the MM(D&R) Act. This being so, in any inter se comparison (whether pursuant to Section 11(2) or not), the criteria on the basis of which a decision must be taken by the State Government is what it is specified in Section 11(3).

13.7 The High Court has failed to point out as to what would amount to "special reasons". The Impugned Judgment also does not appreciate that the recommendation in favour of POSCO has been made by the State Government keeping in mind the larger interests of the State and its citizens. The basis of this decision was the economic and environmental benefit accruing to the State from POSCO's mining methods.

13.8 POSCO is a wholly owned subsidiary of M/s POSCO, which is a Korean company having more than 25 years of experience in developing minerals in various countries in the world and is the world's second largest steel maker by market value and Asia's most profitable steel maker. M/s POSCO's operating profit margin is the top in the World Steel Industry, and it is the most competitive steel maker as per 2010 World Steel Dynamics. According to 2010 World Economic Forum M/s POSCO is one among the 100 companies to last the next 100 years. Geomin is a company which was incorporated in September, 1991, with an authorized share capital of Rs. 1,00,000/- (Rupees one lakh), obviously only with a view to take advantage of the notification dated 23.8.1991 issued by the State Government. Geomin did not have any experience of having undertaken any mining activities, and, therefore, cannot be said to have possessed any special knowledge or experience in mining operations. Further, sometime in the year 2007, control of Geomin, through acquisition of a majority of the share of the company, was taken over by one 'Navayuga Steel Limited'. In the submission of the appellant, the experience and/or qualifications of 'Navayuga Steel Limited' cannot be used in support of Geomin's application made in the year 1991, since the merit of an applicant for a prospecting licence/mining lease would have to be judged as one the date of the application itself, as otherwise the process of selection would be rendered arbitrary if an applicant is permitted to add to its qualifications after knowing the relative qualifications of other applicants. If this is permitted, such a process of adding to one's qualification would become never-ending. In any event, if in substance and in effect a totally new entity has been permitted to be brought into existence, by transfer of substantial shares to another company, the original applicant can no more claim priority of its application as its character as its character has undergone a substantial transformation.

13.9 The reliance by Kudremukh Company on Section 11(1) of the Act is wholly erroneous, as (admittedly) no reconnaissance permit was ever granted in its favour. Under Section 11(1) of the MM(D&R) Act, preference can be claimed if an applicant for the grant of a PL has already been granted a reconnaissance permit qua the said area; and the conditions prescribed in the first proviso to Section 11(1) are met. The reconnaissance work stated to have been carried out by the Department of Geology of the State Government, at Kudremukh's expense, also cannot attract Section 11(1) of the Act in its favour. Further, in any event, Kudremukh Company is bound by the aforementioned direction for simultaneous consideration of all applications given by the Central Government, as per the decision of Revisional Authority, which was upheld by the High Court.

Stand of Geomin Minerals & Marketing (P) Ltd.

14. Learned counsel for the Geomin Minerals & Marketing (P) Ltd. made the following submissions:

14.1 A preferential right in the field of mining is an important right. The preferential right conferred under un-amended Section 11 up to 1999 cannot be curtailed under amended Section 11. Since Geomin Minerals & Marketing (P) Ltd. applied on 29th October, 1991 the law that was applicable on the said date of application i.e. an amended Section 11 shall be applicable for consideration of application filed by Geomin Minerals & Marketing (P) Ltd.

14.2 On the other hand if the amended Section 11 is applied, in that event the judgment of this Court in ***Sandur Manganese & Iron Ores Limited v. State of Karnataka (2010) 13 SCC 1*** will apply. The consequence will be as follows:-

(a) Section 11 (4) of the amended Section will apply.

(b) Section 11 (5) will not be available.

(c) If amended Section 11 (4) applies, then all persons applied on 29th October, 1991 will be treated as first applicants. The choice between them will be governed by Section 11(3).

(d) Even if Section 11 (5) is applied, special reasons referred to in Section 11 (5) cannot be same that of the reasons to be recorded for the purpose of Section 11 (3).

In the present case, the exercise which State Government has done mixes up the matter under Section 11 (3) and 11 (5) for recommending the

name of M/s. POSCO India Pvt. Ltd., therefore it is contrary to the provisions of Section 11 and recommendation in favour of the POSCO India Pvt. Ltd. is not bona fide.

14.3. Amended Section 11 is prospective in nature. It is the Rule on the date of application that would be applicable and not the Rule on the date of consideration. In view of Rule 8 (C) of Mineral Concession Rules it cannot be said that Section 11 will be applicable from the date of consideration. As per the ratio of the judgment in ***Sandur Manganese & Iron Ores Limited v. State of Karnataka (2010) 13 SCC 1*** if amended Section 11 is applied then Geomin Minerals & Marketing (P) Ltd. is entitled for benefit of the aforesaid judgment.

14.4. Memorandum of Understanding or the arrangements outside the provisions of the MM(D&R) Act cannot be used to trample on the rights of prior or same day applicants. The principle is to be followed irrespective of whether the unamended or amended Section 11 is applied.

14.5 First Day Applicant enjoys and is entitled to priority over all subsequent days applications including the POSCO application which was made on 27th September,2005 i.e. after about 14 years from the date of the Geomin applications.

Stand of the State of Orissa:

15. Mr. Rakesh Dwivedi, learned senior counsel for the State of Orissa to the facts as noticed above contended as follows:

15.1. Initially a recommendation was made to the Central Government in favour of POSCO for an area of 6204.352 hectares by the State Government on 19th December, 2006. Pursuant to which the Revisional Authority after hearing the matter set aside the recommendation made in favour of POSCO and the State Government was directed vide order dated 27th September, 2007 to consider all pending applications simultaneously and to decide inter se merit and then pass an order as per law after affording an opportunity to all the applicants. Earlier the recommendation in favour of POSCO was made for an area which was partially notified and partially non-notified and other applications were not considered and hence the matter was remitted back by the Revisional Authority to the State Government.

15.2. The State Government had thereafter granted hearing to all the applicants and had considered the inter se merit of the applicants. An overall

holistic consideration and record shows that the Government had an inter se comparison of the applicants as directed by the Central Government and had also made recommendation in favour of POSCO by invoking Section 11 (5) of the MM (DR) Act, 1957.

15.3. The case of Geomin had been considered. During the hearing, Geomin stated that it is a joint venture between Navyuga Group and T. P. Minerals Group and it wanted to set up one ore based steel complex of 12 MTPA capacity but at that time their project was under consideration by the High level clearance authority. The case of Kudremukh Company based on PL No.1991 dated 17.2.2002 was considered. This company proposed to invest Rs.100 Crores in mines and Rs.5,000 Crores in industry and its plant was in Mangalore. State of Karnataka. It was proposing some plants in Sundergarh District but there was no definite proposal received by the State. Jindal Steel and Power Limited (hereinafter referred to as the 'JSPL') had submitted four PL and one ML applications. The PL applications are dated 22.2.2007. They did not submit sufficient documents as required under Rule 22 (3) (i) of MC Rules and legally accepted Geological Prospecting Report for their ML application. This company is part of Jindal Group and was operating a steel plant at Raigarh. Chhattisgarh. It was considered to be a serious contender for the applied area. There applied area was 4930.57 hectares after clubbing the four PL applications. Out of this only 90 hectares are overlapping with the PL application of POSCO. Thus, their PL applications cover an area which is overwhelmingly distinct from the area recommended for POSCO. Consequently, JSPL had not filed any Writ Petition nor had applied for impleadment before the High Court. It has chosen to move an intervention application belatedly in the SLP filed by Geomin. This application has not been allowed and it is liable to be rejected. The PL Application No.2122 dated 27.9.2005 for 6828.54 hectares filed by POSCO India was considered and they were considered to be a front runner and possessing outstanding merit in comparison to all other applications. They proposed to set up a World's first steel plant project using FINEX technology which was a next generation eco-friendly process which allows direct use of cheap iron ores fines and non-coking coal is feed stock and has consequently lower emissions as compared to blast furnace. They had assured captive consumption of the mineral at their plant at Paradip which was to be a port based steel plant. It was likely to create huge employment and generate huge revenue.

15.4. In Part-F, Summary, it has been noted that only two companies i.e. POSCO India Ltd. and Jindal Stripes have achieved the miles stones or the eligibility criteria laid down in the MOU for recommendation of raw-material

linkage to their proposed steel plant. It mentions "as far as relevant merits are concerned in terms of proposed investment, financial resources capability for scientific mining and exploration of ore, it could be safely concluded that M/s. POSCO India (P) Ltd. stands out as the most meritorious among all the MOU signed applicants and as well as other applicants as narrated above, it mentions that application of Jindal Stainless was being considered for other areas. The "conclusion" has been drawn and it has been specifically stated in sub-para (c) that Geomin Minerals and Marketing has some merit but they cannot be considered at par with POSCO India. Kudremukh Company was found to be highly meritorious but its merit was not comparitable with M/s. POSCO India taking into account the comprehensive advantage of POSCO in terms of revenue and employment generation. In sub-para (f) it was concluded that on account of the ability to carry out scientific exploration and mining, capability to mobilize adequate financial resources for investment setting up of value addition facilities including 12 MTPA steel plant based on eco-friendly and resource use efficient technology which will generate huge revenue and employment, the POSCO India deserves precedence over all other applicants and it stands out as the most meritorious.

15.5. While considering the extent of area to be recommended, it was noted that POSCO had applied for 6828.24 hectares in Kandhar region. Considering all relevant aspects the State Government decided to recommend an area of 4050 hectares only in favour of POSCO to the Government of India for prior approval for grant of PL. Expressly invoking Section 11 (5) of MMDR Act, 1957 in addition to the inter se comparison of merits, the comparative statement table prepared with the parameters under Section 11 (3) in view and with table forms parts of the minutes. The minutes recorded that applications are to be disposed of in accordance with Section 11 (2) & (3) and relevant provisions of Mineral Concession Rules. The State Government has complied with the directions of the Central Government and has applied its mind to all relevant factors and material produced by the various applicants and after making inter se comparison of minutes arrived at a conclusion that POSCO was more meritorious from the point of scientific exploration and mining, mobilization of financial resources, use of eco-friendly and resources – use efficient technology investments including the steel plant project and general of employment and revenue. In addition, the State Government has also invoked the provisions of Section 11 (5) of the Act.

15.6. Further stand of the State of Orissa is that : Geomin's application PL No.1334 dated 29/10/1991 cannot be considered to be a prior application in view of the following facts:

Geomin had made 7 PL applications for different areas to the State Government of Orissa. An area of 186 hectares in Village Rantha. District Sundargarh applied vide application No.1334 dated 29.10.1991 is overlapping. Thus, the area recommended for POSCO includes about 186 hectares of area applied for by Geomin.

15.7. The order of the High Court dated 14th July, 2008 had been passed in the context of PL Application No.1338 in Malantoli Block. This has nothing to do with the area recommended for POSCO.

After the above High Court order, Geomin made a representation with respect to PL Application No.1337.

15.8. Geomin's applications, in particular PL No.1334, all dated 29th October, 1991 were made on an individual basis as a Private Ltd. Company. The nature of business indicated was mining, processing and sale of minerals and mineral products. The affidavit mentions that it is a new company and therefore there are no income tax/sales tax returns of clearance certificates. As regards financial resources the application simply says "sound" and refers to Articles of Association. In the experience column Geomin shows no experience and refers to qualified and experienced "people" in the company. No name or details are given. Geomin does not hold any PL or ML. There is no claim that any Director has any such experience. The application is highly deficient and there is no proposal for setting up any industry based on minerals. After 14 years from the notification under Rule 59 a letter dated 7.09.2004 for sympathetic consideration was made and order dated 15.7.2003 passed by the Central Government (Tribunal) was referred to Geomin, also wrote a letter dated 27.12.2005 requesting that they should be allowed to submit fresh proposal. Earlier on 20.12.2004 AXL also submitted a letter. Thereafter another letter dated 30.12.2006 was written. In this letter for the first time it was proposed that a 0.5 MTPA capacity steel plant in the State of Orissa would be set up through our group company AXL Industries and PLs were required for that purpose. In the aforesaid letters, there is no claim for any preference under Section 11 (2). The third letter dated 7.6.2007 refers to the proposal to set up 0.5 MTPA capacity steel plant in Orissa and also offers to consider setting up of the project through Geomin itself or to consider amalgamation of the two companies. Then by letter dated 6.10.2007 it informed that Geomin has now entered into a partnership with the Navyuga Group of companies who are a large conglomerate with interests in engineering, exports, mining, ports, power, real estate. I.T. etc. It further informed that Navyuga Group is planning to set up steel plant in Orissa with 12 MTPA capacity. By letter it

was also informed that Navyuga has already acquired 50 % equity stake in Geomin. Therefore the request was made to consider its application "keeping the above in mind''. By the fifth letter dated 13.11.2007 they wished to know the status of Geomin's applications regarding the process of evaluation of application over Khandhar Block, District Sundargarh.

15.9 If the provisions operating at the time of the application are to be considered then Geomin's application would stand rejected in terms of Rule 24(3) of Mineral Concession Rules, 1960 which was omitted on 07.01.1993. Secondly, the Geomin's application was highly deficient and the deficiencies were partially removed which were provided after the notice issued. Moreover, Geomin first placed reliance on 0.5 MTPA steel plant being set up by its group company AXL Industries then offered to set up the said project by itself. Thereafter relied upon 12 MTPA steel plant being set up by Navyuga Group which acquired 50% equity stake was later increased to 70% of the equity share. Application was sought to be considered on this basis. Therefore, Gemin's application is effectively and substantively of October/December, 2007.

15.10 Section 11 as amended by Act 38 of 1999 w.e.f 18th December, 1999, would apply. The contention of Geomin that the old provisions would apply is incorrect. This matter is not res integra. In the case of ***State of Tamil Nadu Vs. Hind Stone, (1981) 2 SCC 2005***, this Court has decided that the provisions of the Act and Rules as operating at the time of consideration would be applicable.

Stand taken by Kudremukh Company :

16. Learned senior counsel appearing of behalf the Kudremukh Company submitted as follows:

16.1 That the State Government vide letter dated 25.04.2009 has communicated the rejection of the applications of the Company, to the extent of an area of 2130 hectares, which was within the recommended area of POSCO of 2500 hectares. The applications of the Company were rejected on the ground that the M/s. POSCO was the most meritorious of all the applications. The rejection of the Company's ML/PL application had been challenged before the Ld. Central Mines Tribunal by filling Revision Application No.22(6)/2009-RC-I & Revision Application No. 22(7)/2009-RC-I respectively. The Revisional Authority vide final orders dated 23.08.2011, has been pleased to allow the revision applications and set aside the orders dated 25.4.2009 passed by the State Government rejecting the ML and PL applications of the Company.

16.2 The State of Orissa has filed two Writ Petitions being W.P.(C) No. 6429 of 2012 and W.P.(C) No. 6431 of 2012 against the Final Order No. 550/2011 & 549/11 dated 23.9.2011 passed by Government of India in Revision Application No. 22(6)/2009-RC-I & Revision Application No. 22(7)/2009-RC-I respectively. The same is pending adjudication before the Orissa High Court. The Company is not aware if M//s. POSCO has challenged the said order passed by the Ld. Revisional Authority.

16.3 The recommendation if favour of POSCO purportedly under Section 11(5) is not a valid recommendation as per the provisions of the Act. Section 11(5) would have not application in the present case where the applicants were being considered simultaneously and the same has to be granted to the applicant who satisfies the criteria under Section 11(3) when compared with the others. The Revisional Authority vide order dated 27.09.2007 had directed to consider all applications 'simultaneously'. Therefore, all the applications had to be considered taking into consideration the parameters of section 11(3). The State Government itself in its recommendation dated 9.1.1009 had stated that the applicants were evaluated and taken up for disposal in accordance with Section 11(2) and (3) of the Act. But ultimately made the purported recommendation in favour of POSCO under section 11(5) of the act, which is not applicable.

16.4 Section 11(5) would be applicable only if the area is 'non-notified' and the State Government has for 'special reasons' wants to give preference to a later applicant to an application which was received earlier. The 'special reasons' need not be other than what has been mentioned in Section 11(3) but may be over and above the reasons mentioned in Section 11(3). Section 11(5) will have no application where applications are considered simultaneously for areas which are notified, which is the present case. The recommendation dated 9.1.2009 made by the state Government is not sustainable.

17. As far the contentions raised by Geomin Minerals claiming priority by virtue of being an earlier applicant, it was submitted that the said contention no longer holds force after the amendment of Section 11(2) of the Act. As per the amended Section 11(2), applications which were made during the period of notification and all applications received prior to the publication and had not been disposed of shall be deemed to have been received on the same day for the purpose of assigning priority. Therefore, a prior applicant has no preferential right to be considered over a later applicant. It is submitted that the right, if any, under the pre-amended provisions stands obliterated after the amendment came into force and cannot be construed as a 'vested' right.

18. It was further contended that the Court, if it so deems fit may direct the Central Government to consider all applications while deciding grant of prior approval under Section 5(1) of the Act, after giving the parties a right to represent and decide the same taking all factors into consideration that Kudremukh Company is a public sector undertaking and the substantial area of the proposed recommended area was prospected at the cost of Kudremukh Company. The same may be decided uninfluenced by any observations made in the impugned judgment and the recommendation made under Section 11(5).

19. The contentions of the Kudremukh Company was summarised as follows:

(i) The Kudremukh Company is a public sector undertaking which is best suited to protect national resources of the Country.

(ii) The Company may be allotted at least the portion of the area which was prospected by the Department of Geology at the cost of more than 1 crore;

(iii) Based on the assurances of the State Government at the highest level, the Company has altered its position to its detriment and the Government ought to have granted the PI/ML to the petitioner;

(iv) The Company is more meritorious as compared to others, as it has special knowledge in mining operations, the nature and quality of the technical staff and adequate financial resources, which are the prescribed considerations in Section 11(3) of the Act. As far as the so-called proposed investment in Industry based on mines by POSCO is concerned, it is still illusory and nothing tangible has been invested on the ground. The Company's merit has also been recognized by the State Government, but is erroneously claimed that POSCO is more meritorious on the ground of the s-called proposed steel plant which is yet to take off and the work on the plant has not yet commenced.

20. In the aforesaid factual background and rival contentions made in the appeals, intervention petitions as well as counter affidavits, the main issue emerges for consideration is **whether the writ petition was premature and in the case of applicants whether pre amended Section 11 or amended Section 11 of the MM(D&R) Act is applicable.**

21. Before deciding the aforesaid issues it is relevant to note that the issue relating to competence of the State Government to make reservation

and the 1962 notification issued by the State Government reserving certain area fell for consideration before this Court in ***Monnet Ispat and Energy Limited v. Union of Inida & Ors. (2012) 11 SCC 1.*** In the said case, this Court held that the authority of the State Government to make reservation of a particular mining area within its territory for its own use is the offspring of ownership, and it is inseparable therefrom unless denied to it expressly by an appropriate law. By MM(D&R) Act that has been done by Parliament. Setting aside by a State of land owned by it for its exclusive use and under its dominance control, is an incident of sovereignty and ownership.

In the light of aforesaid observation made by this Court in ***Monnet Ispat and Energy Limited v. Union of Inida & Ors. (2012) 11 SCC 1*** and in view of the relevant facts of the present case, it is to be determined as to whether the writ petition preferred by Geomin was pre-mature.

22. Under Section 5 of the MM(D&R) Act, the State Government cannot grant a reconnaissance permit, prospective licence or mining lease to any person unless previous approval of the Central Government has been obtained. The proviso to Section 5(1) expressly prohibits grant of PL except with previous approval of Central Government as quoted hereunder:

Further, where Section 11(5) is invoked, there also prior approval of the Central Government is also required. The proviso to Section 11(5) prescribes that prior approval of Central Government shall obtained "before passing any order under the sub-section''. In the present case the State Government has only made recommendations and has sought approval of Central Government under proviso to Section 5(1) and proviso to Section 11(5) but no final decision has been taken. The State Government can pass final order granting mining licence only if approval is granted by the Central Government under Section 5(1) or Section 11(5) which reads as follows:

"**5(1).** A State Government shall not grant a reconnaissance permit, prospecting licence or mining lease to any person unless such person ---

(a) is an Indian national, or a company as defined in sub-section (1) of section 3 of the Companies Act, 1956 (1 of 1956); and

(b) satisfies such conditions as may be prescribed:

Provided that in respect of any mineral specified in the First Schedule, no reconnaissance permit, prospecting licence or mining lease shall be granted except with the previous approval of the Central Government.

> **11(5).** Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an applicant whose application was received earlier:
>
> Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this sub-section."

23. Iron ore is a major mineral specified in Para C of the First Schedule. In matters of such major mineral, ever State Government itself cannot undertake prospective or mining operations without having prior consultation with the Central Government as per Section 4(3) of the Act, and if prospecting licence of mining lease is to be granted to any other person, then previous approval of Central Government is to be obtained under Proviso to Section 5(1). The consideration of recommendation made by the Central Government for grant of prior approval is an exclusive jurisdiction of the Central Government under the MM(D&R) Act, 1957 and there is no good reason for pre-empting the Central Government from considering the merits of the recommendation.

24. Until the Central Government has passed an order either granting or refusing approval under Section 5(1) and Section 11(5) of the Act, it would not be permissible for any person to file a writ petition under Article 226 of the Constitution of India and any such petition if filed would be premature. In the instant case, the High Court committed a grave error of law in proceeding to observe that 'special reasons' did not exist on invoking Section 11(5) and that there was no comparison of merits In the record. The record has been shown to this Court and its apparent that the State Government has tabulated and evaluated the inter se merits and has concluded that POSCO is more meritorious. All applications are not justified and in fact the High Court appears to have usurped the jurisdiction of the Central Government in proceeding to make these remarks. The scrutiny of the merits was premature and the High Court should have refrained from entering into the merits.

25. The second proviso to Rule 63A also provides that the disposal of the applications by the State Government is case of minerals listed in the First Schedule to the Act shall mean either recommendation to the Central Government for grant of mineral concession, and in all other cases disposal

shall mean refusal to grant the mineral concession. This also an indication that the recommendation made by the State Government does not constitute an order as envisaged by Section 30 of the Act.

26. The next issue relates to application of Section 11 i.e. whether pre-amended Section 11 or post amended section 11 shall apply.

We have noticed that by amending Act, First Proviso to Section 11(2) was inserted. Pre-amended non obsente clause i.e. sub Section 4 of Section 11 was re-numbered as sub Section 5 to Section 11 and a new sub Section 4 to Section 11 was introduced by amending Act.

The pre amended provisions of Section 11(2), (3) (4) and the post amended provisions of Section 11(2), (3) (4) and (5) read as follows:

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 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). Not withstanding 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), (4) and (5) are as follows:

11(2). Subject to the Provisons of sub-section(1), where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit 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 as 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 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, 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;

(a) the financial resources of the applicant;

(b) the nature and quality of the technical staff employed or to be employed by the applicant.

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

(d) 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 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(5). Notwithstanding anything contained in sub-section (2) but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an applicant whose application was received earlier;

Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this sub-section."

27. The State of Orissa and some others have taken plea that amended Section 11, as amended by Act 38 of 1999 w.e.f 20th December, 1999, would apply.

28. According to the State of Orissa the preferential right envisaged in Section 11(1) is considerably distinct from the preference envisaged by Section 11(2). It is only in the case of Section 11(1) where a person has already held a reconnaissance permit or a prospective licence that he gets a preferential right for obtaining a prospecting licence or mining lease. It may be seen that Section 11(5) is subject to the provisions of sub-section (1) and, therefore, the State Government has no authority to give special reasons for overriding the preference. Further, Section 11(5) is notwithstanding Section 11(2) can be overridden by special reasons.

29. Another distinction is that while Section 11(1) uses the expression "shall have a preferential right for obtaining", Section 11(2) uses the expression "shall have the preferential right to be considered for grant". Thus, under Section 11(2), the preferential right is only in relation to consideration. The preference envisaged under Section 11(2) does not mean that the other applicants are not to be considered. It could only mean that if on an inter se consideration, the applicants are at par, then the prior application may be given a preference.

30. On the other hand learned counsel for the Geomin has submitted that pre-amended Section 11(2) shall be applicable.

31. In ***State of Tamil Nadu v. M/s Hind Stone, (1981) 2 SCC 205*** similar question fell for consideration before this Court. That was a case relating to renewal of lease for mining minerals. The argument was that Rule 9 itself laid down the criteria for grant of renewal of lease and therefore, Rule 8-C should be confined, in considering applications for grant of leases in the first instance. This court held that an application for the renewal of a lease is, in essence of application for the grant of a lease for a fresh period and, therefore, the Rule 8(C) is attracted.

32. Amended Section 11(2) is applicable where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit or prospective licence or mining lease and two or more persons have applied for reconnaissance permit, prospective licence or 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, prospective licence or mining lease, over the applicant whose application was received later.

However, as per Proviso to Section 11(2) where an area is available for grant of reconnaissance permit, prospecting licence or mining licence, 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 for the purpose of assigning priority under said sub-section. Thus under amended Proviso to Section 11(2), even those applications received prior to the publication but had not been disposed of, shall be deemed to have been received on the same day for the purpose of assigning priority under the said sub Section.

33. According to us, this not the stage of decide as to whether in the present case the pre-amended or amended Section 11(2) shall be applicable and thereby priority should be assigned under pre-amended or amended Section 11(2) as the matter has already been considered by the State Government and recommendation is required to be considered by the Central Government under Section 5(1) of the Act.

The Central Government is required to go through the relevant facts of each case to determine whether the recommendation is to be approved or not. While deciding the question the Central Government will keep in mind the order which was passed by the Revisional Authority (Central Government) in the case of Dagara on 2nd May, 2008.

34. It is well settled that no applicant has statutory or fundamental right to obtain prospecting licence or mining lease. In this connection one may refer to this Court decision in ***Monnet Ispact (supra).*** Therefore, the High Court before interfering with the recommendation ought to have looked into the nature of recommendation.

35. In view of the finding as recorded above, we are of the view that the High Court committed a grave error in deciding the case on merits and deciding the question of legality of the recommendation made by the State Government. In fact they should have left the matter to the Central Government to pass an appropriate order in accordance with law instead of entertaining a pre-mature writ petition. The State Government by its recommendation having forwarded the tabulated chart showing inter se merit of each applicant. It was not for the High Court to sit in appeal to decide who among all is more meritorious and is entitle4d for preferential right.

36. We, accordingly, set aside the impugned judgment dated 14th July, 2010 passed by the Division Bench of the Orissa High Court and remit the matter to the Central Government to consider the question of approval under Section 5(1) taking into consideration the recommendation made by the State Government. While deciding the question it will keep in mind the objections raised by the parties as noticed in the preceding paragraphs. It is expected that the decision will be taken on an early date and shall be communicated to the State Government. The appeals area allowed with the aforesaid observations and direction, but there shall be no order as to costs.

Appeal allowed.

2013 (II) ILR - CUT- 541

C. NAGAPPAN, C. J. & PRADIP MOHANTY, J.

W.A NO. 115 OF 2012 (Dt. 17.07.2013)

RABINDRANATH CHOUBEY ……..Appellant

.Vrs.

CHAIRMAN-CUM-MANAGING DIRECTOR, MAHANADI COAL FIELDS LTD., JAGRUTI VIHAR, BURLA, SAMBALPUR & ANR. .....Respondents

(A) PAYMENT OF GRATUITY ACT, 1972 – S. 4

Payment of Gratuity – Application rejected as premature for non-completion of the disciplinary proceedings against the appellant in view of Coal India Executives Conduct, Discipline and Appeal Rules, 1978 framed by Coal India Ltd. – Order challenged in writ petition – Learned Single Judge dismissed writ petition on the ground of existence of appellate forum – Hence the writ appeal.

Provisions of payment of Gratuity Act and Rules framed there under being statutory in nature shall prevail over the non-statutory rules framed by the Coal India Ltd. the holding Company of respondent No. 1 – Withholding payment of gratuity during the pendency of the disciplinary proceedings by respondent No. 1 is illegal as the original impugned Order Dt. 15.04.2011 passed by the respondent No. 2 rejecting the application for payment of gratuity to the appellant cannot sustain in the eye of law- Held, impugned Order passed by the learned Single Judge is set aside – Order Dt. 15.04.2011 passed by the respondent No. 2 is quashed – Direction issued for payment of Gratuity to the appellant. (Paras13, 14)

(B) Constitution of India, 1950 – Art. 226 r/w Section 7 (7) of the Payment of Gratuity Act, 1972

Writ Jurisdiction – Scope, when alternative remedy is available – Held, exclusion of writ jurisdiction on the ground of availability of alternative remedy is a rule of discretion and not a rule of compulsion – In appropriate cases this Court may still exercise its writ jurisdiction ignoring the plea of alternative remedy.

In this case the appellant made an application for payment of gratuity – His application was rejected on 15.04.2011 by the Controlling

Authority and the Regional Labour Commissioner (Central) Rourkela – Since the relevant rules stipulate that any person aggrieved by an Order of the Controlling authority may within 60 days from the receipt of the order, prefer an appeal to the Regional Labour Commissioner (Central) of the area he confused with regard to the appellate authority and filed the writ petition – Writ petition dismissed by the learned Single Judge on the ground of existence of appellate forum – Hence this writ appeal – The present case warrants that the learned Single Judge should have exercised the writ jurisdiction – Held, impugned order passed by the learned Single Judge is liable to be set aside.

(Para 7)

Case laws Referred to:-

1. (2007) 1 SCC 663 : (Jaswant Singh Gill-V- Bharat Cooking Coal Ltd.)
2. (2010) 6 SCC 718 : (Umesh Kumar Singha-V-State of Bihar& Ors.)
3. (2010) 7 SCC 305 : (Secretary, Forest Department & Ors. -V-Rasul Chowdhury)
4. (2011) AIR SCW 6577 : (State Bank of India-V-Ram Lal Bhaskar & Anr.)

For Appellant - M/s. C. Ananda Rao, S. K. Behera, A.K. Rath & G.B Panda
For Respondents -M/s. Debraj Mohanty & Sujit Mohanty.

C. NAGAPPAN, C.J. This writ appeal is preferred challenging the order dated 21.03.2012 passed by the learned Single Judge in W.P.(C) No. 24835 of 2011. The writ petitioner is the appellant herein.

2. The brief facts of the case leading to filing of this writ appeal are as follows.

The appellant/writ petitioner was working as Chief General Manager (Production) since 17.02.2006 at Rajmahal Area under Mahanadi Coalfields Ltd., Burla, Sambalpur in the State of Odisha. A memo containing articles of charge was issued to him on 01.10.2007 alleging that there was shortage of stock of coal in Rajmahal Group of Mines which was under his management and enquiry was proposed to be conducted under Rule 29 of the Conduct, Discipline & Appeal Rules, 1978 of Coal India Ltd. However, during the pendency of the departmental proceeding, the appellant/writ petitioner was allowed to retire on 31.07.2010 (AN) on attaining the age of superannuation. He submitted an application on 21.09.2010 to the Director (Personnel), Mahanadi Coalfields Ltd. for payment of gratuity. On the same date he also

submitted an application before the Controlling Authority under Payment of Gratuity Act, 1972 –cum- Regional Labour Commissioner (Central) Rourkela-respondent No.2 for payment of gratuity. The said application was taken on file as application No. 36 (3)/2010 RKL by the respondent No.2. Thereafter, notice was issued on 15.11.2010 by the respondent No.2 calling upon the respondent No.1-Chairman-cum- Managing Director, MCL, Burla to appear on 01.12.2010 for enquiry. Accordingly respondent No.1 submitted reply on 13.12.2010 stating that the payment of gratuity of the appellant has been withheld due to reason that disciplinary case is pending against him. The respondent No.2, after hearing both the parties, in its order dated 15.04.2011 held that the claim of the appellant for payment of gratuity is pre-mature as the disciplinary proceeding is yet to be concluded by the management.

The appellant sought for quashing of the said order of the respondent No.2 by filing W.P.(C) No. 24835 of 2011 stating that the said order was passed by the respondent No.2-Regional Labour Commissioner (Central) Rourkela without proper application of mind and in violation of the relevant provisions of the Act and Rules and also contrary to the judgment of the Supreme Court in the case of Jaswant Singh Gill Vs. Bharat Cooking Coal Ltd. Further, the case involves interpretation of the relevant provisions of the Act and Rules, and therefore, finding no other alternative and efficacious remedy he has filed the writ petition under Articles 226 & 227 of the Constitution of India.

Learned Single Judge while disposing of the writ petition, vide impugned order dated 21.03.2012 held that in view of the existence of an appellate forum against the order passed by the respondent No.2, the writ petition is not maintainable; however, the writ petitioner may file an appeal before the appellate authority within 21 days from the date of passing of the impugned order and in such event the appellate authority shall dispose of the same within a period of three months therefrom.

Being aggrieved by the same, the writ petitioner has preferred the present writ appeal.

3. The first contention of the learned counsel for the appellant is that the Payment of Gratuity Act, 1972 and Rules made thereunder provides that any person aggrieved by an order of the “Controlling Authority” may within 60 days of the order, prefer an appeal to the Regional Labour Commissioner (Central) who has been appointed as appellate authority and since the impugned order was passed by the Controlling Authority-cum-Regional

Labour Commissioner (Central) Rourkela, to avoid confusion and ambiguity, the appellant challenged the order by filing the writ petition. Further, there are no disputed facts involved and the issue involved being purely question of law, directly covered by the decision of the Supreme Court in the case of Jaswant Singh Gill Vs. Bharat Cooking Coal Ltd., reported in (2007) 1 SCC 663, the impugned order of the learned Single Judge directing the appellant to approach the appellate authority is erroneous and liable to be set aside.

4. Learned counsel for the appellant further contended that the Rules framed by the Coal India Ltd. are not statutory rules and they have been made by the holding company of the respondent No.1. Though the disciplinary enquiry against the appellant has been completed as back as on 25.03.2009, no further notice has been issued by the respondent No.1 company till date and the statutory right to receive gratuity accrued to the appellant cannot be impaired by reason of Rules framed by the Coal India Ltd. and the action of withholding the gratuity even after allowing the appellant to retire from service is illegal and the order dated 15.04.2011 passed by the respondent No.2 terming the claim of the appellant as premature is contrary to law and liable to be quashed.

5. Per contra, learned counsel appearing for respondent No.1 submitted that the writ petition is not maintainable in view of the statutory remedy of appeal available under Sub-section (7) of Section 7 of the Payment of Gratuity Act, 1972 which is an efficacious remedy in itself and the order of the learned Single Judge directing the appellant to pursue the remedy of appeal is sustainable in law. It is further contended that the disciplinary proceedings could not be completed on account of the non-cooperation of the appellant. The disciplinary proceedings commenced while the appellant was in service and shall be deemed to be proceeding and be continued even after his retirement in the same manner as if he is continuing in service and accordingly the disciplinary authority may withhold the payment of gratuity for ordering the recovery from the gratuity towards loss caused to the company if the appellant is found guilty of misconduct and hence withholding of the gratuity amount till the completion of the disciplinary proceedings is legal. In support of his submissions, learned counsel for the respondent No.1 cited some decisions.

6. The original impugned order dated 15.04.2011 holding that the claim of the appellant for payment of gratuity is premature was passed by the respondent No.2, namely, Controlling Authority under Payment of Gratuity Act, 1972 –cum- Regional Labour Commissioner (Central) Rourkela after conducting enquiry under Sub-section (4) of Section 7 of the Payment of

Gratuity Act, 1972 (in short 'the Act') and against the said order appeal is provided to the appellate authority under Sub-section (7) of Section 7 of the Act. Rule 18 of the Payment of Gratuity (Central) Rules, 1972 (in short 'the Rules') stipulates the procedure for preferring the appeal. Clause 10 of the Form-'U' (Abstract of the Act and Rules) published and inserted by G.S.R. 2868 dated 22nd November, 1975 to the Rules stipulates that any person aggrieved by an order of the controlling authority may, within sixty days from the date of receipt of the order, prefer an appeal to the Regional Labour Commissioner (Central) of the area who has been appointed as the appellate authority by the Central Government. Clause 11 thereof stipulates that all Assistant Labour Commissioners (Central) have been appointed as Controlling Authorities and all the Regional Labour Commissioners (Central) as Appellate Authorities.

7. As already seen, the original impugned order dated 15.04.2011 was passed by the Controlling Authority and the Regional Labour Commissioner (Central) Rourkela and, according to the appellant, there was confusion and ambiguity with regard to the appellate authority and hence he has filed the writ petition. Learned Single Judge in the impugned order has referred to a Notification issued by the Ministry of Labour and Employment dated 04.01.2006, which specified the Regional Labour Commissioner (Central), Bhubaneswar as the appellate authority for the State of Orissa. Admittedly the respondent No.2 as well as the appellate authority as specified in the above notification are the Regional Labour Commissioner (Central) and therefore the contention of the appellant that there was confusion and ambiguity is to be countenanced. Further, there are no disputed question of facts involved in the present case and the issue is purely question of law. It is settled law that exclusion of writ jurisdiction on the ground of availability of alternative remedy is a rule of discretion and not a rule of compulsion and in appropriate case this Court may still exercise its writ jurisdiction and therefore, we are of the considered view that the present case warrants such an exercise to be done and hence the order of the learned Single Judge is liable to be set aside. We also deem it fit to deal with the merits of the case.

8. It is an undisputed fact that the appellant was governed by Coal India Executives Conduct, Discipline and Appeal Rules, 1978 (in short 'the Rules, 1978'). Rule 27(1)(i) thereof provides for 'minor penalties' like withholding increment, withholding promotion, and recovering from pay; and Rule 27(1)(iii) provides for 'major penalties' like reduction to a lower grade, compulsory retirement, removal from service, and dismissal. By Office Memo dated 23.11.2005 issued by the Coal India Ltd., recovery from gratuity

stipulated as a minor penalty under the Rule 27(1)(i)(d) of the Rules, 1978 has been deleted. Rule 34 of the Rules, 1978 provides for 'special procedure in certain cases'. Rules 34.2 and 34.3 thereof are relevant to be extracted, which reads thus :

> " 34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.
>
> 34.3 During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/misconduct as mentioned in Sub-Section (6) of Section 4 of the Payment of Gratuity Act 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act 1972 should be kept in view in the event of delayed payment in the case the employee is fully exonerated."

9. The Payment of Gratuity Act, 1972 is a complete code containing detailed provisions and it not only creates a right to payment of gratuity but also laid down principles of quantification thereof. Further, sub-section (6) of Section 4 contains a non-obstante clause vis-à-vis sub-section (1) thereof. By reason thereof when an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. Clause (a) of sub-section (6) of Section 4 of the Act speaks of the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of , property belonging to the employer shall be forfeited to the extent of the damage or loss so caused.

10. The Rules have been made by the holding company viz. Coal India Ltd. and they are not statutory rules. Their Lordships in the decisions in the case of Jaswant Singh Gill (referred to supra) considered the very same Rules framed by the Coal India Ltd. vis-à-vis the claim of gratuity of the employee and clearly held thus:

"9. The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent 1.

10. The provisions of the Act, therefore, must prevail over the Rules. Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the Company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed.

11. Power to withhold penalty (sic gratuity) contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefor is rendition of five years' continuous service.

12. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retiral benefits or gratuity."

11. In the present case, though the disciplinary proceedings against the appellant was initiated prior to attaining the age of superannuation, he retired from service on superannuation and hence the question of imposing a major penalty of removal or dismissal from service would not arise as per the dictum of the Supreme Court in the above decision. In the same way power to withhold payment of gratuity as contained in Rule 34(3) of the Rules, 1978 shall be subject to the provisions of the Payment of Gratuity Act. The statutory right accrued to the appellant to get gratuity thus cannot be impaired by reason of the Rules framed by the Coal India Ltd. which do not have the force of a statute. The above decision of the Supreme Court squarely applies to the facts of the present case. If that be so, respondent No.1 cannot withhold the payment of gratuity to the appellant citing the pendency of the disciplinary proceedings.

12. Learned counsel for the respondent No.1 cited the decision of the Supreme Court in the case of Umesh Kumar Sinha Vs. State of Bihar & Ors., reported in (2010) 6 SCC 718. In the said decision Rules 27 and 43(b) of Bihar Pension Rules, which provide that pension includes gratuity and the power of the State Government to withhold or withdraw whole or any part of it including forfeiture of gratuity by way of punishment, was considered and penalty imposed was upheld. The said decision is not applicable to the facts of the present case. In the same way other two decisions in the case of Secretary, Forest Department & Ors. Vs. Abdur Rasul Chowdhury, (2009) 7 SCC 305 and State Bank of India Vs. Ram Lal Bhaskar & Anr., 2011 AIR SCW 6577 upon which reliance has been placed by the learned counsel for the respondent No.1 are not applicable to the fact situation of the case in hand.

13. As discussed earlier, the provisions of Payment of Gratuity Act and Rules framed thereunder shall prevail over the Rules framed by the Coal India Ltd, the holding company of respondent No.1. Withholding payment of gratuity of the appellant during the pendency of the disciplinary proceedings by the respondent No.1 is obviously illegal and accordingly the original impugned order dated 15.04.2011 passed by the respondent No.2, rejecting the application for payment of gratuity to the appellant on the ground that it is premature, cannot be sustained in the eye of law and liable to be quashed.

14. In the result, the writ appeal is allowed and the impugned order of the learned Single Judge is set aside and the order dated 15.04.2011 under Annexure-9 to the writ petition, passed by the Controlling Authority and Regional Labour Commissioner (Central) Rourkela-respondent No.2, is hereby quashed. The appellant/petitioner shall be paid the gratuity amount as claimed in his application under Annexure-2 series. No costs.

Appeal allowed.

2013 (II) ILR - CUT- 548

C. NAGAPPAN, CJ & PRADIP MOHANTY, J.

W.P.(C) NO.1289 OF 2010 (Dt.30.08.2013)

M/S. RAJAT KUMAR BISWAL ……..Petitioner

.Vrs.

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

ODISHA MINOR MINERAL CONCESSION RULES, 2004 – RULE 73 (2) & (3)

Petitioner awarded work for "Construction and Maintenance of Rural Roads" under PMGSY – He submitted running account bills but the Opp.Parties deducted substantial amount there from towards the cost of royalty on the materials used in the work – Hence the writ petition.

In this case the running account bills submitted by the petitioner are inclusive of the amount charged towards royalty and the cost of the minor minerals purchased by it for the purpose of execution of the PMGSY work – The claim for such payment is in the nature of reimbursement – So the petitioner in terms of Sub-rule (2) is liable to produce "transit pass" and in terms of Sub-rule (3) is liable to produce the receipt showing payment of cost of minor minerals as well as transit pass – Since the petitioner has failed to comply with the requirements of Sub-rules (2) & (3), the Opp.Parties have rightly deducted royalty from its running account bills and such deduction cannot amount to collection of royalty twice as alleged by the petitioner – Held, the action of the Opp.Parties in deducting the royalty from the running accounts bill of the petitioner cannot be said to be illegal or arbitrary – Writ petition is liable to be dismissed.

(Para 12)

Case law Referred to:-

AIR 2007 Orissa 97 : (Akuli Charan Das, etc.etc.-V- State of Orissa & Ors.).

For Petitioner - M/s. J. B. Sahoo, M.K. Rout, P. Mohapatra.
For Opp.Parties - Addl. Govt. Advocate.

PRADIP MOHANTY,J In this writ petition, the petitioner challenges the action of the opposite parties in deducting royalty from the running account bills of the petitioner on the ground that the same is illegal, arbitrary and contrary to the rules.

2. The brief facts leading to filing of the present writ petition are that the petitioner is a special class contractor registered under rule 6 of the P.W.D. Contractors Registration Rules, 1967. On being duly selected as a successful bidder, the petitioner was awarded with different packages of work for "Construction and Maintenance of Rural Roads" under the Pradhan Mantri Gram Sadak Yojana in the district of Mayurbhanj vide Annexure-2 series. On receipt the work orders and entering into agreement, the

petitioner proceeded with execution of the three packages of work bearing number OR-21-197, OR-21-199 and OR-21-200 and around 70% of these work have already been completed by now. But, when the petitioner submitted running account bills, the opposite parties deducted a substantial amount therefrom towards the cost of royalty on the materials used in the work and demanded for submission of Form-K under Orissa Minor Minerals Concession Rules, 2004. Aggrieved with the aforesaid action of the opposite parties, the petitioner has come up before this Court with the present writ petition.

3. The contention of the petitioner is that for execution of the aforesaid construction and maintenance work the petitioner was to collect materials, such as, chips, metals and moorum as per the terms and conditions contained in the tender agreement. The petitioner collected such materials from different leaseholders of mines/quarries from whom the Government have already collected lease value, surface rent, dead rent and royalty as provided under rule 24 of the Orissa Minor Minerals Concession Rules, 2004. The petitioner contractor being not a lessee or a quarry permit holder is no way concerned with payment of royalty to the Government and is only concerned with the payment of cost of the materials collected from the quarries. Royalty is collected from the quarry permit holders, who are obliged to pay the same to the Government under rule 24 of the aforesaid Rules. Hence, it is not permissible under law to demand royalty from the contractors like the petitioner and to deduct the same from their bills. Further contention of the petitioner is that in a batch of cases (Akuli Charan Das, etc. etc. vrs. State of Orissa and others) the issue relating to reimbursement of royalty paid by the contractors was raised before this Court and by interpreting Rules 23 and 24 of the Orissa Minor Minerals Concession Rules, 2004 this Court held that the petitioners are justified in claiming reimbursement of royalty inasmuch as there cannot be payment of royalty twice, i.e., by the leaseholder so also by the contractor in respect of the selfsame material. The deduction of royalty from the running account bills of the petitioner is highly illegal as the petitioner is neither a leaseholder nor a licensee of any quarry and the petitioner is to purchase the materials from different quarries which are legally operated by the quarry leaseholders. It is not the duty of the petitioner to submit Form-K under Orissa Minor Mineral Concession Rules, 2004 which relates to the application for quarry lease and its renewal under Rule 26(2) of the said Rules. Such arbitrary demand of the opposite parties for submission of Form-K by the petitioner and deduction of royalty from the running account bills in respect of the work in question is illegal and arbitrary. In support of his contention, learned

counsel for the petitioner relies upon a decision reported in ***AIR 2007 Orissa 97 (Akuli Charan Das, etc. etc. vrs. State of Orissa and others***).

4. The opposite parties have filed their counter affidavit denying and disputing the averments in the writ petition. Referring to clauses 39.1 and 41.1 of the D.T.C.N., an extract of which is annexed as Annexure-A to the counter affidavit, the opposite parties have specifically stated that the petitioner contractor is to give royalty to the revenue authority before lifting minerals from the leased quarry and produce the royalty receipt/ K Form/ R Form during submission of its bill in support of payment made by it towards royalty, failing which the royalty amount would be kept withheld from the bill and the same would be deposited with revenue authority. Clause (ii) of rules 24 and 28 of the Orissa Minor Minerals Concession Rules, 2004 provides that the royalty shall be leviable on minor minerals from the leased area at the rates specified in Schedule-II of the said Rules. Rule 73 of the said Rules postulates that no minor minerals shall be dispatched from the leased area without a valid transit pass issued by the competent authority and no authority in-charge of execution of public work shall pass any bill for reimbursement of royalty paid on any minor mineral unless the person claiming such reimbursement produces the transit pass. In view of this, the petitioner in order to procure the minor minerals has to obtain the transit pass for the purpose of transportation and has to produce the same for the purpose of passing its bills. Therefore, the allegation of the petitioner that royalty has been collected twice, i.e., from the leaseholder of the quarry as well as the petitioner is not tenable in the eye of law. Apart from this, there is a condition in the agreement that the VAT, Income Tax, Royalty and other taxes are to be recovered from the contractor at the rate fixed by the Government from time to time. The petitioner has entered into agreements in respect of three packages of work. In all the three agreements, the aforesaid clause exists and, therefore, the petitioner's claim that he is not liable to pay the royalty is not acceptable.

5. In the background of the above factual matrix and the stand taken by the respective parties, the following question is formulated for consideration by this Court;

> "Whether the opposite parties are justified in claiming that they are entitled to deduct royalty from the bills of the contractors at the time of effecting payment to the contractors, if no receipt with regard to payment of royalty and/or transit pass is produced by those contractors at the time of raising such bills, when rule 24 read with rule 28 of the Orissa Minor Minerals Concession Rules, 2004 has

fixed the liability for payment of royalty on the holder of a quarry lease."

6. This Court carefully perused the Mines and Minerals (Regulation and Development) Act, 1957 (as amended by Act 67 of 1957), the Orissa Minor Minerals Concession Rules, 2004, the pleadings and documents filed by the respective parties and the decision cited by the learned counsel for the petitioner in ***Akuli Charan Das etc. etc. v. State of Orissa & Ors***, AIR 2007 ORISSA 97.

7. It is asserted by the petitioner that the opposite parties are insisting on production of Form-K at the time of effecting payment against the running account bills of the petitioner. In support of such assertion, not a single scrap of paper has been filed by the petitioner. In absence of any documentary evidence it is difficult to believe that in fact such a demand is being made by the opposite parties. Furthermore, Form-K, as provided in rule 26 (2) of the Orissa Minor Minerals Concession Rules, 2004, is the format of a register maintained by the competent authority in which application received for quarry lease and its renewal is entered. The petitioner has nothing to do with same. It is not believable that the opposite parties are asking the petitioner to produce Form-K which the petitioner is not obliged to maintain. For all these reasons, by no stretch of imagination can it be presumed that the opposite parties have been demanding for production of Form-K by the petitioner contractor.

8. As it appears, the claim of the petitioner is laid on the basis of the provisions contained in rule 24 read with rule 28 of the Orissa Minor Minerals Concession Rules, 2004 (for short "2004 Rules"). On careful perusal of both the aforesaid rules, it is seen that as per rule 24 "the holder of a mining lease" and as per rule-28 "the lessee" is liable to pay dead rent, surface rent, royalty and fees for compensatory afforestation in terms of clauses (i), (ii) and (iii) thereof. In the face of such clear and unambiguous statutory provisions, now it is to be seen if the opposite parties, who are public authorities, are well within their jurisdiction in deducting royalty from the running account bills of the petitioner on its failure to produce receipt with regard to payment of royalty or transit pass.

9. Before delving into the question formulated in this case, it is to be borne in mind that the legislative intention behind the enactment of the Orissa Minor Minerals Concessions Rules, 2004 is only to protect the State's interest. The minor minerals of the State should not be allowed to be used by any person without paying the State's entitlements by way of

various levies, taxes, royalties, etc. To prevent evasion of payment of royalty, various precautionary measures have been undertaken by the legislators by incorporating different rules in the Orissa Minor Minerals Concession Rules, 2004. Rule 73 of the 2004 Rules is one of those rules, which assumes much importance so far as collection of royalty is concerned. Sub-rules (1), (2) and (3) of Rule 73, being relevant for the purpose of this case, are extracted hereunder:

"73.(1) No licensee/lessee or permit holder or auction holder or auction purchaser shall dispatch any minor minerals from an area without a valid Transit Pass issued by-

(a) the Deputy Director or the Mining Officer having jurisdiction in case of decorative stones; and

(b) the competent authority in case of other minor minerals;

in Form-R, printed and machine numbered, which shall be supplied by the respective authority as aforesaid on payment of the cost thereof.

(2) No authority in charge of execution of public work shall pass any bill for reimbursement of royalty paid on any minor mineral unless the person claiming such reimbursement produces the transit pass referred to in Sub-rule(1).

(3) The provisions of Sub-Rule(2) shall apply mutatis mutandis to cases where any bill claiming the reimbursement of the cost for purchase of any minor mineral is submitted before any authority in charge of execution of public work. Such authority shall not pass the bill unless the receipt of the amounts so paid is produced."

As is evident, sub-rule (1) of Rule 73 clearly provides that no minor minerals shall be despatched by the permit holder from the leasehold area without a valid transit pass issued by the competent authority descried in clause (a) and (b) thereof in Form-R. The term "transit pass" has been defined in rule 2 of the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 (for short "2007 Rules). This 2007 Rules have been framed in exercise of the powers conferred by Section 23-C of the Mines and Minerals (Regulation and Development) Act, 1957 (amended vide Act 67 of 1957). Section 23-C of the aforesaid Act clearly empowers the State Governments to make rules, by notification in the Official Gazette, for preventing illegal mining, transportation and storage of minerals and for the purposes connected therewith. Rule 2 of 2007 Rules in clause (q) defines "transit

pass" as a pass issued by the competent authority for lawful transportation of any mineral, raised in accordance with the provisions of the Act and Rules made thereunder, by a carrier. Further in clause (r) thereof the term "transit permit" has been defined to mean that the permission granted by the competent authority in the prescribed form for removal of mineral from one place to another. This means, no minor mineral can be transported without a transit pass/transit permit from the source of a leaseholder. So, on bare reading of sub-rule (1), it can be safely concluded that without transit pass/transit permit neither the holder of a mining lease can dispatch any minor mineral from the lease area nor any carrier can carry such minor mineral to any destination. The necessity of transit pass has also been highlighted in rule 56(xiv) of the 2004 Rules which speaks in clear term that the auction holder shall not remove any minor mineral from the area without obtaining prior permission from the competent authority or any other officer authorized by him and that no minor mineral shall be dispatched from the area without valid transit pass issued by such officer. A conjoint reading of both the provisions would go to show that if anybody intends to lift minerals from a source of a lease holder or auction holder, the same can be done only on the strength of a transit pass in Form-R by procuring the same from the lease holder or auction holder. In the case at hand, the petitioner contractor is admittedly executing public work by using minor minerals and, as such, it must have procured transit pass in Form-R from the lease holder or auction holder while purchasing the minor minerals.

At this juncture, it is to be seen whether the petitioner is liable for production of transit pass along with its running account bills. In this connection, sub-rule (2) of Rule 73 is very clear. Sub-rule (2) clearly mandates that unless the person claiming reimbursement of royalty produces transit pass referred to in sub-rule (1), no authority in charge of execution of public work shall pass any bill for reimbursement of royalty paid on any minor mineral. Here, the question arises whether the running account bills submitted by the petitioner are inclusive of expenditures incurred by him towards royalty and/or payment already made by him towards royalty, and if so, whether such claim of the petitioner for payment on account of royalty is a "reimbursement". According to Chambers Dictionary "reimbursement" means to repay or compensate someone for money already spent, losses, damages, etc. If the running account bills of the petitioner are inclusive of royalty, then payment claimed by the petitioner on account of royalty obviously is in the nature of reimbursement. But, the fact remains, whether the running account bills of the petitioner includes royalty. Undoubtedly, the bills are raised by the contractors on the basis of the rates quoted by them in their bids. In clause 41.1 of Detailed Tender

Call Notice (D.T.C.N.), an extract of which is annexed as Annexure-A to the counter affidavit, it is clearly provided that the rates quoted by the contractors shall be deemed to be inclusive of sales tax and other levies, duties, royalties, cess, toll, taxes of Central and State Governments, local bodies and authorities that the contractor will have to pay for performance of the contract. Thus, it can be safely concluded that the running account bills submitted by the petitioner are inclusive of royalty, which is deemed to have already been paid by the petitioner, and as such the claim for such payment in its running account bills is in the nature of reimbursement. This aspect has been clarified in the judgment rendered in Akuli Charan Das (supra), on which reliance has been placed by the petitioner, and in paragraph 16 thereof it has been observed as follows :

> "16. .....In other words, while "Royalty" does find mention in the "Abstract of Rates", yet the payment of the same cannot be treated as a payment to the contractor towards his profits but only as a reimbursement towards the royalty borne by him, and is a separate and distinct head for computation of costs."

In the above circumstances, the irresistible conclusion is that the petitioner's running account bills being inclusive of royalty and the claim for payment on account of the same being in the nature of reimbursement, the petitioner is liable to submit transit pass referred to in sub-rule (1) along with the running account bills. In the writ petition, nowhere the petitioner has stated that it has filed transit pass along with its running account bills. Therefore, in terms of sub-rule (2), the bills of the petitioner claiming payment on account of royalty should not have been passed for payment. In other words, such claim for payment of royalty being in the nature of reimbursement should have been withheld / deducted from the running account bills of the petitioner in absence of transit pass. As such, no fault can be found with the opposite parties for deducting royalty from the running account bills of the petitioner in absence of transit pass.

10. Sub-rule (3) of Rule 73 envisages that sub-rule (2) shall be applicable mutatis mutandis to the cases where any bill claiming reimbursement of the cost for purchase of any minor mineral is submitted before any authority in charge of execution of public work and that such authority shall not pass such bills unless the receipt of the amounts so paid is produced. From a bare reading of this provision, it is evident that no bill claiming reimbursement of the cost for purchase of any minor mineral shall be passed by any authority in charge of execution of public work, if the receipt showing payment of such amount is not produced. The expression "sub-rule (2) shall be applicable mutatis mutandis" appearing in sub-rule (3)

denotes that production of transit pass is mandatory in cases of claim for reimbursement of the cost for purchase of the minor mineral. In this case, the running account bills submitted by the petitioner must have included the cost of minor minerals, as it is averred in the writ petition that the petitioner is executing the work in question by procuring minor minerals from different quarry holders. As such, the claim of the petitioner on that account can be construed as claim for reimbursement of cost of minor minerals purchased by it. In such view of the matter, the petitioner, in terms of sub-rule (3), is liable to produce transit pass as well as the receipt showing payment of cost of minor minerals along with the bills. In the writ petition, the petitioner has not uttered a single word with regard to either production of transit pass or receipt showing payment of cost of minor minerals along with the running account bills. In the circumstances, it cannot be said that deduction of royalty by the opposite parties from the running account bills of the petitioner is illegal and unjust.

11. The above apart, there is a condition in the agreements, the copies of which have been annexed as Annexure-1 series to the written note submitted by the opposite parties, that the VAT, income tax, royalty and other taxes are to be recovered from the contractor at the rate fixed by the Government from time to time. The petitioner has entered into agreements in respect of three packages of work. In all the three agreements, the aforesaid clause exists. Therefore, the petitioner's claim that it is not liable to pay the royalty is not acceptable.

12. For the foregoing discussions, this Court arrives at the conclusion that the running account bills submitted by the petitioner are inclusive of the amount charged towards royalty and the cost of the minor minerals purchased by it for the purpose of execution of the PMGSY work. The claim for such payment is in the nature of reimbursement. Therefore, the petitioner in terms of sub-rule (2) is liable to produce 'transit pass' and in terms of sub-rule (3) is liable to produce the receipt showing payment of cost of minor minerals as well as transit pass. Since in the instant case the petitioner has failed to comply with the requirements of sub-rules (2) and (3), the opposite parties have rightly deducted royalty from its running account bills and such deduction cannot amount to collection of royalty twice, as alleged by the petitioner. The conclusion arrived at by this Court gets support from the observations made in Para 17 of the judgment rendered in the case of Akuli Charan Das (supra) which are extracted hereunder:

> "17. ….We are of the view that under 2004 Rules, although no obligation is cast on the State to effect deduction of royalty from the

bills of the petitioner, but before releasing the bills of the petitioners the State is justified in seeking evidence of such payment of royalty, since the payment claimed by the petitioners on account of 'royalty', is clearly in the nature of a reimbursement and therefore, any claim for reimbursement has to be claimed upon furnishing evidence of payment and not otherwise….."

13. In view of the above, the action of the opposite parties in deducting the royalty from the running accounts bill of the petitioner in respect of the work under PMGSY cannot be said to be illegal or arbitrary. This Court therefore does not find any merit in this writ petition which is accordingly dismissed.

Writ petition dismissed.

2013 (II) ILR - CUT- 557

C. NAGAPPAN, CJ & INDRAJIT MAHANTY, J.

W.P.(C) NO. 7825 OF 2013 (Dt.24.04.2013)

BISWA RANJAN MOHANTY ……...Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

TENDER – Petitioner challenged Auction notice published in the Daily "Sambad" Dt.19.03.2013 for settlement of annual lease of black granite mines belonging to Shree Jagannath Temple, Puri.

In this case opening of tenders have been held on 02.04.2013 and the petitioner filed the writ petition on 04.04.2013 – Auction notice does not violate Odisha Miner Mineral Concession Rules, 2004 – Since the petitioner did not participate in the auction bids he has no locus standi, even, to bring any challenge to the terms and conditions of the tender after the auction has been concluded – Writ petition merits no consideration. (Para 5)

For Petitioner - M/s. R.K. Mohanty, Sr. Adv.
M/s. B. Mohanty, B.C. Swain

& R. Mohanty.
For Opp.Parties - Mr. Asok Mohanty, (Advocate General).

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I. MAHANTY, J. The present writ application has been filed by the petitioner challenging the tender/auction notice published in the Daily "Sambad" dated 19.3.2013 for settlement of annual lease of black granite Mines/Stone quarry for the year 2013-14 belonging to Shree Jagannath Temple, Puri.

2. Learned counsel for the petitioner placed reliance on an earlier judgment of this Court passed in W.P.(C) No.11095 of 2010 dated 9.7.2010, wherein this Court had set aside the impugned auction notice issued by Shree Jagannath Temple Administration and directed as follows:

> "It is open for the Shri Jagannath Temple Administration to seek permission from the competent authority of the State Government to exploit the minor mineral which is available in their property. If such request is made by it either to the State Government or the competent authority, it may be considered in accordance with the provisions of the Orissa Minor Mineral Concession Rules, 2004."

It is asserted by the petitioner that the impugned notice does not comply with the statutory provisions of Orissa Minor Mineral Concession Rules, 2004 as well as the judgment rendered by this Court in W.P.(C) No.11095 of 2010 and, therefore, the impugned notice of tender under Annexure-1 ought to be set aside/quashed.

3. On perusal of the tender notice under Annexure-1, it is clear therefrom that the notice has been issued by the Sub-Collector, Khurda. The said notice clearly announces the fact that the sairat sources are located in the property of Shree Jagannath Mahapravu Bije, Puri and would be auctioned by public auction for the financial year 2013-14 on 2.4.2013 at 11.00 A.M. The upset price has been duly fixed and the auction would be undertaken by the Tahasildar, Khurda.

4. The mere fact that the security deposit is required to be made in the name of Chief Administrator, Shree Jagannath Temple by way of Bank Draft. In our considered view that does not in any manner violate the Orissa Minor Mineral Concession Rules, 2004 and rather, is in consonance with the earlier direction of this Court passed in W.P.(C) No.11095 of 2010 dated 9.7.2010. The earlier directions were clearly issued in order to safeguard the

property of Shree Jagannath Mahapravu Bije and ensure that maximum revenue accrues in favour of the Temple Administration for the development of the temple and also to ensure that all such auctions take place through public auctions alone and not through private negotiations.

5. We have perused the impugned notice and find no justifiable ground to interfere with the same. We further find that the present petitioner has filed the present writ application on 4th April, 2013 whereas the auction notice has been published in the Daily "Sambad" dated 19th March, 2013 and the opening of the tenders were stated to have been held on 2nd April, 2013 at 11.00 A.M. Learned counsel for the petitioner has admitted that the petitioner did not participate in the auction bids, which opened on 11.00 A.M. on 2nd and 3rd April, 2013 and, therefore, we are further of the considered view that the petitioner has no locus standi whatsoever even to bring any challenge to the terms and conditions of the tender after the auction has been concluded.

6. Accordingly, we find that the writ application merits no further consideration and the same stands dismissed but in the circumstances, without cost.

Writ petition dismissed.

2013 (II) ILR - CUT- 559

V. GOPALA GOWDA, C.J. & B. N. MAHAPATRA, J.

OJC No. 13687 OF 1997 & 16749 of 1998 (Dt.26.06.2012)

DIPALI CHAND ……...Petitioner

.Vrs.

CHAIRMAN, OPSC AND ORS. …..….Opp. Parties

(A) ODISHA JUDICIAL SERVICE RULES, 1994 – Rule 7 r/w section 7 of the Odisha Reservation of vacancies in posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (In short ORV Act, 1975)

Reservation/de-reservation of SC & ST Category Posts shall be made strictly in accordance with the Provisions of the ORV Act 1975 – Rule 7 (3) of the Rules, 1994 stipulates that if there is non-availability of sufficient number of candidates from SC or ST, unfilled vacancies reserved for them shall be filled up in accordance with the provisions of the ORV Act – Section 7 of the ORV Act prescribes that if in any recruitment year, the number of candidates either from SC or ST is less than the number of vacancies reserved for them even after exchange of reservation between the SC & ST, the remaining vacancies may be filled up by General Candidates after de-reserving the vacancies in the prescribed manner.

In this case as there was non-availability of four ST candidates (2 male +2 Female) one ST post was given to one SC male on exchange basis and remaining three unfilled ST Posts were de-reserved and were given to two General (male) and one General (women) candidates on merit by following the due procedure prescribed under the OJS Rules, 1994 read with Provisions of the ORV Act. Held, writ petitions are devoid of any merit, hence dismissed. (Paras 21, 22, 24)

(B) SERVICE LAW – Suitability and eligibility of candidates have to be considered with reference to the last date for receiving applications.

In this case as the first writ petitioner did not belong to SEBC Category as on the last date of submission of her application she is not entitled to claim the post in the SEBC (women) Category.

(Para 16)

Case laws Referred to:-

1. (1993) 2 SCC 429 : (Dr. M.V. Nair-V-Union of India & Ors.)
2. (1994) 2 SCC 723 : (U.P. Public Service, Commission, U.P, Allahabad & Anr.- V- Alpana)
3. (1995)(Suppl) 4 SCC 706: (Smt. Harpal Kaur Chahal-V-Director, Punjab Instructions, Punjab & Anr.)
4. (1997) 4 SCC 18 : (Ashok Kumar Sharma & Ors.-V-Chander Shekhar & Anr.)

For Petitioner -M/s. Manoj Mishra, Sr. Adv., S.K. Pradhan, P.K. Das & P.K. Mohanty,
M/s. S. N. Kar & S. K. Mohanty

For Opp. Parties - M/s. B.K. Dash (for O.P. Nos. 1 & 2)
M/s. R.K. Mohapatra, Govt. Adv, (for O.P. Nos. 3&4)

M/s. S.P Mishra, Sr. Adv., P. K. Jena, N.Panda, D.P.Mohapatra, S.Mishra, S. Das,S. Nanda, S. K. Mohanty & A. K. Dash (for O.P. No. 5)
M.Chand, D. R. Parida, S. Khan, M. Mohapatra & K.B. Mund (for O. P. No. 6)
M/s. H. B. Das & P. K. Naik (for O. P. No. 12)
M/s. D. Ray, B. K. Jena & J. P Rout (for O.P. No. 19)
M/s. R.K. Mohanty, D. K. Mohanty, A. P. Bose, S.N.Biswal, S. K. Mohanty, S. Mohanty, P. Jena, M.R. Dash, P.K. Samantray & N. Das (for O.P. No. 28)
M/s. C. R. Mishra, D. Behura, G. Mishra, D. Das & H. K. Mallick (for O.P. No. 30)
M/s. S. N. Kar & J. Das (for O.P No. 31)
M/s. S. K. Mishra, L. Pradhan & N. Sahani (O.P No. 35)
M/s. A. K.Mohapatra & D. P. Rath (for O.P.No.36)

V. GOPALA GOWDA, C.J. These two writ petitions were listed for hearing together in view of the direction of the Supreme Court dated 20.11.2003 in C.A. Nos. 5986, 5987 and 5985 of 1998. The Hon'ble Supreme Court remanded the matter to this Court for fresh decision on merits after giving an opportunity to the writ petitioners to implead all necessary parties in the writ petition. Though the matter was heard by a Division Bench of this Court and after conclusion of the hearing, the matter was reserved for judgment on 24.9.2008, subsequently that Bench released the matter in the year 2010 and thereafter these matters were listed before this Bench for hearing.

2. The first writ petition being O.J.C. No.13687/1997 has been filed by the petitioner (hereinafter called 'the first petitioner'), who is claiming to be a Women S.E.B.C. candidate submitted her application pursuant to Advertisement No.5 of 1996-97 published by the Orissa Public Service Commission (OPSC) for filling up the post of Temporary Munsif (Emergency Recruitment) in Class-II of Orissa Judicial Service, with a prayer for issuance of a writ of mandamus directing the opposite parties-authorities to give her appointment in view of Resolution under Annexure-6, which is with regard to Reservation for Socially and Educationally Backward Classes (SEBC) in posts and services under the State strictly following the provisions of Women

Reservation Rules, 1994 and further to direct the opposite parties to confer service seniority of the petitioner from the date of engagement of other opposite parties-candidates giving all consequential service and financial benefits.

3. The writ petitioner in the second writ petition, being O.J.C. No.16749/1998 (hereinafter called 'the second petitioner'), who was a General (Women) category candidate in the said recruitment has filed this writ petition with a prayer to quash the appointment of opposite party Nos.3 and 4 (opposite parties-candidates) and to issue a direction to the opposite parties-authorities to appoint the petitioner in the post of Temporary Munsif under Emergency Recruitment.

4. As both the writ petitions are analogous, the same are taken together for hearing and disposal. Brief facts in respect of the two writ petitions are stated with a view to find out as to whether the petitioners are entitled for the relief as prayed in these writ petitions.

5. The Orissa Public Service Commission (OPSC) invited application vide Advertisement No.5 of 1996-97 dated 17.06.1996 for filling up 25 posts of Temporary Munsif (Emergency Recruitment) in Class-II of the Orissa Judicial Service (OJS). Pursuant to the said advertisement both the petitioners applied for the said post furnishing all the documents. The examination for the said posts was held in the month of September, and petitioners appeared in the examination. The result was published on 15.10.1996 declaring 39 candidates as successful in the examination. The first petitioner's name was found at Sl. No.18 and second writ petitioner's name was found at Sl. No.19 indicating therein that they belong to Women Category. Petitioners came to know that the State Government going to give appointment to 23 candidates selecting 17 candidates from the merit list serially and 6 candidates from reserved categories of SC & ST.

6. It is the case of the first petitioner that the Government of Orissa in the Welfare Department brought out a Gazette Notification dated 30.8.1996 vide it Resolution dated 29.7.1996 recommending the Orissa State Commission for Back Ward Classes for inclusion of SEBC category in the State List and the name of the Castes/Communities stated in the Schedule of the said Notification included the caste of the first petitioner. It is stated that petitioner belongs to 'Raju' Community and comes under the SEBC category pursuant to the said Notification, which is disclosed from the Caste Certificate produced under Annexure-4. However, it is stated by the first petitioner that since the last date of submission of the application for the

posts in question was fixed to 05.08.1996 and the Gazette Notification showing inclusion of the Caste of the petitioner under SEBC category was published on 30.08.1996 (just after 25 days of the fixed for last date of submission of application), there was no scope for the first petitioner to submit her SEBC Certificate along with the application form. It is further submitted on behalf of the first writ petitioner that in view of the Gazette Notification, the roster points in a cycle of 80 point model roster for SEBC, the petitioner being SEBC (W) candidate is entitled to remain at Sl. No.9 of the merit list for getting appointment in stead of Sl.No.17. Therefore, placing the first petitioner at Sl.No.17 in the merit list, instead of placing her at Sl. No.9, is bad in law.

7. It is further contended by the learned counsel for the petitioner that 13 candidates belonging to General category were appointed in gross violation of declared policy and mandate of Reservation Rules governing the field. If the law of reservation is applied strictly, then 9 posts should have gone for general category taking the percentage of reservation of 27% for SEBC, 16.25% for SC and 22.5% for ST candidates. It is stated that out of the admitted 25 advertised vacancies 13 posts went to the general category. In order to accommodate 13 general candidates, there should have been 37 advertised vacancies. Therefore, it is submitted that the selection and appointment was made de hors the Reservation Rules and Resolutions of Government and the declared policies of the State Government.

8. It is further submitted alternatively that if women candidate belonging to SC/ST community is not available for recruitment, then those posts should be filled up by SC/ST (Male) candidates. In the absence of any such SC/ST (Male) candidates those posts should be filled up by reserved women candidates in order to meet the statutory requirement of 33% reservation for women. However, in the instant case those posts went in favour of General (Male) candidates which is in gross violation of Articles 14 and 16 (4) of the Constitution and the Reservation Rules and Resolution of the Government. Therefore, it is submitted that the petitioner is entitled for appointment against reserved category of SEBC.

9. It is further contended that out of 3 (Male) ST posts, one ST candidate was selected and appointed. The second Male (ST) post was exchanged with SC (Male), namely, H. K. Sethy, who was at Sl. No.38 of select list, and he was appointed accordingly. The third (Male) ST post after de-reservation went in favour of one General (Male) candidate, namely, Subhadarshi Patnaik, who was at Sl. No.12 of the select list and was appointed. Out of 2 ST (Women) posts, no ST women was selected and appointed, however, after de-reservation of the same, one ST (Women) post

went in favour of candidate at Sl. No.16 of the select list namely Geeta Mohanty, who was a General (Women) candidate and another ST (Women) post went in favour of Sl. No.15 of the select list, namely, Prasant Kumar Dash, who was General (Male) candidate. Therefore, the selection and appointment is contradicting the declared policy of women reservation and in direct violation of the reservation Rules for SEBC as no SEBC (Women) candidate from the select list has been appointed.

10. Supporting the aforesaid contentions urged on behalf of the first writ petitioner, in addition thereto, it is submitted by the learned counsel for the second writ petitioner that the posts reserved for SEBC (Women) category on de-reservation could not have been given to Male candidates belonging to SEBC category. It could only be filled up by a women candidate belonging to General category at best. It is contended that the post meant for women category could not be made over to any Men candidate, rather it could be given to a General Women candidate whose name finds place in order of merit list. This is necessary because the total percentage i.e. more than 30% of the total posts meant to be filled up by women candidates could not be interfered with. The total percentage of women reservation has to be complied with and be kept in mind by the Government.

11. It is further contended by the learned counsel for the second writ petitioner that the post reserved for S.T. (Women) could not be encashed on exchange basis with S.C. (Men), rather it had to go to General (Women) category candidates on de-reservation. It is submitted that three posts of women categories (one SC and two ST) could not have been given to any men candidates of any category and it could be only given to eligible women candidates of General category. The total reservation meant for women candidates of all categories has to be kept intact. In the advertisement the total number of post reserved for women of all categories was eight. Out of those eight, four were reserved for General (Women), one for SC (Women), two for ST (Women) and one for SEBC (Women). Therefore, in case of non-filling of any post of women candidates of any category, it should go to women candidates of general category in order of merit and in no case it would go to a male candidate and any deviation of that will result in hostile discrimination and violation of reservation policy of the Government and Articles 14, 15 (3) and 16 of the Constitution. It is submitted by the learned counsel for the second writ petitioner that the principles of reservation have wrongly been applied in the instant case in making appointment inasmuch as the posts against which two male candidates namely one Subhadarshi Pattnaik at Sl. No.12 and another Prasant Kumar Dash at Sl. No.15 of the P.S.C. list were appointed in place of two women S.T. candidates. For non-availability of those two women ST candidates, it would go to two women

candidates of general category straightway applying the principles contained in Orissa Civil Services (Reservation of Vacancies for Women in Public Services) Rules, 1994 (hereinafter called the OCS (RVWPS) Rules, 1994. Therefore, it is contended that so far as appointment of Prasant Kumar Dash and Subhadarsi Pattnaik are concerned, they are required to be quashed and in their place both the writ petitioners who were at Sl. Nos.18 and 19 of the P.S.C.'s list are entitled to be appointed.

12. The State Government has filed its statement of counter justifying the selection and appointment of candidates by duly following the reservation Rules for women. Inter alia it is contended that the select list was prepared by the Government taking into account the reservation for women and the reservation for women in all categories was given as per Rule 21 (1) of the Orissa Judicial Service Rules, 1994 as directed by this Court vide judgment dated 22.08.1997 while disposing of a batch of cases and O.J.C. No. 143 of 1996 and OJC Nos.5566, 6040, 6041 and 6088 of 1997. It is submitted that the O.P.S.C. sent the merit list of 39 candidates under Rule 19 (1) of the O.J.S. Rules, 1994 which includes 26 General, 6 SEBC, 6 SC and 1 ST candidates out of which 14 were women. The Advertisement was made for 25 posts as per the break up given in the advertisement. Select list of 25 candidates was prepared by Government under Rule 21 (1) of the Rules. The names of the petitioners found place at Sl. Nos. 18 & 19 of the merit list sent by the OPSC under unreserved category. Since 6 women candidates were above the petitioners, petitioners' name could not be included in the select list. In fact the list prepared by this Court in the earlier judgment passed in the aforesaid writ petitions also did not include the names of both the petitioners. While disposing of the said writ petitions, this Court re-cast the select list and directed that the appointments to be made according to the recast list. No doubt the judgment of this Court was challenged before the Apex Court and the Hon'ble apex Court remanded the matter to this Court for fresh decision on merits and after giving necessary opportunity to the writ petitioners to implead all necessary parties therein. At paragraph 7 of the counter affidavit it is stated that as per the prevailing rules and the notifications of the Govt. G.A. Department dated 23.12.1992, 1/3rd of posts were given to the women candidate in all the categories. Out of 25 vacancies 13 wee kept for General candidates (9 for UR + 4 for Female). Out of 13 posts meant for General Candidates in order of merit, the 9th candidate Smt. Salini Kumari Devi (women candidate) came into the list on her own merit and was not counted for giving reservation to women and out of 13 posts for general candidates 1/3rd i.e. four were given to women candidates who were at Sl. No.10, 11, 13 and 14 of the merit list. Four posts (3 male + 1 Female) were reserved for SC candidates and as there was no SC (women)

candidate available, as per the Rules it was given to SC (male) candidate and accordingly four SC posts were filled up. Five posts (3 male + 2 female) were reserved for ST category. Only one candidate, namely, Mr. Rahesh Ekka was available from ST category and after exchange from ST to SC one Mr. Hemant Kumar Sethi who was a SC candidate at Sl. No.38 of the merit list was given appointment against the ST category and accordingly two posts of ST category were filled up and three posts remained vacant and after de-reservation of those three ST posts, those were filled up by general category candidates and out of the said three, 1//3rd post i.e. one post was given to Smt. Gita Mohanty a General (Women) candidate who was at Sl. No.16 of the merit list and 6th among the women candidates. There were three posts (2 male + 1 female) reserved for SEBC candidates and among the SEBC candidates as no women SEBC candidate was available all the three posts were filled up by SEBC (Male) candidates. The first writ petitioner claims that she belongs to "RAJU" community/caste which was included in the list of SEBC published on Govt. of Orissa Gazette on 30.08.1996 which was much after the last date of receipt of application i.e. on 5th August, 1996. Therefore, the first writ petitioner was not at all a SEBC candidate as on the last date of application and hence she cannot claim that she should be given appointment against the post reserved for SEBC (women) candidate. Therefore, it is prayed that the writ petitions are liable to be dismissed as the petitioners have no case.

13. With reference to the aforesaid pleadings and rival legal contentions urged by the parties, the following points arise for consideration.

(1) Whether the petitioner in the first writ petition is entitled to be selected and appointed against the post meant for SEBC (women)?

(2) Whether the petitioners can claim that after de-reservation of posts earmarked for ST category, petitioners should have been selected and appointed even though their names find place in the select list below the persons who have been selected and appointed ?

(3) What order ?

14. The first point is required to be answered against the petitioner in the first writ petition for the following reasons.

It is an undisputed fact that Orissa Public Service Commission invited applications vide Advertisement No.5 of 1996-97 dated 17.06.1996 for filling up of 25 posts of Temporary Munsifs (Emergency Recruitment) in Class-II of the Orissa Judicial Service (OJS). The last date for submission of application was fixed to 05.8.1996. Pursuant to the said advertisement both the

petitioners applied as General (Women) candidates. It was clearly stipulated in the advertisement that the candidates claiming to be of Other Back Ward Class must produce attested copy of such certificate. It is an admitted fact that the first petitioner did not produce her caste certificate showing that she belongs to OBC/SEBC community at the time of submission of her application form or before the last date fixed for submission of application. Even the first writ petitioner did not file her caste certificate at any time on or before the date of publication of result of such examination i.e. 15.10.1996. Therefore, the authority treated her as a General (Women) candidate. It is further an undisputed fact that the first writ petitioner's community ('Raju' community) was included in the SEBC category for the first time vide Government of Orissa Gazette Notification dated 30.08.1996 whereas the last date of submission of the application was fixed to 05.08.1996. The said Notification was prospective in nature. Therefore, as on the last date of submission of application the first writ petitioner was not having the status of SEBC and therefore she had no eligibility apply against the SEBC category.

15. There can be no dispute to the settled legal proposition that the selection process starts from the date the applications are invited and any person eligible on the last date of submission of the application, has a right to be considered against the said vacancy provided he/she fulfils the requisite qualification or eligibility criteria. Therefore, the eligibility criteria as it stands on the last date of submission of the applications is to be applied.

A three Judge Bench of the Supreme Court, in Dr. M.V. Nair Vs. Union of India & Ors. (1993) 2 SCC 429, held as under:-

> "It is well settled that suitability and eligibility have to be considered with reference to the last date for receiving the applications, unless, of course, the notification calling for applications itself specifies such a date."

In U.P. Public Service Commission, U.P., Allahabad & Anr. Vs. Alpana, (1994)2 SCC 723, the Supreme Court, after considering a large number of its earlier judgments, held that eligibility conditions should be examined as on last date for receipt of applications by the Commission.

In Smt. Harpal Kaur Chahal Vs. Director, Punjab Instructions, Punjab & Anr., 1995 (Suppl) 4 SCC 706, the Supreme Court held:-

> " It is to be seen that when the recruitment is sought to be made, the last date has been fixed for receipt of the applications, such of those candidates, who possessed of all the qualifications as on that

date, alone are eligible to apply for and to be considered for recruitment according to Rules."

In Ashok Kumar Sharma & Ors. Vs. Chander Shekhar & Anr., (1997) 4 SCC 18, the Supreme Court held that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be adjudged with reference to that date and that date alone and it is a well established proposition of law.

16. In view of the above in the instant case it is very much clear that as the first writ petitioner did not belong to SEBC category as on the last date of submission of her application, she is not entitled to claim the post in the SEBC (Women) category.

17. The second point is also required to be answered against the petitioners for the following reasons.

18. After perusal of the records, it is very much clear that out of 25 vacancies 13 were kept for General candidates, 4 for SC, 3 for OBC and 5 posts for ST category. In the instant case the second petitioner has no grievance against the filling up the posts of General, SC and OBC category. The dispute relates to filling up of unfilled posts of ST category. It is an undisputed fact that five posts (3 male + 2 female) were reserved for ST category and only one candidate, namely, Mr. Rajesh Ekka was available from ST category who was appointed. After exchange from ST to SC one Mr. Hemant Kumar Sethi, a SC candidate who was at Sl. No.38 of the merit list was given appointment against the ST category and accordingly two posts of ST category were filled up and three posts of that category remained vacant.

19. The main grievance of the petitioners is that the post meant for ST (women) category could not be made over to any Men candidate, rather it could be given to General (Women) candidate whose name finds place in the merit list. It is further contended by the learned counsel for the petitioners that the principles of reservation have wrongly been applied in the instant case, inasmuch as making appointment of two General (male) candidates namely on Subhadarshi Pattnaik at Sl. No.12 and another Prasant Kumar Dash at Sl. No.15 of the P.S.C. list in place of two women S.T. candidates, which is bad in law. In case of non-availability of the ST (Women) candidates, the said posts should have gone to two women candidates of general category straightway applying the principles contained in OCS (RVWPS) Rules, 1994.

20. In our considered view, the said contention is untenable in law for the reason that during the relevant time the recruitment and service conditions of Judicial Officers were governed by the Orissa Judicial Service Rules, 1994 (in short 'OJS Rules, 1994). Further, number of posts of each category and reservation of posts were mentioned in the advertisement in terms of Rules 7 and 9 of the said Rules, 1994. Rules 7 & 9 of the OJS Rules, 1994 is extracted hereunder for better appreciation.

> ***"7. Reservation for Scheduled Caste and Scheduled Tribe candidates*** **–** (1) There shall be reserved vacancies for the candidates belonging to Scheduled Castes and Scheduled Tribes in accordance with the provisions of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and the rules made thereunder.
>
> (2) In filing up vacancies reserved under Sub-rule (1), candidates belonging to the Scheduled Castes or Scheduled Tribes shall be considered for appointment in the order in which their names appear in the list prepared in accordance with the Rule 21.
>
> (3) If sufficient number of candidates belonging to the Scheduled Castes or Scheduled Tribes, as the case may be are not available for filling up all the vacancies so reserved the remaining vacancies shall be filled up in accordance with the provisions of the Act and rules as referred to in Sub-rule (1):
>
> Provided that the provisions of Sub-section (4) of Section 9 of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 shall have no application to the recruitment made to the Orissa Judicial Service."
>
> (emphasis added)
>
> ***"9. Reservation for women and backward classes*** . As nearly as may be, reservation for women, and socially and educationally backward classes, shall be made in accordance with the G.A. Department Resolution No.2M-54-/92/43328/Gen. dated 23rd December, 1992 [Welfare Department No.35758-OBC-75/94, dated the 8th/12th December, 1994.]

21. On careful reading of Rule 7 of the Rules, 1994 it is clear that reservation/de-reservation of SC & ST category posts shall be made strictly in accordance with the provisions of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Caste and Scheduled Tribe) Act, 1975

(hereinafter in short called the 'ORV Act). Accordingly, in the instant case the State Government has duly made the reservation for SC & ST as shown in the advertisement. Rule 7 (3) of the Rules, 1994 makes it very clear that if there is non-availability of sufficient number of candidates from SC or ST, unfilled vacancies reserved for them shall be filled up in accordance with the provisions of the ORV Act. Section 7 of the ORV Act clearly prescribes that if in any recruitment year, the number of candidates either from SC or ST is less than the number of vacancies reserved for them even after exchange of reservation between the SC and ST, the remaining vacancies may be filled up by general candidates after de-reserving the vacancies in the prescribed manner. On careful reading of said provision, it is clear that after de-reservation the remaining vacancies shall be filled up by the General candidates on merits.

22. In the instant case, after exchange of one ST post to SC category, as there was no other SC candidate available for exchange. Government de-reserved those vacant three ST posts and filled them up by general category candidates as per their merit duly following Rule 7 of Rules, 1994 and Section 7 of the ORV Act. Further, out of the said three posts, 1/3rd post i.e. one post was given to one Smt. Geeta Mohanty a General (Women) candidate who was at Sl. No.16 of the merit list, applying the reservation principles for women. Such action of the State Government cannot be said to be arbitrary or unreasonable. Further, in view of the aforesaid Rule it is very much clear that reservation or de-reservation of SC & ST category posts in the Orissa Judicial Service Examination was governed under OJS Rules, 1994 and ORV Act, 1975. Therefore, the contention urged on behalf of the petitioners that appointment shall be made as per Rule 4 (3) of the Orissa Civil Services (Reservation of Vacancies for Women in Public Services) Rules, 1994 is untenable in law as the said OCS (RVWPS) Rules, 1994 has no application to the instant case. Rule 4 (3) of the OCS (RVWPS) Rules, 1994, upon which much reliance has been placed by the learned counsel for the petitioners, has no application to the instant case for one more reason that the said OCS (RVWPS) Rules, 1994 provides for reservation in respect of 'Physically Handicapped, Sports men, Ex-Servicemen and General candidates' as specified under Rule 4 (1) of the said Rule, but not in respect of SC & ST category. It would be clear from the conjoint reading of Rule 4 (3) and Rule 4 (1) respectively.

In view of the above, by no stretch of imagination the petitioners can claim their rights to that de-reserved posts as their position in the merit list is below the rank of the said three opposite parties-candidates, namely, Subhadarsi Patnaik, Prasanta Kumar Das and Smt. Geeta Mohanty, as the

Orissa Civil Services (Reservation of Vacancies for Women in Public Services) Rules, 1994 is not at all applicable to the instant case. The Government has rightly filled up the unfilled ST category posts duly following the procedure prescribed under Rule 7 of the OJS Rules, 1994.

23. By careful reading of Rule 9 of the OJS Rules, 1994, it is clear that the reservation for women shall be made in accordance with G.A. Department Resolution No.2M-54-/92/43328/Gen. dated 23rd December, 1992 which provides that 33% posts in each category shall be reserved for women. Further, clause-3 of the said Resolution provides as under :

> "3. If in any year, the vacancies reserved for these categories remain unfilled due to non-availability of the eligible women candidates belonging to the relevant category, the unfilled vacancies shall be filled up by male candidates of the same category."

24. Similarly it is provided under Rule 9 of OJS Rules, 1994 that the reservation for SEBC shall be made as per the Notification of the Tribal Welfare Department date 10th September, 1993. As per the aforesaid Resolution and Notification provided under Rule 9 of Rules, 1994, advertisement was made and all the posts were filled up and due to non-availability of Women candidates of respective categories those posts were filed up by Male candidates of that category. However, as there was non-availability of four ST candidates (2 male+2 female) one ST post was given to one SC male on exchange basis and remaining three unfilled ST posts were de-reserved and were given to two General (male) and one General (women) candidates on merits by following the due procedure prescribed under the OJS Rules, 1994 read with provisions of ORV Act.

25. For the reasons stated above, we are of the considered view that there is no merit whatsoever on the contentions urged on behalf of the petitioners. The writ petitions are devoid of any merit and are accordingly dismissed. No order as to costs.

Writ petitions dismissed.

2013 (II) ILR - CUT- 572

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

JCRLA NO.124 OF 2003 (Dt.05.09.2012)

SANTOSH KUMAR SAHOO ……...Appellant

.Vrs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Circumstantial evidence – Plea of last seen theory – As per prosecution evidence P.Ws.2, 7 and the deceased were seen in the company of the appellant at about 8 P.M. but the dead body of the deceased was recovered on the next day at about 9 A.M. – This Court is not inclined to believe the last seen theory since there was a long time gap between the deceased having been last seen in the company of the accused and the time of discovery of the dead body of the deceased – Held, prosecution has not been able to prove its case beyond all reasonable doubt and it is not safe to convict the appellant – Impugned judgment of conviction and sentence are set aside.

(Paras 10,11,12)

Case law Referred to:-

(1997) 13 OCR 245 : (Jagata Singh -V- State).

For Appellant - Mr. D.K. Satpathy, Adv.
For Respondent - Mr. Sk. Zafarulla,
Addl. Standing Counsel.

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment and order dated 02.05.2003 passed in Sessions Trial No.354 of 2001/33 of 2001 whereby the learned Addl. Sessions Judge, Angul while acquitting co-accused Achuta Pradhan and Ashok Pradhan has convicted the present appellant Santosh Kumar Sahoo for commission of offence under Section 302, IPC and sentenced him to undergo imprisonment for life.

2. The prosecution case in brief is that the deceased had love affair with one Kuni, the sister of co-accused Achyuta (since acquitted). As such, parents of the deceased had given a marriage proposal. But, such proposal was turned down due to protest of the wife of Achyuta. Consequently, the deceased was threatened with dire consequences by co-accused Achyuta and his brother co-accused Ashok (since acquitted). It is alleged that the present appellant intended to marry the said Kuni. On 27.04.2001 night, because of the good term he had with the deceased, the present appellant

called the deceased from his house and took him towards railway line. On the next day, i.e., on 28.04.2001 the dead body of the deceased was found on the railway line. The matter was reported at the Handapa Police Station. During investigation, the present appellant gave recovery of the knife, his bloodstained cloth and the watch of the deceased. The I.O. (P.W.12) seized those articles, sent the dead body for post mortem examination, examined the witnesses, also sent the incriminating materials for chemical examination and ultimately after completion of investigation submitted charge sheet as against the appellant and two others under Section 302/34 of the IPC.

3. The plea of the defence is complete denial of the prosecution case.

4. The prosecution, in order to prove the charge, examined as many as 12 witnesses including the doctor and exhibited 18 documents. Defence examined none.

5. The learned Addl. Sessions Judge, who tried the case by framing charges as against three accused persons, namely, Achuta Pradhan, Ashok Pradhan and Santosh Kumar Sahoo (the present appellant), on assessment of oral and documentary evidence available on record acquitted co-accused Achuta Pradhan and Ashok Pradhan of the charge under Section 302/34, IPC, and convicted the present appellant under Section 302, IPC and sentenced him to undergo imprisonment for life relying upon some of the incriminating circumstances.

6. Mr. Kabi Satpathy, learned counsel for the appellant assails the impugned judgment inter alia on the grounds that there is no direct evidence as against the present appellant and basing on the sole evidence of leading to discovery he has been convicted. He further submits that without any corroborative evidence no conviction can be made only on leading to discovery, which, as a matter of fact, has not been proved by the prosecution. He further submits that there are major contradictions in the evidence of the witnesses upon whom the trial court has placed reliance for recording conviction of the appellant. Therefore, it is a fit case where this Court should interfere and set aside the judgment of conviction and sentence passed by the trial court.

7. Mr. Sk. Zafarulla, learned Additional Standing Counsel vehemently contends that no doubt the conviction of the appellant is based on the circumstantial evidence but such circumstances are very clear, cogent and lead to an irresistible conclusion that the appellant is guilty. From the evidence of P.Ws.2, 3 and 8 motive of the appellant is clearly established. A definite inference is drawn from the evidence of P.Ws.2 and 3 that in the

night of occurrence the appellant and the deceased were seen together by them and in the early morning the deceased was found dead. Absence of any evidence with regard to availability of any other person at the spot other than the appellant, clearly points an accusing finger towards him. The evidence of P.W.5 from whom the watch belonging to the deceased was recovered as well as the evidence with regard to recovery of the weapon of offence, i.e., blood stained knife at the instance of the appellant indicate that the appellant is the author of the crime. Therefore, there is no scope for this Court to interfere with the impugned judgment.

8. Perused the record and went through the deposition of the witnesses minutely. P.W.1 is a witness to the inquest and has proved the inquest report Ext.1. P.W.2, the mother of the deceased, in her examination-in-chief stated that accused persons, except the present appellant, came to her house and threatened to kill her son deceased Rabindra alleging that he tried to keep relation with their sister. Hearing that, she gave proposal of marriage of the deceased with their sister, but due to objection the negotiation was failed and attempt was made to marry their sister with the present appellant. On the date of occurrence at about 8.00 P.M. being called by the present appellant deceased accompanied with him and did not return at night and on enquiry by Dina she told that deceased had gone with the present appellant. During course of their search, she heard that the deceased was killed and his dead body was lying at the railway line. P.W.3 is the father of the deceased. He corroborated the evidence of P.W.2 with regard to the threat given by other accused persons except the present appellant. He further deposed that on the date of occurrence at about 8.00 P.M. his son (deceased) had accompanied the present appellant to the spot. In cross-examination he admitted that threat was given by Ashok and Achuta (co-accused persons since acquitted) and that except giving threat they never quarrelled with the deceased. P.W.4 is a co-villager and a witness to the recovery of the weapon offence, i.e., knife. He also proved the seizure list Ext.2. He specifically stated in his examination-in-chief that while in police custody the present appellant confessed his guilt, which was recorded by police under Ext.3, then led the police and the witnesses to the place of concealment and brought out the blood stained knife from the bush which was seized by police under the seizure list Ext.2. In cross-examination he admitted that he did not remember the contents of the seizure list and the statement made by the present appellant. He further admitted that he saw the knife in police jeep and that police brought the knife and kept it in the jeep. P.W.5 is another co-villager and he deposed that while in custody the present appellant and police came to him and he gave the watch to police which the appellant had earlier given to him. He proved the seizure list Ext.4

whereunder the said watch was seized. In cross-examination he admitted that he is a matriculate but he had not personally read the seizure list. No document was kept when the present appellant gave the watch. He also admitted that Bishnu and Kapila were present at the time of seizure of the watch. P.W.6 is a witness to the inquest. P.W.7 is a co-villager and a witness to the last seen theory. He deposed that deceased Rabindra and he used to sleep together. On the material date deceased accompanied appellant towards Railway line but did not return and in the next morning his dead body was recovered. P.W.8 is the informant and brother of the deceased. He proved the F.I.R. Ext.6. In his examination-in-chief he stated that he heard the incident from his parents. P.W.9 is a witness to the recovery of the weapon of offence, i.e., knife. He although corroborated the statement of P.W.4 with regard to recovery of the weapon of offence, in cross-examination he admitted that the recovery took place at the evening hours and the place of concealment was accessible to all. He also admitted that after his arrival the I.O. had not asked anything to accused appellant.

P.W.10 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries:-

"(i) Abrasion 11" x 3" over anterior aspect of right thigh.

(ii) Abrasion 3½" x 1" over lateral aspect of upper part of right thigh.

(iii) Abrasion 3" x 1½" over right iliac fossa.

(iv) Bruise (pressure mark) 5½" x 5" over anterior aspect of neck.

(v) Abrasion 3½" x 1" over external aspect of left forearm.

(vi) Abrasion 1½" x 1" over superior aspect of left shoulder.

(vii) Punctured wound of size 1½" x 1" x 7" over right side of anterior side of chest wall at level of 3rd and 4th rib adjacent to sternum (on probing of wound cross of blood comes out)

(viii) Incised wound 1½" x 1" x 1½" over left side of back.

(ix) Incised wound 1½" x 1" x 1½" over left side of back.

(x) Incised wound 1½" x 1" x 1½" over left side of back.

(xi) Incised wound 1½" x 1" x 1½" over left side of back.

(xii) Incised wound 1½" x 1" x 1½" over right side of back below interior angle of scapula.

(xiii) Incised wound 1½" x 1" x 1 ½" over right side of back at level of spines of T-3 and T-4.

(xiv) Incised wound 1½" x 1" x ½" over posterior aspect of left shoulder.

(xv) Incised wound 1½" x 1" x ½" over posterior aspect of right shoulder.

(xvi) Incised wound 1½" x 1" x 1" just over the injury no.13.

(xvii) Incised wound 1½" x 1" x 1" over posterior aspect of right side of neck behind right pinna."

He opined that the death was due to externo internal haemorrhage and shock as a result of the injury to heart and superior Venae Cavae and asphyxia due to pressure over trachea. He proved the post mortem examination report under Ext.7. He further opined that except injury Nos.1, 2 and 6 all other injuries mentioned in the post mortem report can be possible by the weapon of offence produced before him.

9. P.W.12 stated that at the relevant point of time he was the O.I.C. of Handapa Police Station. He received the F.I.R., registered the case and investigated into the matter. During the course of investigation, he visited the spot, conducted inquest over the dead body of the deceased, sent the dead body for post mortem examination, examined the witnesses and arrested other accused persons. On 4.5.2001 he was intimated that the present appellant has surrendered before the learned S.D.J.M., Athamallik. So, he made a prayer and brought the appellant to police custody. During examination, the appellant in presence of the witnesses admitted his guilt and gave recovery of weapon of offence, i.e., the knife. Due to his transfer, on 07.06.2001 he handed over charge of investigation to S.I. of police P.K. Patra (P.W.11), who on completion of investigation submitted charge-sheet against the present appellant and two others. In cross-examination P.W.12 admitted that on 27.04.2001 night the deceased was last seen with the present appellant at about 10.00 P.M. but the dead body was found on the next day at about 9.00 A.M.

10. From the above evidence it is crystal clear that by P.Ws.2 and 7 the deceased was seen in the company of the appellant at about 8.00 P.M**.** but

the dead body of the deceased was recovered on the next day at about 9.00 A.M. after a long gap of more than 24 hours. In the case of ***Jagata Singh Vrs. State*** reported in (1997) 13 OCR 245 the last seen theory was not accepted as an incriminating circumstance as because there was long time gap between the deceased having been last seen in the company of the accused and the time of discovery of the dead body of the deceased on the ground that the possibility of any other person coming in between could not be ruled out. In view of the ratio decided in ***Jagata Singh*** (supra), this Court is not inclined to believe the last seen theory since there was a long time gap between the deceased having been last seen in the company of the accused and the time of discovery of the dead body of the deceased. Furthermore, discrepancies appearing in the statements of the witnesses to the last seen theory (P.Ws.2 & 7) make their evidence unreliable. So far as leading to discovery of the weapon of offence is concerned, P.W.4 in cross-examination admitted that he saw the knife in the police jeep and that police brought the knife and kept in the jeep. He also admitted that he has not read the seizure list. P.W.9 in cross-examination admitted that the recovery was made during the evening hours on the same day but the I.O. admitted in his examination-in-chief that the present appellant surrendered before the learned S.D.J.M., Athamallik on 4.5.2001 and he took him (appellant) to police custody on remand on 5.5.2001 and that day the appellant admitted his guilt in presence of the witnesses, led the police and the witnesses to the place of concealment and gave discovery of weapon of offence. P.W.9 also admitted that the place wherefrom the weapon of offence was discovered was accessible to all. The above admission of P.Ws.4 and 9 raises grave doubt with regard to discovery of the weapon of offence at the instance of the appellant. P.W.5 from whom the watch was seized admitted in cross-examination that no document was kept when appellant gave the watch, that the statement of the appellant was not recorded in his presence and that the seized watch was not produced in the court. He further admitted that Bishnu and Kapila were present at the time of seizure of watch but both Bishnu and Kapila were not examined by the prosecution.

11. For the reasons noted above, this Court feels that the prosecution has not been able to prove its case beyond all reasonable doubt and as it is not safe to convict the appellant. Accordingly, the impugned judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Angul in Sessions Trial No.354 of 2001 are set aside and the appellant is acquitted of the charge.

It is stated at the Bar that the appellant is in custody. If that be so, the appellant Santosh Kumar Sahoo be set at liberty forthwith, unless his detention is required otherwise.

12. The JCRLA is accordingly allowed.

2013 (II) ILR - CUT- 578

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

MISC.CASE NO. 890 OF 2012 (Dt.26.08.2013)
(Arising out of CRLA NO.147/2003)

NANDA SETHI & ORS. ……..Petitioners

.*Vrs.*

STATE OF ORISSA ……..Opp.party

(A) CRIMINAL PROCEDURE CODE, 1973 – S.482

Bail granted U/s.389 (1) Cr. P.C. – Gross violation of the conditions of bail – Public prosecutor knowing fully well remained silent – Held, victim or relation of a victim can move for cancellation of bail U/s.482 Cr. P.C. (Para 8)

(B) CRIMINAL PROCEDURE CODE, 1973 – S. 389 (1)

Bail granted U/s. 389 (1) Cr. P.C. – Gross violation of the conditions of bail – Public prosecutor knowingly remained silent – Held, victim or relation of a victim can move for cancellation of bail U/s. 482 Cr. P.C.

In this case the appellants challenged their conviction U/s.302 I.P.C. and were released on bail by this Court with conditions that they should not indulge in any unlawful activities – However after being released on bail they threatened dire consequences to the witnesses and committed murder of the informant – One of the witnesses filed application U/s.482 Cr. P. C. for cancellation of their bail – Knowing fully well the public prosecutor did not move an application for

cancellation of bail – Held, in order to prevent abuse of process of its order and to secure the ends of justice this Court cancelled bail granted to the appellants in exercise of its power U/s.482 Cr. P. C.

(Paras 8,9)

Case law Referred to

AIR 1967 SC 286 : (Pampapathy -V- State of Mysore)

For Appellants - M/s. Pravash Ch. Jena, S.J. Das, A.K. Das
For Misc.Case (Petitioner) M/s. Deba Prasad Das & Sashikanta Behera
For Respondent - Learned Addl. Standing Counsel

BISWAJIT MOHANTY, J. This is an application for cancellation of bail under Section 482 of Cr.P.C. filed by one A.Dilesu Dora, who happens to be P.W.5 in Sessions Case No.368 of 2001, out of which Criminal Appeal No.147 of 2003 arises.

2. Shortly stated the facts are as follows:

The appellants three in number have filed Criminal Appeal No.147 of 2003 against the judgment and order dated 9.5.2003 passed by the learned Sessions Judge, Ganjam-Gajapati, Berhampur in Sessions Case No.368 of 2001 convicting and sentencing the appellants to undergo life imprisonment for the charges under Section 302/34 of I.P.C. During pendency of the appeal, appellants filed Misc. Case No.217 of 2011 praying for bail. On 20.06.2011, the above noted Misc. Case was allowed by this Court directing the trial court to admit the appellants to bail on such terms and conditions as may be deemed just and proper. Accordingly, on 1.7.2011, the learned Sessions Judge, Ganjam directed to release the appellant Nos.2 and 3 on bail with conditions that they should not leave the territorial jurisdiction of that court without prior permission and that they should not indulge in any unlawful activities. Similarly, on 6.7.2011, the learned Sessions Judge, Ganjam directed to release the appellant No.1 on bail with conditions that he should not leave the territorial jurisdiction of that court without prior permission and should not indulge in any unlawful activities.

3. After being so released on bail, the appellants started threatening the present petitioner as well as the informant, his brother, namely, A. Ganesh Dora who was examined as P.W.1 in Sessions Case No.368 of 2001 with an intention to kill them. It may be noted here that the above noted Sessions Case No.368 of 2001, out of which Criminal Appeal No.147 of 2003 arises

was for commission of murder of one, A. Fakir Mohan Dora in the year 2001, who happens to be the brother of the present petitioner (P.W.5) and informant (P.W.1).

4. While on bail, the appellants committed offence under Sections 306/326/34 of I.P.C. and Section 3 of the E.S. Act read with Section 27 of the Arms Act. On account of this, Berhampur Sadar P.S. Case No.172 of 2011 was registered against them. It is further submitted that in the said case, preliminary Final Form was filed on 6.6.2012 and final charge sheet was filed on 25.06.2012. The above noted Berhampur Sadar P.S. Case No.172 of 2011 was registered at the instance of the informant, Rajendra Sahoo on 5.12.2011.

On 5.12.2011 itself, the appellant No.1 started threatening A.Ganesh Dora (P.W.1/informant) with dire consequences. Accordingly, on 7.12.2011, A. Ganesh Dora filed F.I.R. at Berhampur Sadar P.S. and the said F.I.R. was registered as P.S. Case No.175 of 2011. In the said F.I.R., A. Ganesh Dora (informant/P.W.1) made it clear that the appellant No.1 was threatening to kill both, A.Ganesh Dora and A.Dilesu Dora in order to take revenge. On 8.2.2012, the appellants were arrested in connection with Berhampur Sadar P.S. Case No.172 of 2011. Further, learned counsel for the petitioner in the present Misc. Case submitted that on 7.4.2012, the appellants in furtherance of their criminal conspiracy committed the murder of A.Ganesh Dora (P.W.1/informant) and accordingly the present petitioner, A.Dilesu Dora filed F.I.R. No.53 of 2012 at Berhampur Sadar P.S. The above noted F.I.R. No.53 of 2012 was registered under Sections 302/120-B/34 of I.P.C. read with Section 27 of the Arms Act and Section 3 of the E.S. Act. In the said case, preliminary Final Form has been submitted on 30.12.2012. On perusal of the preliminary Final Form, it is clear that during investigation, it came to the light that since A.Ganesh Dora (P.W.1/informant) was trying to get the bail of the appellants cancelled, the appellants became revengeful and hatched out a plan from inside the jail by contacting the accused, Siba Sankar Gouda and his associates to immediately commit the murder of A.Ganesh Dora. In this background, accused, Sibasankar Gouda collected his associates, namely, Simanchal Sethy, Bijay Sahoo and Mangal Sabat and hatched out a plan to commit murder of A.Ganesh Dora. Ultimately, they executed their plan successfully by murdering A.Ganesh Dora on 7.4.2012. While in police custody, Siba Sankar Gouda confessed to have committed the murder along with his associates, namely, Simanchal Sethy, Bijay Sahoo and Mangal Sabat as per the direction of the accused persons Maya @ Maheswar Gouda, Nanda Sethy and Kalia Gouda (who are the appellants in the present Criminal Appeal No.147 of 2003) while they were in jail. Sibasankar

Gouda also led to discovery of weapon of offence, i.e., one Kati stating that he has used the same for committing the murder of A. Ganesh Dora. During course of investigation, the police seized original Interview Register of Circle Jail, Berhampur where the appellants are presently stationed. On verification of the said Interview Register, it was found that accused, Sibasankar Gouda had met appellant Nos.2 and 3 on 5.4.2012, i.e., prior to the date of occurrence on 7.4.2012. In such background, the petitioner in the present case, who happens to be P.W.5 in Sessions Case No.368 of 2001 out of which Criminal Appeal No.147 of 2003 arises prays for cancellation of bail of appellants as they have misused their liberty and they have committed heinous offences. In the Misc. Case he has also averred that appellants are now sending other antisocial persons to kill him.

5. The appellants have filed an objection to the above prayer for cancellation of bail. In their objection, they have taken a stand that A.Dilesu Dora (P.W.5) whose two brothers have been murdered have no *locus standi* for filing the cancellation of bail in view of second proviso to Clause (1) of Section 389 of the Code of Criminal Procedure, 1973, which makes it clear that where the convicted person is released on bail, it shall be open to the public prosecutor to file an application for cancellation of bail. Accordingly, learned counsel for the appellants submitted that petition filed by A. Ganesh Dora under Section 389 (1) of Cr.P.C. is not maintainable and only Public Prosecutor can file an application for cancellation of bail. Secondly, he submitted that Berhampur Sadar P.S. Case No.172 of 2011 and Berhampur Sadar P.S. Case No.53 of 2012 have been registered against the appellants to falsely implicate them in order to take revenge. So far as Berhampur Sadar P.S. Case No.175 of 2011 is concerned, where appellant No.1 was the accused, it is submitted that in the said case appellant No.1 has already been acquitted by the trial court due to insufficient evidence. In such background, the appellants pray for dismissal of the petition for cancellation of bail filed by A.Dilesu Dora.

6. During course of hearing, learned counsel for A.Dilesu Dora strenuously urged that though one of the conditions for grant of bail was that the appellant should not indulge in any unlawful activities; the appellants have violated the said condition with impunity and as a result brother of the petitioner, A.Ganesh Dora (P.W.1/informant) has been murdered. Further, learned counsel submitted that he has not filed the present application for cancellation of bail under Section 389 (1) Cr.P.C., but under Section 482 of Cr.P.C. In support of his contention, learned counsel for the petitioner (A.Dilesu Dora) relies on a decision of the Hon'ble Supreme Court reported in AIR 1967 SC 286 (***Pampapathy v. State of Mysore***). In that case, the

Mysore High Court had allowed the application for cancellation of bail and directed re-arrest of the accused, who were on bail pending appeals against conviction under various provision of Indian Penal Code. There, the applications for cancellation of bail were filed under Section 498 (2) and 561 (A) of the Code of Criminal Procedure, 1898. In that case an argument was advanced on behalf of the accused that once an order of bail is made pending appeal, subsequent conduct of the accused-appellant however reprehensible cannot justify the appellate court in revoking the order of bail and directing re-arrest of all the accused-appellants. The Hon'ble Supreme Court repelled such contention stating that if the contention of the appellant was accepted then it would lead to fantastic result. The appellants may commit further acts of violence for the very same offences for which they have been convicted. Accordingly, the Hon'ble Supreme Court found no fault with the order of cancellation of bail issued by Mysore High Court and held that the provision of Section 561 (A) are clearly attracted to the facts of the case and the High Court was entitled to cancel the bail of the appellants under the said Section. It is needless to mention that present Section 482 of Cr.P.C. is the new incarnation of Section 561 (A) of the old Code.

7. Per contra, learned counsel for the appellants argued that as per the judgment of the Hon'ble Patna High Court pronounced on 9th October, 2012 in Criminal Appeal (D.B.) No.721 of 2008 (***Madhusudan Prasad v. The State of Bihar***), a petition for cancellation of bail can only be moved by Public Prosecutor under second proviso to sub-clause (1) of Section 389 of Cr.P.C. and contended that neither the informant nor anybody else can file a petition for cancellation of bail. Second proviso was introduced with effect from 23.06.2006 by Code of Criminal Procedure (Amendment) Act, 2005.

8 (i) A bare reading of Section 389 of Cr.P.C. makes it clear that though liberty has been given to the Public Prosecutor to file an application for cancellation of bail, it nowhere restricts any other affected person or relative of a victim from moving for cancellation of bail granted under Sub-clause (1) of Section 389 of Cr.P.C. The Hon'ble Supreme Court in its decision in the case of Pampapathy (supra), made it clear that where the appellants indulge in gross misuse of liberty granted to them while enlarged on bail, the High Court would be justified in exercising its power under Section 561 (A) to cancel the bail. In the said decision, the Hon'ble Supreme Court also made it clear that the inherent power can be exercised if the matter in question is not covered by any specific provision of the Cr.P.C. Here, admittedly, there exists no provision of the Cr.P.C. to cover a situation like the present where despite commission of ghastly crimes in violation of condition of bail, the Public Prosecutor does not take any step to file an application for

cancellation of bail. Cr.P.C. does not make it clear as to what is the remedy left to the victim/relatives of victim under such circumstances. The present Misc. Case was filed before this Court on 18.05.2012. Despite this, the State/Public Prosecutor did not file any petition to cancel bail of the appellants. Thus, it is a clear case when this Court can exercise its inherent power under Section 482 of Cr.P.C. to cancel bail in order to prevent abuse of process of its order and also to secure the ends of justice.

(ii) So far as the decision of the Patna High Court is concerned, with great respect, we are unable to persuade ourselves to accept the ratio of the said decision that only a Public Prosecutor can file a petition for cancellation of bail under second proviso to Section 389 of Cr.P.C. and none else. The said decision does not take into account as to what would happen if despite gross violation of conditions of bail, Public Prosecutor does not move application for cancellation of bail. Even, otherwise, the said decision of Patna High Court is distinguishable on facts. There, the allegation was that the bail was granted on account of wrong presentation of facts and after grant of bail, accused was pressurizing the witnesses. There, the Court came to a finding that there has been no violation of any conditions of bail. But in the instant case, as indicated earlier, it is clear that there has been serious violation of condition of bail and Berhampur Sadar P.S. Case No.53 of 2012 has been registered for murder of P.W.1. Further, Patna High Court decision nowhere lays down that in view of second proviso to Clause (1) of Section 389 of Cr.P.C. recourse to Section 482 of Cr.P.C. cannot be taken by victim/relative of victim under any circumstances for cancellation of bail. In our humble opinion, victim/relation of the victim can move for cancellation of bail under Section 482 of Cr.P.C., when bail conditions are grossly violated, particularly where Public Prosecutor remains silent.

(iii) Further, the Hon'ble Supreme Court has made it clear in AIR 2000 SC 1851 and AIR 2001 SC 2023 that power vested in the High Court to cancel the bail can be invoked by State or any aggrieved party. High Court can also exercise the said power suo motu and at the instance of a near relative. Here, petitioner is that unfortunate person whose two brothers have been murdered.

9. Narration of facts (supra) of present case makes it clear that the appellants have violated the conditions imposed in the bail order with impunity and have committed heinous crimes. One of the conditions was that the appellants should not indulge in any unlawful activities. Here, perusal of Case Diaries shows that appellants have indulged in unlawful activities for which, charge sheets have been filed in Berhampur Sadar P.S. Case No.172 of 2011 and Berhampur Sadar P.S. Case No.53 of 2012 against appellants.

Admittedly, the informant has been killed in the meantime leading to filing of Berhampur Sadar P.S. Case No.53 of 2012. In such background, if the High Court will not exercise its power under Section 482 of Cr.P.C., then there would be grave injustice and citizens will lose their faith in criminal justice system.

10. Therefore, in such background, we humbly record our dissent with reasoning of the Patna High Court in the case of Madhusudan Prasad (supra) and allow the present Misc. Case. Accordingly, we cancel the bail order given in favour of the appellants in this Criminal Appeal No.147 of 2003 and direct that the appellants should be taken into custody immediately, if they are not already in jail custody in connection with any other case. Accordingly, the Misc. Case is disposed of.

Application allowed.

2013 (II) ILR - CUT- 584

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

W.P.(C) NO. 3415 OF 2004 (Dt.17.05.2013)

ASHOK KUMAR PRUSTY ……..Petitioner

.Vrs.

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

SERVICE LAW – Petitioner an N.M.R. employee – Apprehending termination he filed a writ petition earlier where in direction issued to the O.P.-Corporation to take up his case for regularization – Letter issued to him to Opt for V.R.S. – Action challenged – Petitioner's case for regularization not considered where as his juniors have been retained in service – Filing of false affidavit by OLIC – Held, Direction issued to OLIC to treat the petitioner at par with juniors and take up his case for regularization – Impugned order directing the petitioner to Opt for V.R.S. is quashed and direction issued for payment of all arrears – Proceeding be initiated against the Law Officer of OLIC for filing of false affidavit. (Paras 15,16)

Case laws Referred to:-

1.AIR 1999 SC 482 : (Mohan Singh-V- late Amar Singh)
2.(2006) 4 SCC 683 : (State of Karnataka-V- All India Manufacturers Organization)
3.(2006) 4 SCC 1 : (Secretary of Karnataka-V- Uma Devi)
4.1993 (I) OLR 348 : (Smt. Urmila Senapati-V- State of Orissa & Ors.)

For Petitioner - M/s. Goutam Mishra

For Opp.Parties - Addl. Govt. Advocate, (for O.P.No.1.)

M/s. Sandeep Parida, Rita Mohanty, Amiya Ranjan Naik. (for O.P.Nos.2 to 4).

M. M. DAS, J. The petitioner in the present writ petition has challenged the action of Orissa Lift Irrigation Corporation Ltd. (for short, 'the OLIC') for trying to terminate his service in the guise of showing him as a surplus staff on the ground that such action on the part of the OLIC is arbitrary and in contravention of the earlier directives of this Court as well as the Hon'ble Supreme Court.

2. The factual backdrop of this case discloses that the petitioner was appointed as a NMR Electrician under the Lift Irrigation Sub-Division, Sambalpur of OLIC on 1.1.1985 and was continuing as such. Annexure-1 to the writ petition is a gradation list, which indicates the date of engagement of the petitioner as 1.1.1985.

3. In the year 1994, the petitioner apprehending that the OLIC would arbitrarily terminate him filed OJC No. 8068 of 1994 before this Court praying for regularization of his service. The said writ petition was disposed of by order dated 15.7.1998 which is to the following effect:

> " Heard Shri G.B. Dash for the petitioner and Shri Mohanty for the opposite parties.
>
> Considering the submission of the counsel for the parties, we are of the opinion that present case is covered by order dated 2.4.1996 passed in O.J.C. No. 2680 of 1995 (Md. Khan Halder and another v. The Orissa Lift Irrigation Corporation Limited and another). We accordingly dispose of this case in the same terms and conditions and direct that since the petitioner is working as N.M.R. for a pretty long period the opposite parties will take up his case for regularization and grant of regular scale of pay".

This fact is not disputed by the opp. parties – OLIC. When the petitioner was continuing in service, in 1996, the Government of Odisha took a policy decision to terminate the services of N.M.R. employees. A spate of writ petitions were filed at that point of time. O.J.C. No. 2102 of 1996 was filed by 40 N.M.R. Junior Engineers and in the said writ petition, this Court directed the OLIC to carry out regularization in a phased manner and before regularizing the petitioners in the said writ petition, the Corporation should not make any fresh recruitment.

4. The Hon'ble Supreme Court in Civil Appeal Nos. 3615 to 3622 of 1991 and Civil Appeal Nos. 1701 to 1705 of 1992 also passed similar directions for carrying out regularization in a phased manner.

5. It is the case of the petitioner that without regularizing him, his juniors were regularized and the OLIC was forcing its employees to go on VRS. In fact, on 2.2.2004 the OLIC came up with the following order:-

> "Government of Orissa in W.R. Department in their letter No. 6425 dated 17.2.2004 have been pleased to allow another chance to the left out employees of OLIC who have not applied for VRS/VSS to go with effect from 30.4.2003/31.5.2003. Accordingly, the employees, who are intending to go on VRS/VSS from the above date may apply in proper form in triplicate by 25.3.20004 to the concerned Superintending Engineers/Executive Engineers positively. After receipt of applications, the Superintending Engineers/Executive Engineers will scrutinize the same and submit to Head Office by 31.3.2004. Applications received after the due date will not be taken into consideration and action will be taken to relieve the Zero/Surplus category employees with effect from 30.4.2003/31.5.2003 on VRS/VSS without any further notice".

Pursuant to the aforesaid general order dated 2.2.2004, the petitioner was served with a letter dated 4.3.2004 (Annexure-3) wherein he was asked to opt for VRS failing which he would be relieved without any further notice. The petitioner being aggrieved by the aforesaid letter under Annexure-3 has filed the present writ petition praying, inter alia, to quash the order under Annexure-2 dated 23.2.2004 as well as Annexure-3 dated 4.3. 2004 and direct the OLIC to regularize the service of the petitioner from the date, when his juniors have been regularized.

6. During pendency of this writ petition, this Court passed an interim order on 24.3.2004 in Misc. Case No. 3545 of 2004 to the following effect protecting the service of the petitioner:

"Misc. Case No. 3545 of 2004

Issue notice as above accepting one set of process fee.

In the interim, no coercive action shall be taken against the petitioner on the ground and if, he has not exercised option for VRS/VSS, in terms of office order No. 8580 dated 23.2.2004 till 7.4.2004, without prejudice to the rights and contention of the parties.

List this matter on 7th April, 2004"

The said interim order was extended from time to time and is in force.

7. The OLIC on receiving the notice has filed its counter affidavit on 30.6.2004 taking the stand that there were large number of employees in the Corporation who were surplus and the Corporation in order to down-size itself and to reduce the financial burden took steps to retain few employees and all surplus staff were requested to opt for VRS. However, in the counter affidavit, the case of the petitioner that his date of entry into the service was 1.1.1985 and, about his juniors being regularized, are not specifically refuted.

8. The petitioner has filed a rejoinder reiterating his earlier stand about his juniors being regularized as per the order passed by this Court as well as the Hon'ble Supreme Court. The documents under Annexure-4 series appended to the rejoinder indicate that one Shri Rajendra Prasad Mahanta (N.M.R. Electrician) was regularized on 31.3.1998 though he entered into service in the same category as the petitioner on 17.12.1985, i.e., after eleven months from the date of joining of the petitioner. The petitioner also relies on similar regularization of one Shri Hrusikesh Dehury in the post of N.M.R. (see Annexure-5 to the rejoinder). The said Hrusikesh Dehury also joined after the present petitioner started working on 1.1.1985. Misc. Case No. 1536 of 2009 was filed by the petitioner in the writ petition for an interim order directing the OLIC to release the arrear salary till May, 2009. This Court by order dated 15.4.2009 directed that in the meantime, the arrear salary of the petitioner for the period he has worked shall be computed and paid to him by end of May, 2009. As the aforesaid amount was not paid, the petitioner filed contempt application, being CONTC No. 138 of 2011, and pursuant to the orders passed by this Court, the OLIC paid a portion of the dues to the petitioner. On 3.8.2012 , an additional affidavit was filed by the OLIC, wherein a stand has been taken that the petitioner was a N.M.R. Electrician belonging to Zero category and reliance was placed on the common order dated 3.8.2007 passed in a batch of writ petitions, the operative portion of the said order dated 3.8.2007 relied upon the OLIC reads as follows:-

> "This being the position, we are not inclined to accede to the prayer of the petitioners to direct the O.Ps not to dispense with the services of the petitioners and to pass any order for their continuance. So far as payment of compensation to the petitioners is concerned, the same shall be paid by the O.Ps –Corporation. As to the claim of the petitioners for their arrear salary since April, 2007, we make it very clear that if the petitioners have worked and are entitled to the same, their entitlement shall be computed and paid to them along with the retrenchment benefit as early as possible.

9. A bare reading of the aforesaid order would show that the said order did not deal with specific question raised by the present petitioner with regard to his juniors having been regularized prior to him and that the OLIC is flouting the orders passed by this Court in the previous writ petition filed by the petitioner, as stated above. Apart from the above mentioned additional affidavit, the OLIC filed a reply to the rejoinder on 3.8.2012 mentioning therein that on enquiry, the date of joining of the petitioner is found to be 1.9.1987. It appears from Annexure-N/2 dated 23.8.2011 appended to the affidavit filed by the OLIC that the said enquiry was conducted during the pendency of the writ petition and it has been mentioned in the enquiry report as follows:-

> "Regarding actual date of engagement/joining in OLIC Ltd. by Sri Ashok Kumar Prusty, NMR Electrician, it was seen that :-
>
> (i) The E.E.L.I. Sambalpur had submitted one gradation list of N.M.R. Electrician wherein the date of joining was stated to be 01.01.1985.
>
> (ii) But, subsequently a good number of correspondences have been made by this division where in the date of joining of Sri Prusty, N.M.R. is mentioned as 01.09.1987 vide letter no .89 dt.11.011999 and letter No.821 dt.13.03.2009 of the E.E.L.I. Sambalpur (copy enclosed). The first date of joining as 01.01.1985 could not be established during enquiry.
>
> Hence, the date of engagement may be treated as 01.09.1987 as reported by the E.E.L.I. Sambalpur since, the Division could not produce any supporting records regarding the date of joining as 01.01.1985 and as the period engaged from 01.01.85 to 30.4.85 for different works does not count for continuity of his engagement as Electrician. The observation made in enclosed herewith.
>
> It is therefore, requested to please take expeditious steps for regularization of the matter, as such cases are leading to rise legal complicacies and very embarrassing situations for OLIC.".

10. After the aforesaid affidavit was filed, the petitioner filed Misc. Case No. 14399 of 2012 praying therein to initiate a criminal proceeding under section 340 Cr.P.C. against the OLIC for filing a false affidavit. Annexing to the said Misc. Case, the petitioner has filed the following documents:-

(i) Certificate given on 8.6.1992 mentioning his date of entry into service as January, 1985. The said document has been signed by the Assistant Engineer, Life Irrigation Division, Sambalpur.

(ii) Certificate dated 18.12.2003 mentioning that the petitioner was under the direct control of the Executive Engineer since 1.1.1985.

(iii) Chart showing the staff position of OLIC mentioning the date of entry into service of the petitioner as 1.1.1985.

(iv) Letter dated 2.5.2000 issued by the Executive Engineer, L.I. Division, Sambalpur to the Establishment Officer, OLIC, Bhubaneswar mentioning the date of entry of petitioner as 1.1.1985.

(v) Letter dated 27.2.2007 issued by the OLIC to the Labour Commissioner, Orissa, mentioning the date of entry of the petitioner into service as 1.1.1985.

11. Mr. Gautam Mishra, learned counsel for the petitioner relying upon the aforesaid additional affidavit filed by the OLIC pressed hard that it is a clear case where a false affidavit has been filed by the officials of the OLIC and action should be initiated under section 340 of the Cr.P.C. as against such deponent. For the aforesaid contention, Mr. Mishra relied upon the decision in the case of ***Mohan Singh v. late Amar Singh***, AIR 1999 SC 482, wherein the Hon'ble Supreme Court has held as follows:-

> "……Tampering with the record of judicial proceedings and filing of false affidavit, in a court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity. Since, we are prima facie satisfied that the tenant has filed false affidavits and tampered with judicial record, with a view to eradicate the evil of perjury, we consider it appropriate to direct the Registrar of this Court to file a complaint before the appropriate Court and set the criminal law in motion against the tenant, the appellant in this case namely Mohan Singh".

Mr. Mishra also relied upon the decision in the case of ***State of Karnataka v. All India Manufacturers Organization,*** (2006)4 SCC 683 for substantiating his contention that this is a fit case, where proceeding should be initiated under section 340 Cr.P.C. He submitted that in the present case, there are prima facie materials to indicate that the OLIC in order to justify its stand that the petitioner joined on 1.9.1987 has filed an affidavit through its Law Officer on 3.8.2012 and 15.3.2013 wherein, it has been specifically mentioned that the date of engagement of the petitioner may be treated as 1.9.1987 as reported by the E.E., L.I., Sambalpur. Since the Division could not produce any supporting documents regarding the date of joining as 1.1.1985 and the period of engagement of the petitioner from 1.1.1985 to 30.4.1985 for different works does not count any continuity of his engagement as Electrician. Mr. Mishra further vehemently argued that the aforesaid stand clearly amounts to filing a false affidavit as there are admittedly a serious of documents which have been mentioned herein before indicating that the OLIC itself has mentioned the date of entry of the petitioner into service as 1.1.1985.

12. Learned counsel for the OLIC, on the other hand, strongly relied upon the decision in the case of ***Secretary of Karnataka v. Uma Devi*** , (2006)4 SCC 1 in order to contend that the writ petition is liable to be dismissed . In the case of Uma Devi (supra), in paragraph-53 thereof, the Hon'ble Supreme Court has held as follows:-

> "53. One aspect need to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in Para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In the context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years of more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The

process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme".

13. Considering the facts of the present case, it is found from the same that the petitioner herein had approached this Court in O.J.C. No. 8068 of 1994 which was disposed of on 15.7.1998 with a categorical direction to regularize the service of the petitioner basing reliance on similar cases. The said order has attained its finality. It also appears that the OLIC in the Civil Appeals has also made a commitment to undertake regularization in a phased manner. In the case of ***Smt. Urmila Senapati v. State of Orissa and others,*** 1993 (I) OLR 348, the aforesaid Civil Appeals disposed of by the Hon'ble Supreme Court have been referred to and it has been held as follows:-

"In a recent case of such an N.M.R. worker serving under the Orissa Lift Irrigation Corporation O.J.C. No. 5081 of 1990 (Harihar Pradhan V. Orissa Lift Irrigation Corporation Ltd. and Ors.) decided on 16th April, 1991, this Court had directed to consider the case of the workman for absorption on regular basis and had further indicated to evolve a scheme if such a scheme is not yet under operation on a rational basis for absorbing casual/daily rated workers who have been serving under the corporation for more than one year. The Corporation being aggrieved by the judgment of this Court had carried the matter to the Supreme Court in Civil Appeal nos. 3615, 3628 of 1991. the Supreme Court disposed of the matter by its order dated 13th of October, 1992, a copy where of was produced before us by Mr. Patnaik appearing for the petitioner observing therein that there is no ground to interfere subject to the modification that the scheme for absorption prepared by the Corporation should provide for regularization of all workmen who have put in five years of service with the Corporation instead of one year as directed by the High Court. The petitioner in the present case having served for more than five years also satisfies the guidelines indicated by their lordships of the Supreme Court in relation to regularization of daily rated workers under the Orissa Lift Irrigation Corporation".

14. Under the aforesaid circumstances, this Court is of the considered view that the decision the case of Uma Devi (supra),cannot be made applicable to the facts of the present case. It is more so when, there are

ample materials on record to indicate that some of the juniors of the petitioner have been regularized by the OLIC pursuant to the orders of this Court and the Hon'ble Supreme Court as mentioned herein before. This Court further finds that in view of the facts situation of this case, it is clear that the belated stand of the OLIC that the petitioner did not work from 1.1.1985 is an after-thought and such a belated stand cannot be accepted. This is more so in view of the contemporaneous documents produced by the petitioner in Misc. Case No. 14399 of 2012 which have been mentioned above, more particularly, the letter of OLIC issued to the Labour Commissioner.

15. In view of the aforesaid facts and circumstances, this Court finds the claim of the petitioner is acceptable land issue the following directions:

(a) The OLIC is directed to treat the petitioner at par with his juniors like Shri Rajendra Prasad Mahanta (NMR Electrician), who was regularized on 31.3.1998 (refer Annexure-4 series filed with the rejoinder). This Court further directs the OLIC to comply with the earlier direction of this Court passed in O.J.C. No. 8068 of 1994 within a period of one month from the date of communication of this judgment; and

(b) In view of the above findings, this Court quashes the order dated 4.3.2004 under Annexure-3 issued to the petitioner and directs that all arrears, as due and admissible, should be paid to the petitioner within a period of three months from the date of communication of this judgment;

16. Ordinarily, as a prima facie case is made out, this Court would have directed initiation of proceeding against the Law officer of OLIC for filing false affidavit on 3.8.2012, but desist from doing so, in view of the relief granted to the petitioner as above.

17. With the aforesaid observations and directions, the writ petition stands allowed, but in the circumstances, without cost.

Writ petition allowed.

2013 (II) ILR - CUT- 593

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

W.P.(C) NO. 27424 OF 2011 (Dt.17.05.2013)

SK. ANISOOR RAHEMAN & ORS. ……...Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

ODISHA POLICE MANUAL – RULE. 667

Appointment of temporary constables – Not against permanent vacancies – To observe them permanently their suitability within the meaning of Rule 667 (5) of the Odisha Police Manual is required to be considered and they must undergo the normal selection process.

In this case the petitioners were appointed as temporary Constables for a few days but not against permanent vacancies, so merely because of their temporary appointment they cannot, be observed permanently – Held, no infirmity in the impugned orders passed by the Tribunal calling for any interference by this Court.

(Para 10)

Case law Referred to:-

AIR 2010 SC 932 : (Rakhi Ray & Ors.-V- The High Court of Delhi & Ors.).

For Petitioner - M/s. A.K. Mishra, Sr. Advocate with Mr. Jayadev Sengupta, D.K. Panda, G. Sinha & A. Mishra.

For Opp.Parties - Mr. Trilochan Rath, Addl. Standing Counsel.

B.K.MISRA, J. The petitioners being aggrieved by the common order dated 27.1.2011 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. Nos.2109 (C) of 2008, 2616 (C) of 1996 and 3500 (C) of 1996 under Annexure-10 and the order dated 22.9.2011 passed in M.P. No.488 (C) of 2008 arising out of O.A. No.2109 (C) of 2011 under Annexure-12, have approached this Court for quashing the said orders of the learned Tribunal as at Annexures-10 and 12. They have also prayed for a direction to the opposite parties, more particularly, opposite party no.2 to

appoint the petitioners as constables against the vacant posts in the district of Khurda and also to quash the letter dated 25.9.2008 issued by the Government of Orissa in Home Department under Annexure-8.

2. The case of the petitioners is that pursuant to the advertisement published in the daily "The Sambad" dated 9.9.1995 under Annexure-1, applications were invited for recruitment of constables to the Orissa Armed Reserve Police. The petitioners, who had registered their names in the employment exchanges and having the requisite qualifications, applied for the post of Constables. The petitioners appeared at the recruitment test, which was held as per the guidelines given in the Police Order No.295 of 1994. The selection process was started on 9.10.1995 and completed on 14.10.1995. In the said selection test, 25 male persons belonging to general category, 8 SEBC (Men), 9 Women candidates belonging to general category, 3 women candidates belonging to SC, one SEBC (Women), 20 male persons belonging to Scheduled Tribe, 8 male belonging to Scheduled Caste category and 5 general male Home Guards and one SC woman Home guard were selected and thus 80 candidates were appointed as constables against the advertised vacancy of 66. The present petitioners though had appeared at the selection test, could not be appointed. In the year 1996 in connection with General Election to Lok Sabha pursuant to the direction of the Chief Election Commission, the Government in Home Department on 18.4.1996 wanted to utilize the candidates who were in the waiting list prepared by the selection committee for recruitment of police constables as temporary constables. The Superintendent of Police, Khurda moved the higher authorities in the matter. Since, no waiting list had been prepared by the Selection Committee, which conducted the test for recruitment of constables to the Orissa Armed Reserve Police, the Orissa Police Headquarters issued instructions that though there was no waiting list of selected candidates, the candidates, who were qualified in all the tests, but could not be appointed due to limited vacancy, can be appointed as temporary constables in connection with Lok Sabha Election during 1996. Copies of such letters dated 16.4.1996, 17.4.1996 and 18.4.1996 have been annexed as Annexures-2 series. Pursuant to the letters under Annexure-2 series, appointment orders were issued in favour of the petitioners on 19.4.1996 under Annexure-3 series. It is the further case of the petitioners that as on 31.8.1996 there were 135 vacancies in the cadre of constables, but on account of retirement and due to other reasons, 150 posts were available to be filled up. The petitioners along with 287 persons were appointed as temporary constables, but after the due period was over, neither any extension was given nor their services were regularized for which they approached the Orissa Administrative Tribunal challenging the

inaction of the opposite parties in not giving them appointment as reserve police constables. The learned Tribunal after hearing the matter disposed of the said O.A. Nos.2616 (C) of 1996 and 3500 (C) of 1996. Since the same did not yield any result, the petitioners approached this Court by filing a writ application bearing OJC No.6736 of 1996 and the said writ application was disposed of on 25.2.2008 giving a direction to the opposite parties, especially to opposite party no.1 to consider the case of the petitioners, who were selected and appointed temporarily as constables in Civil police and whose services were terminated and to take a decision as expeditiously as possible. Pursuant to such direction, the petitioners made a representation to opposite party no.1 under Annexure-5 to consider their case for appointment as constables and to give them a personal hearing, which was forwarded by Government in Home Department to the D.G. & I.G. of Police under Annexure-6. It is the further case of the petitioners that during the pendency of their representation, a fresh advertisement was issued for filling up 1310 posts of constables out of which 163 were earmarked for Khurda district. Such advertisement was published in the daily "Dharitri' on 4.8.2008 as at Annexure-7. According to the petitioners, as per Rule 667 of the Orissa Police Manual, constables enlisted for temporary purposes or in temporary vacancies, are to be employed forthwith and Rule 667 (b) of the Police Manual further speaks that suitable temporary constables shall be absorbed in temporary vacancies as they occur and be sent forthwith to police training schools. Thus, according to the petitioners, when on one hand their representation was kept pending despite the specific direction of this Court in OJC No.6736 of 1998, but advertisement was published for filling up 1310 vacancies in the cadre of constables as per Annexure-7 prescribing higher educational qualifications and age limit. The petitioners again approached the Orissa Administrative Tribunal by filing O.A. Nos.2109 (C) of 2008, O.A. No.2616 (C) of 1996 and 3500 (C) of 1996 challenging the order of rejection of their representation by the Director General of Police. The learned Tribunal after hearing the parties, disposed of the same by holding that the petitioners are to undergo the prescribed recruitment test and they would be absorbed only when they re found suitable in all respect. In the event they were selected and absorbed, their seniority shall count as per the Rules for the period of their regular absorption after training and they shall not be entitled for any retrospective benefits. Thereafter, the petitioners filed an application, which was registered as M. P. No.488 (C) of 2011, for modification/clarification of the said order and the learned Tribunal by order dated 22.9.2011 held that the selected candidates shall get their seniority as per Rules, but without retrospective benefits. The learned Tribunal further observed that the Rules towards the age and qualification as was in vogue then are applicable to the petitioners, but they are to undergo the next

recruitment test and should be found suitable in those tests. Thus, being aggrieved with the orders of the learned Tribunal as at Annexures-10 and 12 and also the letter of the Government as at Annexure-8, the petitioners have approached this Court for the aforementioned reliefs.

3. Opposite Parties 1 to 3 have filed their counter affidavit admitting the fact that the petitioners were appointed as temporary constables during the last Lok Sabha Election held in the year 1996, but it is their specific case that the claim of the petitioners for absorbing them against the regular vacancies does not arise and Rule 667 of the Orissa Police Manual is not applicable to the petitioners as they were appointed as temporary constables for few days and not against permanent vacancies. As such, the petitioners have no right for being appointed on regular basis and the writ petition should be dismissed.

4. We have heard Mr. A.K. Mishra, learned Senior Counsel appearing for the petitioners and Mr. Trilochan Rath, learned Addl. Standing Counsel appearing for the opposite parties.

5. The main thrust of the argument of Mr. Mishra, learned Senior Counsel is that when there is specific provision in the Orissa Police Manual with regard to temporary appointments and even if the petitioners were appointed for a brief period of nearly one month during 1996 General Lok Sabha Election, a right has accrued to them to be absorbed in permanent vacancies when such vacancies were there and they are required to be sent to the Police Training School for training directly. It was contended by Mr. Mishra that this aspect of the case was never considered by the learned Tribunal. Besides that out attention was drawn to the defects in the advertisement issued under Annexure-7 and also the fact that though pursuant to the advertisement under Annexure-1, 66 candidates were to be recruited for the post of Constable in the Orissa Armed Reserve Police, but the authorities committed illegalities in giving appointment to 80 candidates, which is beyond the advertised posts. However, we are not concerned with the aforesaid fact as, nowhere, any challenge has been made with regard to filling up vacancies beyond the advertised posts. In this writ petition, the prayer of the petitioners is only to quash Annexures-10, 12 and 8 and not the advertisement under Annexure-7.

6. Mr. Rath, learned Addl. Standing Counsel appearing for the opposite parties, on the other hand, argued with vehemence that the vacancies available having filled up, the process of selection has come to an end and the waiting list etc. cannot be used as a reservoir to fill up the vacancy,

which came into existence after issuance of the notification/advertisement. Such unexhausted select list/waiting list becomes meaningless and cannot be pressed into service and in that contest, reliance was placed on a decision of the Supreme Court in ***Rakhi Ray and others v. The High Court of Delhi and others, AIR 2010 SC 932.***

7. In the instant case, admittedly, there was no waiting list of candidates, who were found suitable by the selection committee for recruiting constables to the Orissa Armed Reserve Police pursuant to the advertisement issued under Annexure-1. It is also seen that for the General Election to the Lok Sabha in the year 1996, the Chief Election Commission wanted deployment of police personnel and accordingly, the Superintendent of Police, Khurda at Bhubaneswar solicited instruction from the D.I.G. (Administration), Cuttack under Annexure-2 series that if the candidates, who had appeared in the recruitment test held in October, 1995 in his district can be utilized for the election arrangement, even though no candidate was kept in the waiting list. The Chief Electoral Officer and Special Secretary to Government of Orissa, Home (Election) Department in his letter addressed to the Commissioner-cum-Secretary to Government in Home Department gave the willingness of the Commission that the persons in the waiting list prepared by the Selection Committee for recruitment of constables in the past can be utilized after giving them a though and adequate training under Annexure-2 series. Accordingly, appointment orders were issued to the petitioners by the Superintendent of Police, Khurda at temporary constables and their period of engagement was from 20.4.1996 to 11.5.1996 in connection with the General Election to Lok Sabha in 1996. Now the question arises as to whether the petitioners, who were appointed as temporary constables for 22 days, can be absorbed in the regular cadre of constables and would be sent for training directly to the Police Training School within the meaning of Rule 667 of the Orissa Police Manual, Rule 667 of the Orissa Police Manual reads as follows :

> "667. (a) **Temporary appointments** – constables enlisted for temporary purposes or in temporary vacancies may be employed forthwith, but those who have not had previous police or military service shall ordinarily be kept at headquarters and when their work permits, given such training as is available. Temporary men shall not be deputed by themselves, but shall be given duties in which they are accompanied by trained men.
>
> (b) Suitable temporary constable shall be absorbed in permanent vacancies as they occur and be sent forthwith to the Police Training

School for training, unless specially exempted under Rule 684(c). A month before the expiry of the temporary period for which such men are enlisted, the number of suitable men who are willing to serve elsewhere and for whom no vacancies are likely to be available in the district shall be reported to the Inspector General who may have requisition pending from other districts."

8. Learned Tribunal in its order dated 27.1.2011 passed in O.A. Nos.2109 (C) of 2008, 2616 (C) of 1996 and 3500 (C) of 1996 has also dealt with Rule 667 (b) of the Orissa Police Manual.

9. It is to be remembered that the present petitioners pursuant to the advertisement under Annexure-1 appeared at the test, which was held by the selection committee from 09.10.1995 to 14.10.1995, but they could not be appointed because all the 80 vacancies had been filled up. Annexure-7 was issued on 4.8.2008, i.e., after long 13 years, when the petitioners appeared at the selection test for recruitment of constables to the Orissa Armed Reserve Police held in the year 1995.

10. Clause (b) of Rule 667 of the Orissa Police Manual stipulates that suitable temporary constables shall be absorbed in permanent vacancies as they occur and be sent forthwith to the Police Training School for training, unless specifically exempted under Rule 684 (c) of the Orissa Police Manual. Suitability of a person within the meaning of Rule 667 (b) of the Orissa Police Manual after long 13 years, in our considered view, can only be judged when they would be required to undergo a test and therefore, the learned Tribunal was justified in holding that the petitioners should undergo a test and their present age and qualification shall not be a bar as per the advertisement issued in Annexure-7 and it was further clarified by the learned Tribunal under Annexure-12 that the age and qualification of the petitioners, which was in vogue, i.e., age and qualification, which were prescribed as per the advertisement under Annexure-1 would be applicable to the petitioners, but they are required to undergo the next recruitment test and should be found suitable. We find no infirmity in the orders of the learned Tribunal calling for any interference by this Court.

11. In view of the foregoing discussions, the writ petition being devoid of merit, stands dismissed. However, there shall be no order as to cost.

Writ petition dismissed.

2013 (II) ILR - CUT- 599

M. M. DAS, J & C. R. DASH, J.

W.P.(C) NO. 4451/2013 & W.P.(C) (P.I.L)NO. 4839/2013(Dt.01.08.2013)

DEBENDRANATH SAHOO & ANR. ……Petitioners

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

A. CONSTITUTION OF INDIA, 1950 – ART.226

Writ of quo-warranto – Appointment of O.P.3 as State Co-operative Election Commissioner challenged – Writ of quo-warranto shall never lie unless there is statutory violation in appointing O.P.3 or there is lack of eligibility for his appointment under any statute or the Constitution.

In this case there is no contravention/violation of Sub-section (2) & (3) of Section 28 (AA) of the OCS Act, 1962 while appointing Mr. Rabi Narayan Senapati (O.P.3) as State Co-operative Election Commissioner as alleged by the petitioners – Held, no writ of quo-warranto can be issued to quash the appointment of O.P.3. (Para 22)

B. CONSTITUTION OF INDIA, 1950 – ART.226

Writ petition – Appointment of O.P.3 as State Co-operative Election Commissioner challenged on the ground that he is involved in number of vigilance cases – In all the cases State Government passed orders not to recommend the case to Govt. of India as there is no sufficient proof of Criminal misconduct or criminal conspiracy against O.P.3 and majority of cases is based on suspicion.

In no vigilance case charge sheet was filed against him and no vigilance case was pending against him on the date of consideration of his case for appointment to the post of State Co-operative Election Commissioner – Held, O.P.3 is not disqualified to hold the post of State Co-operative Election Commissioner. (Paras 27,28)

C. CONSTITUTION OF INDIA, 1950 – ART.226, 320

Appointment of O.P.3 as State Co-operative Election Commissioner – Allegation is O.P.3 did not possess requisite qualifications and experience to hold the post.

In this case O.P.3 had necessary experience in administration as he had retired from the post of Development Commissioner – He had experience in the Co-operative Sector as he had worked as the supervisory officer of Co-operative Department and besides he had served the State as a senior administrator in different capacities – Held, O.P.3 had requisite qualifications, experience and qualities to man the post of State Co-operative Election Commissioner.

(Paras 29, 30)

Case laws Referred to:-

1.2013(5) SCC 1 : (State of Punjab-V- Salil Sabhlok & Ors.)
2.(2000)11 SCC 356 : (Inderpreet SinghKahlon & Ors.-V- State of Punjab & Ors.)
3.AIR 2011 SC 1267 : (Centre for P.I.L. & Anr.-V- Union of India & Anr.)
4.(2010)9 SCC 655 : (Hari Bansh Lal-V- Sahodar Prasad Mahto)
5.(1993)4 SCC 119 : (R.K. Jain-V- Union of India)
6.(2002)6 SCC 269 : (Mor Modern Coop.Transport Society-V- Govt. of Haryana)
7.(2003)4 SCC 712 : (High Court of Gujarat-V- Gujarat Kishan Mazdoor Panchayat)
8.(2006)11 SCC 731 : (B.Srinivasa Reddy-V- Karnataka Urban Water Supply &Drainage Board Employees' Association).
9.(2009)8 SCC 273 : (Mahesh Chandra Gupta-V- Union of India & Ors.)

For Petitioner - M/s. Er.Nagendra Ku. Mohanty, B.K.Mohanty, S.K.Dash, B.K.Mohapatra, Rakesh Sahu.

For Opp.Parties - Mr. Ashok Mohanty, Advocate General
Mr. R.K.Rath, N.R. rout, Pami Rath & J.P. Behera (O.P.3).

For Petitioner - M/s. Sukanta Ku. Dalai & s. Mohapatra.

C.R. DASH, J. As facts involved and questions raised in both the writ petitions are same, both were heard analogously on 12.07.2013 and are taken up for disposal by this common judgment.

2. Rabi Narayan Senapati, I.A.S. (opposite party no.3 in both the writ petitions) retired on superannuation from the post of Development Commissioner on 30.11.2012. Vide notification dated 16.02.2013 issued by the Government of Odisha in Co-operation Department by order of His Excellency the Governor (Annexure-1 in W.P.(C)(P.I.L.) No.4839 of 2013 and Annexure-4 in W.P.(C) No.4451 of 2013), he was appointed as State

Co-operative Election Commissioner, Odisha for a period of five years from the date of his appointment or he attains the age of 65 years whichever is earlier.

3. Debendranath Sahoo claiming himself to be a Co-operator involved in different Co-operative Movement for long years filed W.P.(C) No.4451 of 2013 and Biswajit Parida claiming himself to be a public spirited person interested in development and upliftment of the State, who has participated in several Co-operative Movements for farmers besides his profession as an advocate filed W.P.(C) (P.I.L.) No.4839 of 2013 challenging the appointment of Sri Rabi Narayan Senapati as State Co-operative Election Commissioner.

4. The prayer in W.P.(C) No.4451 of 2013 is as follows :-

(I) "Under the facts and circumstances of the case, it is, therefore, prayed that this Hon'ble Court may graciously be pleased to issue a writ of quo-warranto or any other writ(s) declaring the appointment of opposite party no.3 as State Co-operative Election Commissions, Odisha, Bhubaneswar is illegal and non-est in the eye of law".

In W.P.(C) (P.I.L.) No.4839 of 2013, the prayer is to the following effect :-

"It is therefore, humbly prayed that this Hon'ble Court may kindly graciously be pleased to admit the P.I.L. writ petition, issue rule nisi calling upon the opposite parties to show cause;

(A) why the appointment of State Election Co-operative Commissioner under Annexure-1 dtd.13.2.2013 shall not be quashed declaring the same as illegal, arbitrary, mala fide, unconstitutional and contrary to the Sub-section 2 of Section 28 (AA) of the O.C.S. Act, 1962;

(B) why writ of quo warranto shall not be issued, calling upon to opposite party no.3 as to under what authority he is holding the post;

(C) why a writ shall not be issued directing to opposite party no.1 & 2 to make fresh appointment for larger interest of the public."

5. In both the writ petitions the petitioners essentially have sought for issuance of writ of quo-warranto to quash the appointment of Shri Rabi Narayan Senepati, I.A.S. (Retd.) as State Co-operative Election Commissioner. The ground on which such a prayer has been made are two fold:-

(I) Number of Vigilance cases were initiated against Shri Rabi Narayan Senapati, I.A.S. (Retd.) during his incumbency as Secretary to Government in Water Resources Department;

(II) his appointment is not in conformity with Sub-section (2) of Section 28 (AA) of the Odisha Co-operative Societies Act 1962, as amended, vide Odisha Act 1 of 2013 ('O.C.S. Act' for short).

6. Opposite party nos.1 and 2 have filed counter-affidavits in both the writ petitions denying the allegation made in the writ petitions. They have also asserted that Shri Rabi Narayan Senapati having retired from the post of Development Commissioner has had sufficient experience, so far as the matter relating to Co-operative Department is concerned.

7. Mr. Sukanta Kumar Dalai, learned counsel appearing for the petitioner in W.P.(C) (P.I.L.) No.4839 of 2013 taking us through Annexure-4 to the writ petition submits that at least eight Vigilance Cases namely, Bhubaneswar Vigilance P.S. Case No.49 dated 27.10.2000, Cuttack Vigilance P.S. Case No.30 dated 03.06.2003, Cuttack Vigilance P.S. Case No.32 dated 09.06.2003, Cuttack Vigilance P.S. Case No.38 dated 04.07.2003, Cuttack Vigilance P.S. Case No.39 dated 10.07.2003, Cuttack Vigilance P.S. Case No.41 dated 28.07.2003, Cuttack Vigilance P.S. Case No.42 dated 31.07.2003 and Cuttack Vigilance P.S. Case No.35 dated 13.06.2003 were initiated against Shri Rabi Narayan Senapati and in that view of the matter his appointment as State Co-operative Election Commissioner for lack of his integrity is liable to be quashed. Quoting from the judgment of the Hon'ble Supreme Court in the case of **State of Punjab *vrs.* Salil Sabhlok and others**, 2013 (5) S.C.C. 1, Mr. Dalai submits that integrity and honesty of the person to be appointed to high Constitutional position are of paramount importance. Hon'ble Supreme Court in the case of **State of Punjab *vrs.* Salil Sabhlok and others** supra has quoted with approval the observation made by Hon'ble Mr. Justice Dalbir Bhandari in the case of **Inderpreet Singh Kahlon and others *vrs.* State of Punjab and others** (2000)11 S.C.C. 356 in paragraph-31 of the judgment in **State of Punjab *v.* Salil Sabhlok** supra and Mr. Dalai draws our attention to the said observation, which reads thus :-

"This unfortunate episode teaches us an important lesson that before appointing the constitutional authorities, there should be a thorough and meticulous inquiry and scrutiny regarding their antecedents. Integrity and merit have to be properly considered and evaluated in the appointments to such high positions. It is an urgent need of the

> hour that in such appointments absolute transparency is required to be maintained and demonstrated. The impact of the deeds and misdeeds of the constitutional authorities (who are highly placed), affect a very large number of people for a very long time, therefore, it is absolutely imperative that only people of high integrity, merit rectitude and honesty are appointed to these constitutional positions."

Mr. Dalai also relies on the case of **Centre for P.I.L. and another *v.* Union of India and another,** A.I.R. 2011 S.C. 1267 to draw our attention how recommendation for appointing Shri P.J. Thomas as Central Vigilance Commissioner was quashed, as a vigilance case was pending against him.

It is further submitted by Mr. Dalai that Shri Rabi Narayan Senapati, I.A.S. (Retd.) having no experience regarding Co-operative matters, he should not have been appointed as State Co-operative Election Commissioner, as it is violative of Section 28(AA) of the O.C.S. Act.

8. Er. N.K. Mohanty, learned counsel appearing for the petitioner in W.P.(C) No.4451 of 2013 adopts the arguments advanced by Mr. Dalai and adds that Shri Rabi Narayan Senapati has had the uncanny neck of getting the cases in his name cleared at the Government level though number of Vigilance cases were initiated against him and such a person having obliged the political bosses in power whose benefit he had availed may not be in a position to do justice to the post in which he has been appointed. It is also alleged that Shri Rabi Narayan Senapati having taken no oath as provided in Section 28 (AA) of the O.C.S. Act, his continuance as State Co-operative Election Commissioner is non-est in the eye of law.

9. Mr. Ashok Mohanty, learned Advocate General supports the impugned notification and submits that there is pendency of no vigilance case against Shri Rabi Narayan Senapati, I.A.S. (Retd.), as in no case which were initiated against him Government had ever recommended the case to Government of India for sanction of prosecution. It is further submitted by Mr. Mohanty, learned Advocate General that Shri Rabi Narayan Senapati, I.A.S. (Retd.) in his capacity as Development Commissioner was the supervisory authority of the Co-operative Department and all the files of Co-operative Department, were being routed through him. In that view of the matter and in view of the vast experience he had in administration, he cannot be said to have no experience, so far as Co-operative matters are concerned.

Mr. R.K. Rath, learned senior counsel appearing for Shri Rabi Narayan Senapati, I.A.S. (Retd.) submits that as the matter relates to

issuance of writ of quo-warranto in respect of a public office, no P.I.L. is maintainable. There is no pending vigilance case against Shri Rabi Narayan Senapati. Mr. Senapati possesses sufficient experience in the Co-operative Department to man the post of State Co-operative Election Commissioner.

10. The petitioners in both the writ petitions having sought for issuance of a writ of quo-warranto, it is apposite to find out the conditions for the issue of quo-warranto in relation to public office. A writ of quo-warranto will be issued in respect of an office only if the following conditions are satisfied :-

(I) The office must be public.

(II) The office must be substantive in character, which, in other words, means an office independent in title.

(III) It must have been created by statute or by the Constitution itself.

(IV) The respondent must have asserted his claim to the office. The application is premature until the respondent has resumed his office or asserted his claim to it.

(V) The respondent is not legally qualified to hold the office or to remain in the office or some statutory provisions have been violated in making appointment which cannot be cured as an irregularity so that the title to the office becomes invalid or without legal authority. In other words, invalidity of the appointment may arise not only from want of qualification but also from violation of such legal conditions or procedure for appointment, as are mandatory, and as a result of which the appointment becomes void.

11. In short, quo-warranto will not be issued unless there is a clear infringement of the provisions having the force of law, as distinguished from mere administrative instructions or some provisions from the constitution itself. The question to be determined before issuing quo-warranto is whether the impugned appointment has contravened the binding rule of law and not whether it has involved a “manifest error”, which is relevant in a proceeding for certiorari.

12. So far as condition nos. (I), (II), (III) and (IV) are concerned, there is no dispute at the Bar to the effect that the office of the State Co-operative Election Commission is a Public Office; the office is substantive in character; it has been created by the O.C.S. Act 1962 as amended by Odisha Act 1 of 2013 and opposite party no.3 has already asserted his claim to the office. We are concerned, therefore, with condition no (V) to find out as to whether

there has been clear infringement of the provisions of O.C.S. Act 1962 as amended by Odisha Act 1 of 2013, as claimed by learned counsels for the petitioners in both the writ petitions. We are to further find out whether the allegation of lack of qualification of opposite party no.3 Mr. Rabi Narayan Senapati has any legs to stand, in view of the clear assertion by the State in the counter affidavit filed in the case and non-traverse of the same by the petitioners in both the writ petitions by filing any rejoinder.

13. Section 28 (AA) of the O.C.S. Act 1962 as amended by Odisha Act 1 of 2013 contains the provisions regarding superintendence, direction and control of elections to a society vesting in the State Co-operative Election Commissioner.

Sub-section (2) provides for qualification of the person to be appointed as State Co-operative Election Commissioner and the provisions is as follows :-

> "No person shall be qualified for appointment as State Co-operative Election Commissioner unless he is or has been an officer of the Government not below the rank of Secretary to the Government having experience in co-operative sector."

Sub-section (3) of Section 28 (AA) provides for an oath or affirmation by the State Election Commissioner before he enters upon his office and the provision reads thus :-

> "A person appointed as State Co-operative Election Commissioner shall, before he enters upon his office, make and subscribe before the Governor on oath or affirmation in the form as may be prescribed."

14. Mr. Dalai, learned counsel for the petitioner in W.P.(C) (PIL) No.4839 of 2013 alleges that Mr. Rabi Narayan Senapati having not worked at any point of time in co-operative sector, he cannot be held to have experience in co-operative sector and he is thus not qualified to hold the post of State Co-operative Election Commissioner, his appointment being violative of Sub-section (2) of Section 28(AA) of the O.C.S. Act 1962, as amended by Odisha Act 1 of 2013.

Er. Nagendranath Mohanty, learned counsel appearing for the petitioner in W.P.(C) No.4451 of 2013 adopts the same argument.

15. Mr. Ashok Mohanty, learned Advocate General and Mr. Rajat Kumar Rath, learned senior counsel appearing for Mr. Rabi Narayan Senapati,

submit that experience in co-operative sector, as outlined in Sub-section (2) of Section 28 (AA) does not require that a person must have worked in co-operative sector or must have experience in co-operative organization. If the rank of the officer for becoming the State Co-operative Election Commissioner to be not below the rank of Secretary to the Government is read jointly with "having experience in co-operative sector" together as occurring in Sub-section (2) of Section 28(AA), it would be clear that a person of the rank of Secretary to the Government, who must be an I.A.S. officer cannot be expected to be having any direct experience in co-operative organizations. They however must have worked in co-operative department in different capacities with their direct involvement or with their supervisory involvement.

It is further submitted by Mr. Mohanty, learned Advocate General and Mr. Rath, learned senior counsel that opposite party no.3 having worked as Development Commissioner has had the scope to work as a supervisory authority so far as the Co-operative Department is concerned, and in that view of the matter Mr. Rabi Narayan Senapati (opp. party no.3) can be held to have sufficient experience to satisfy the condition of Sub-section (2) of Section 28 (AA).

16. The State in its counter affidavit, referring to Mr. Rabi Narayan Senapati, in paragraph 7 has asserted thus :-

> "……he was an officer in the rank of Chief Secretary and served as Agricultural Production Commissioner, he was the supervisory officer of the Co-operative Department and therefore involved in the functioning of the Co-operative Department."
>
> In reply to the averments made in this paragraph, it is further stated and submitted that opposite party no.3 was the supervisory officer of the Co-operative Department and was therefore involved in the functioning of the Co-operative Department. All files of the Co-operative Department were routed through him for orders of the Government. He also acted as the Chairman of State Level Co-ordination Committee on Crop Insurance (SLCCCI) and he was the Chairman of the State Level Implementation and Manufacturing Committee (SLIMC) for implementation of the re-structuring and reform measure for revival of the Credit Co-operative Societies. He had chaired the meeting of these committees regularly."

17. The aforesaid facts culled from the counter affidavit filed by opposite party nos.1 and 2 make it clear that Mr. Rabi Narayan Senapati (opp. party

no.3) had experience so far as co-operative department is concerned. Such assertion of opposite party nos.1 and 2 have not been traversed by the petitioners in both the writ petitions in any manner by filing rejoinder affidavits. In view of such fact and otherwise, assertions made by opposite party nos.1 and 2 in their counter affidavit have to be held to have been accepted by applying the doctrine of non-traverse. Even otherwise an officer of the rank of Chief Secretary, who has had varied experience and has acted as supervisory authority of the State Co-operative Department can be held to have sufficient experience regarding the functioning of the said Department and functioning of co-operative sectors under the said department.

In the premises as aforesaid, we do not find any merit in this contention raised by learned counsels for the petitioners in both the writ petitions.

18. Er. N.K. Mohanty, learned counsel appearing for the petitioner in W.P. (C) No.4451 of 2013 submits that Mr. Rabi Narayan Senapati having not taken any oath as required under Sub-Section (3) of Section 28 (AA) of the O.C.S. Act 1962 as amended by Odisha Act 1 of 2013, his continuance in the post of Odisha Co-operative Election Commissioner is non-est in the eye of law.

19. Contrary to what is alleged by Er. N.K. Mohanty, learned counsel, it is averred in paragraph-5 of W.P.(C) (PIL) No.4839 of 2013 that opposite party no.3 has taken oath on 18.02.2013. Mr. Dalai, learned counsel appearing for the petitioner in W.P.(C)(PIL) No.4839 of 2013 however does not dispute taking of oath / affirmation by Mr. Rabi Narayan Senapati (opp. party no.3). Mr. Ashok Mohanty, learned Advocate General and Mr. R.K. Rath, learned senior counsel appearing for Mr. Rabi Narayan Senapati assert with emphasis that Mr. Rabi Narayan Senapati has taken oath in compliance of Sub-section(3) of Section 28(AA) before he assumed office as State Co-operative Election Commissioner.

In view of such fact, this contention raised by Er. N.K. Mohanty on the point of oath must fail.

20. Mr. Ashok Mohanty, learned Advocate General and Mr. R.K. Rath, learned senior counsel appearing for Mr. Rabi Narayan Senapati (opp. party no.3) are right in their submissions to the effect that there is nothing on record to show that Mr. Rabi Narayan Senapati possesses no qualification as provided in Sub-section (2) of Section 28(AA) of the O.C.S. Act, 1962, and there is nothing further to show that he (Mr. Rabi Narayan Senapati) has not taken oath before assuming his office, as provided in Sub-section (3) of Section 28(AA) of the said Act.

21. Hon'ble Supreme Court in the case of **Hari Bansh Lal *vrs.* Sahodar Prasad Mahto,** (2010) 9 SCC 655 considered the position of law and, after referring to several earlier decisions, including the case of **R.K. Jain *vrs.* Union of India,** (1993) 4 SCC 119, **Mor Modern Coop. Transport Society *vrs.* Govt. of Haryana,** (2002) 6 SCC 269, **High Court of Gujarat *vrs.* Gujarat Kishan Mazdoor Panchayat,** (2003) 4 SCC 712 **and B. Srinivasa Reddy *vrs.* Karnataka Urban Water Supply and Drainage Board Employees' Association,** (2006) 11 SCC 731**,** held that even for issuance of a writ of quo-warranto, High Court is to satisfy itself that the appointment is contrary to the statutory rule. This principle was framed positively in **Mahesh Chandra Gupta *vrs*. Union of India and Ors, (2009) 8 SCC 273,** wherein it was said "In cases involving lack of 'eligibility' writ of quo-warranto would certainly lie."

22. In view of the position of law, as enunciated regarding issue of the writ of quo-warranto in the aforesaid decisions, it is clear that writ of quo-warranto shall never lie unless there is statutory violation in appointing the respondent or unless there is lack of eligibility of the respondent as prescribed under any statute or the Constitution. Our discussion supra shows that there is no contravention / violation of Sub-sections (2) and (3) of Section 28(AA) of the O.C.S. Act, 1962 so far as the appointment of Mr. Rabi Narayan Senapati as State Co-operative Election Commissioner is concerned. In view of such fact, no writ of quo-warranto can be issued to quash the appointment.

23. The next question that arises for consideration is, whether any other writ or direction can be issued for quashing the appointment of Mr. Rabi Narayan Senapati (opp. party no.3), who is alleged to be involved in number of vigilance cases and is alleged to be not eligible to hold the statutory post like the State Co-operative Election Commissioner for lack of integrity on his part.

24. Hon'ble Supreme Court in the case of **State of Punjab *vrs.* Salil Sabhlok and others**, 2013 (5) S.C.C. 1, was in seisin of the matter where appointment to the post of Chairperson, Punjab Public Service Commission was challenged. Hon'ble Supreme Court, referring to different stages of development of law as to the remedy available to a person aggrieved by an appointment to a constitutional post like the Chairperson of a Public Service Commission, relied on the case of **R.K. Jain vrs. Union of India,** (1993) 4 SCC 119, **B. Srinivasa Reddy *vrs.* Karnataka Urban Water Supply and Drainage Board Employees' Association,** (2006) 11 SCC 731, **Hari Bansh Lal *vrs.* Sahodar Prasad Mahto,** (2010) 9 SCC 655, **Girjesh Shrivastava *vrs.* State of Madhya Pradesh,** (2010) 10 SCC 707,

Duryodhan Sahu (Dr.) ***vrs.*** **Jitendra Kumar Mishra,** (1998) 7 SCC 273, **B. Srinivasa Reddy, Dattaraj Nathuji Thaware** ***vrs.*** **State of Maharashtra,** (2005) 1 SCC 590**, Ashok Kumar Pandey** ***vrs.*** **State of W.B.,** (2004) 3 SCC 349, **Kumar Padma Prasad vrs. Union of India,** (1992) 2 SCC 428, **N. Kannadasan** ***vrs.*** **Ajoy Khose,** (2009) 7 SCC 1, **Centre for PIL** ***vrs.*** **Union of India (2011) 4 SCC 1,** and held that if there is prayer in the main writ petition for issuance of any other writ, direction or order, which the court may deem fit and proper in the facts and circumstances of the case to be issued, nothing prevent the court if so satisfied, from issuing a writ of declaration.

25. Taking a clue from the discussion in the case of **State of Punjab** ***vrs.*** **Salil Sabhlok and others**, 2013 (5) S.C.C. 1, (supra), if the position of the State Co-operative Election Commissioner in the light of O.C.S. Act, 1962 as amended by Odisha Act 1 of 2013 is taken into consideration, appointment of Mr. Rabi Narayan Senapati to the post of State Co-operative Election Commissioner cannot be treated as a "service matter" in the generic sense of the term, as defined in Section 3(q) of the Administrative Tribunal Act, 1985, in as much as there is no master and servant relationship between the State and Sri Rabi Narayan Senapati, and specific provisions have been provided in the O.C.S. Act, 1962 as amended by Odisha Act 1 of 2013 for his appointment, continuance and removal, etc. The post, in which Mr. Rabi Narayan Senapati has been appointed, may be held to be a statutory post only with statutory responsibility for him to discharge, as prescribed under the O.C.S. Act, 1962, as amended by Odisha Act 1 of 2013. In view of such fact, though a writ of quo-warranto is incompetent or inappropriate in view of our discussion supra, any other writ of declaration can be issued if the conditions as discussed supra are satisfied.

26. If the prayers in both the writ petitions are taken into consideration, it is found that in both the writ petitions there has been prayer for issuance of any other order/orders, direction/directions to give complete relief to the petitioners. In that view of the matter and in view of the dictum of the Hon'ble Supreme Court in the case of **State of Punjab** ***vrs.*** **Salil Sabhlok and others**, 2013 (5) S.C.C. 1, (supra) it is to be found out whether initiation of vigilance proceeding against Sri Rabi Narayan Senapati (opp. party no.3) otherwise disqualifies him to hold the post of State Co-operative Election Commissioner.

27. As discussed supra, Annexure-4 to W.P.(C) (PIL) No.4839 of 2013 shows that 8 (eight) number of vigilance cases, vide Bhubaneswar Vigilance P.S. Case No.49 dated 27.10.2000, Cuttack Vigilance P.S. Case No.30

dated 03.06.2003, Cuttack Vigilance P.S. Case No.32 dated 09.06.2003, Cuttack Vigilance P.S. Case No.38 dated 04.07.2003, Cuttack Vigilance P.S. Case No.39 dated 10.07.2003, Cuttack Vigilance P.S. Case No.41 dated 28.07.2003, Cuttack Vigilance P.S. Case No.42 dated 31.07.2003 and Cuttack Vigilance P.S. Case No.35 dated 13.06.2003 were initiated against the petitioner (Mr. R.N. Senapati). In all the cases, the State Government have been pleased to pass order not to recommend the case to Govt. of India as there is no sufficient proof of criminal misconduct or criminal conspiracy found against Sri Rabi Narayan Senapati and majority of cases is based on suspicion and in some cases there is definite finding by the State Government to the effect that even prima facie case is not made out. In view of such fact, though the aforesaid vigilance cases were initiated against others including Sri Rabi Narayan Senapati, in no vigilance case charge-sheet was filed against him and no vigilance case was pending against him on the date his case for appointment as the State Co-operative Election Commissioner was taken into consideration.

28. Learned counsels for the petitioners in both the writ petitions rely heavily on the case of **Centre for PIL *vrs.* Union of India,** (2011) 4 SCC 1 (A.I.R. 2011 S.C. 1267), which deals with appointment of Sri P.J. Thomas as Central Vigilance Commissioner. In the said case, Hon'ble Supreme Court interfered with the appointment, as a vigilance case was pending against Sri P.J. Thomas on the date of his consideration for appointment as Central Vigilance Commissioner. The fact of the said case can be clearly distinguished so far as the fact of the present case is concerned, in as much as, in no vigilance case charge-sheet was filed against Sri Rabi Narayan Senapati (opp. party no.3) and no vigilance case was pending against him on the date of consideration of his case for appointment to the post of State Co-operative Election Commissioner.

29. Mr. Dalai, learned counsel for the petitioner in W.P. (C) (PIL) No.4839 of 2013 relies heavily on certain observations given by the Hon'ble Supreme Court in **State of Punjab *vrs.* Salil Sabhlok and others** (supra) as has been quoted in paragraph-7 of this judgment supra.

But the fact of the aforesaid case of **State of Punjab *vrs.* Salil Sabhlok and others** can be distinguished so far as the present case is concerned, in as much as, Hon'ble Supreme Court on consideration of different aspects, held that Mr. Harish Dhanda had no knowledge or experience whatsoever either in administration or in recruitment nor had he any quality to perform the duties as the Chairman of the State Public Service Commission under Article 320 of the Constitution of India. Contrary to the facts obtained in the aforesaid case of **State of Punjab *vrs.* Salil Sabhlok**

and others, Mr. Rabi Narayan Senapati (opp. party no.3) in the present case had necessary experience in administration, as he had retired from the post of Development Commissioner, he had necessary experience in the Co-operative Sector, as he had worked as the Supervisory Officer of Co-operative Department, and besides such qualities and experience he had served the State as a senior administrator in different capacities.

30. In view of such facts, we do not find any justification to hold that Mr. Rabi Narayan Senapati has had no requisite qualifications, experience and qualities to man the post of State Co-operative Election Commissioner.

31. In fine, we therefore find no justification to interfere so far as appointment of Sri Rabi Narayan Senapati as the State Co-operative Election Commissioner is concerned. Both the writ petitions are accordingly dismissed.

Writ petitions dismissed.

2013 (II) ILR - CUT- 611

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

W.P.(C) NO.15319 OF 2013(Dt.08.08.2013)

STATE OF ORISSA & ORS. ……..Petitioners

.Vrs.

PRABODH KUMAR PAL …….Opp.Party

SERVICE LAW – Whether disciplinary proceeding can be initiated against a Government Servant two years after his retirement – No period of limitation is prescribed under OCS (CCA) Rules, 1962 for initiation of departmental proceedings against a Government Servant – However in view of Rule 7 (2) (b) (ii) of the OCS (Pension) Rules, 1992, a departmental proceeding can not be initiated against a Government Servant in respect of any event which took place more than four years before such institution.

In this case the disciplinary proceeding was initiated on 11.11.2010 when the event relates back to the financial year 2001-02 and 2002-03 and the Opp.Party retired from services on 31.10.2008 – Held, initiation of such departmental proceeding is not sustainable in the eye of law – Impugned order passed by the learned Tribunal quashing the departmental proceeding against the Opp.Party is justified – Direction issued to the petitioners to pay pension and other retiral benefits of the Opp.Party within two months.

(Paras 12,14)

Case laws Referred to:-

1.AIR 2011 SC 2112 : (Noida Entrepreneurs Association -V- Noida)
2.AIR 1999 SC 1841 : (Bhagirathi Jenva -V- Board of Directors, O.S.f.C)
3.(2013)6 SCC 515 : (Anant R. Kulkarni -V- Y.P. Education Society & Ors.)
4.AIR 1999 SC 1416 : (Caotain M.Paul Anthony-v- Bharat Gold Mines Ltd. & anr.-

For Petitioners - Mr. Sangram Das, ASC.
For Opp.Party - In person.

DR. A.K.RATH, J. The seminal question that hinges for our consideration is as to whether disciplinary proceeding can be initiated against the opposite party, a retired Government employee, two years after his retirement.

2. The opposite party had filed an original application being O.A. No.1511 of 2010 before the Orissa Administrative Tribunal, Bhubaneswar praying therein to quash the Memorandum dated 11.11.2010 along with Article of charges and Statement of imputation vide Annexure-9 to the O.A. Adumbrated in brief the case of the opposite party is that while he was functioning as Chief Electrical Inspector (T&D), Orissa, Bhubaneswar, he retired from service on 31.10.2008 on attaining the age of superannuation. Thereafter he had submitted his pension papers before the Chief Electrical Inspector (T&D), Orissa, Bhubaneswar, petitioner no.2, who forwarded the same on 11.11.2008 to the Commissioner-cum-Secretary to Government of Orissa, Energy Department, Orissa, Bhubaneswar, petitioner no.1 for necessary sanction and transmission to the Accountant General, Orissa. When petitioner no.1 did not sanction the pensionary benefits to him, he submitted a representation on 2.3.2009 to the petitioner no.1 through the petitioner no.2. Thereafter petitioner no.2 in his letter dated 4.3.2009 forwarded the representation along with his service book and other relevant papers to petitioner no.1 with a request to sanction the provisional pension

and commuted value of pension in favour of the opposite party. While the matter stood thus, petitioner no.1 in its order no. 3463 dated 24.3.2009 sanctioned the provisional commuted value of pension and provisional pension to the opposite party. The further case of the opposite party is that petitioner no.1 in its letter dated 25.3.2009 vide Annexure-7 to the O.A. cancelled the sanction of provisional commuted value of pension. When all the persuasions ended in a fiasco, he approached the learned Orissa Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar. During pendency of the O.A., by order dated 26.8.2010, learned Tribunal, as an interim measure passed an order to the effect that pendency of the original application shall not be a bar for the authority to finalize and pay the pension and retiral benefits to the opposite party.

3. The further case of the opposite party is that after getting notice from the learned Tribunal, petitioner no. 1 initiated a disciplinary proceeding against him in respect of the events, which took place more than nine years before institution of the proceeding and communicated the memorandum along with articles of charges and statement of imputation vide memo No. 151(2) dated 11.11.2010 made Annexure-9 to the O.A. It is further submitted that the initiation of departmental proceeding against him for the events, which took place during the financial years 2001-02 and 2002-03 is bad in law, inasmuch as the same was initiated after lapse of nine years of the date of event, more so, two years after his retirement. Since his case does not come under the ambit of Rule 7(2)(b)(ii) of the Orissa Civil Services (Pension) Rules, 1992 (hereinafter referred to as "Pension Rules"), the departmental proceeding initiated against him is liable to be quashed.

4. Pursuant to issuance of notice by the learned Tribunal, petitioner no.1 entered appearance and filed a counter. The case of petitioner no.1 is that the pension papers of the opposite party were received by the Department of Energy and it was found that the services of the opposite party from 1.1.1997 to 30.11.2000 had not been entered in his service book. The said fact was neither pointed out by the opposite party, nor by his appointing authority-petitioner no.2. Furthermore, in course of sanction of pension to the opposite party, it came to the notice of the Government that the opposite party was involved in a vigilance case for which a departmental proceeding had been contemplated. After receipt of the required information from the vigilance authority, the charge sheet was prepared and served on the opposite party. Approval of the Government was obtained for the charge sheet and drawal of disciplinary proceeding. In the circumstances, the Government in exercise of its power conferred under Rule 66 & Rule 7(2) of the Pension Rules withheld the final pensionary benefits like commuted

value of pension and gratuity etc. The further case of the petitioner no.1 is that the irregularity committed by the opposite party came to the notice of the Government in the Department of Energy on 31.7.2007, when the opposite party was in Government service. After correspondence with the vigilance authority and examination of papers, complete set of charges in respect of all the six officers, who were involved in the vigilance case, the matter was processed for Government approval for initiation of disciplinary proceedings against the said officers. It is further stated that these six officers were involved in vigilance case, out of which three including the opposite party had retired during the course of finalization of charges. Furthermore, the disciplinary authority of the Junior Engineers is the Engineer-in-Chief-cum-PCEI, Orissa, Bhubaneswar, who had to be consulted for service of the charge sheet. All these process took considerable time before service of charge sheet in 2010. Hence, it cannot be said that the event took place more than four years of initiation of the disciplinary proceeding.

5. Learned Tribunal after hearing the matter at length, in a well discussed judgment dated 19.7.2012 allowed the O.A. and quashed the memorandum dated 11.11.2010, articles of charges and statement of imputation(Annexure-9)to the O.A. Being dissatisfied with the judgment of the learned Tribunal, the State of Orissa and others filed the present writ application.

6. We have heard Mr. Sangram Das, learned Additional Standing Counsel for the State and the opposite party, who appeared in person. Assailing the tenability and defensibility of the judgment of the learned tribunal Mr. Das argued with vehemence that the opposite party during his incumbency as Executive Engineer, RW Electrical Division, Bhubaneswar had committed several irregularities as set out in articles of charges and statement of imputation. He further submitted that while the opposite party was functioning as Executive Engineer, RW Electrical Division from 20.4.2004 to 6.10.2006 during 2001-02 and 2002-03, all total, 1048(482 + 566) repair and maintenance of electrical installations in Government buildings were taken up by the Junior Engineers of Electrical Sections in respect of Keonjhar, Baripada and Balasore. The same were done under the direct supervision of the Assistant Engineer of Electrical Sub-division, Baripada, who was working under his control as well as his direct supervision. The works were executed through different contractors, who had executed agreements. The contractors executed the work during the specified time. The Junior Engineers measured the works but did not prepare the final bills and just paid some amount and kept the bills pending deliberately with mala fide intention. The Assistant Engineer, Electrical Sub-

Division also did not check-measure the bills deliberately. As Executive Engineer, as soon as the works were completed, the same should have been check-measured by the opposite party, but he did not check-measure the work immediately, which amounts to deliberate negligence in his duty. Mr. Das further referred to Articles 2, 3 and 4 of the statement of imputation and submitted that the vigilance took up the investigation of these works. Referring to Rule 7(2)(b)(ii) of the Pension Rules, Mr. Das submitted that the malfeasance and misfeasance committed by the opposite party during the financial years 2001-02 and 2002-03 came to the notice of the Government on 31.7.2007 and, as such, it cannot be said that the event took place more than four years of initiation of the disciplinary proceeding.

7. The opposite party, who appeared in person supported the judgment of the learned tribunal. He submitted that he was not the Executive Engineer, RW Electrical Division, Bhubaneswar at the relevant point of time. Furthermore the alleged event took place during 2001-02 and 2002-03 i.e., more than nine years before such initiation of the disciplinary proceeding and two years after his retirement. Thus, the initiation of departmental proceeding is bad in law.

8. The State of Orissa promulgated the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962("OCS (CCA) Rules" for the sake of brevity) in exercise of its power conferred by proviso to Article 309 of the Constitution of India. Rule 14 of Chapter-V of the said Rules deals with 'Disciplinary authorities', which reads as follows:-

> "14. **Disciplinary authorities**- (1) The Government may impose any of the penalties specified in Rule 13 on any Government servant.
>
> (2) Without prejudice to the provisions of the Sub-rule (4), any of the penalties specified in Rule 13 may be imposed on a member of a civil service or a person appointed to a civil post by the appointing authority or the authority specified in schedule or by any other authority empowered in this behalf by a general or special order of the Governor.
>
> (3) Subject to the provisions of Sub-rule (4), the power to impose any of the penalties specified in Rule 13 may also be exercised in the case of a member of a Civil Service, (Group-C) or Civil Service, (Group-D)
>
> (a) if he is serving in Department of the Government, by the Secretary to the Government of Orissa in that Department.

(b) if he is serving in any other office, by the head of the office, except where the head of that office is lower in rank than the authority competent to impose the penalty under Sub-rule(2).

(4) Not withstanding anything contained in this Rule-

(a) no penalty specified in Clauses (vi) to (ix) of Rule shall be imposed by any authority lower than the appointing authority;

(b) where a Government servant, who is a member of a service or is substantially appointed to any Civil Post, is temporarily appointed to any other service or post and the authority which would have been competent under Sub-rule(2) to impose upon him any of the penalties specified in Clauses (vi) to (ix) of Rule 13 had he not been so appointed to such other service or post is not subordinate to the authority competent to impose any of the said penalties after such appointment, the latter authority shall not impose any such penalty except after consultation with the former authority."

9. On conspectus of the rule, it is evident that no period of limitation is prescribed for initiation of a departmental proceeding against a Government employee. Rule-7(2)(b)(ii) of the Pension Rules on which much reliance has been placed by Mr. Das, is quoted hereunder:

"7. **Right of Government to withhold or withdraw pension**-(1) xx xx xx xx

2(a) xx xx xx.

2(b) such departmental proceedings as referred to in Sub-rule(1) if not instituted while the Government servant was in service, whether before his retirement or during his re-employment-

(i) shall not be instituted save with sanction of Government;

(ii) shall not be in respect of any event which took place more than four years before such instruction;

(iii) xx xx xx."

10. On cursory perusal of the Rule-7(2)(b)(ii) of the Pension Rules, it is crystal clear that the departmental proceeding as referred in Sub-rule(1), if not instituted while the Government servant was in service, whether before his retirement or during his reemployment, shall not be instituted in respect

of any event which took place more than four years before such institution. In **Noida Entrepreneurs Association V. Noida** , AIR 2011 SC 2112, the Hon'ble apex Court held that the competence of an authority to hold an enquiry against an employee who has retired, depends upon the statutory rules which govern the terms and conditions of his service. The Hon'ble apex Court in the case of **Bhagirathi Jenva V. Board of Directors, O.S.F.C.**, AIR 1999 SC 1841 in paragraph- 7 held as follows:

> "7. xxxxxx. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retrial benefits. Once the appellant had retired from service on 30.6.1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retrial benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retrial benefits on retirement."

11. After survey of all the decisions, the Hon'ble apex Court in the case of **Anant R.Kulkarni V. Y.P. Education Society and others**,(2013) 6 SCC 515 speaking through Hon'ble Dr. Justice B.S.Chauhan for the Bench, in paragraph-24 of the report held as follows:

> "24. Thus, it is evident from the above, that the relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even after his retirement, but nature of punishment would change. The punishment of dismissal/removal from service would not be imposed."

12. No period of limitation has been prescribed for initiation of a departmental proceeding against a Government servant in OCS(CCA) Rules and the rule is silent in this respect. Thus, the case is required to be examined in the light of the aforesaid Pension Rules. On a conspectus of Rule 7(2)(b)(ii) of the Pension Rules, it is evident that a departmental proceeding cannot be initiated against a Government servant in respect of any event which took place more than four years before such institution. Article (1) of the statement of imputation would, inter alia, show that the

opposite party was working as Executive Engineer, RW Electrical Division, Bhubaneswar from 20.4.2004 to 6.10.2006 and during 2001-02 and 2002-03 repair and maintenance of electrical installations in Government buildings in three different districts were taken up by the Junior Engineer. As the Executive Engineer would have to check-measure as soon as works were completed but he did not do the same intentionally. Thus, the event relates back to the financial years 2001-02 and 2002-03. The disciplinary proceeding was initiated on 11.11.2010 by the Government of Orissa and, accordingly, a memorandum was issued to the opposite party along with articles of charges and statement of imputation .The opposite party had retired from services on 31.10.2008. In view of the fact that the event took place before four years from the date of institution of the departmental proceeding, we are of the opinion that the initiation of such departmental proceeding is not sustainable in the eye of law. The learned tribunal is quite justified in quashing the departmental proceeding.

13. The next question for our consideration is about the vigilance case. It be noted that a criminal case and a departmental proceeding stand on different footing. A criminal case is to be proved beyond all reasonable doubt, where as in a departmental proceeding, charges are to be proved on preponderance of probability. In **Captain M.Paul Anthony V. Bharat Gold Mines Ltd and another,** AIR 1999 SC 1416, the Hon'ble apex Court in no uncertain terns held as under:-

> "xx xx xx As we understand, the basis for the proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. Whereas in the departmental proceedings, where a charge relating to misconduct is being investigated, the factors operating in the mind of the disciplinary authority may be many such as enforcement of discipline or to investigate the level of integrity of the delinquent or the other staff, the standard of proof required in those proceedings is also different than that required in a criminal case. While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubts."

14. Considering the present case on the anvil of the decisions cited supra, we are of the view that since the departmental proceeding has been quashed on a technical ground, the criminal proceeding, if any, which was initiated against the opposite party will continue. As a corollary, the petitioners are directed to pay the pension and other retiral benefits of the

opposite party within a period of two months from the date of passing of the order. With the aforesaid observation and findings the writ petition is disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 619

INDRAJIT MAHANTY, J. & RAGHUBIR DASH, J.

W.A NO. 51 OF 2013 (Dt. 08.04.2013)

BHAGABAN SETHI … ..…Appellant

.*Vrs.*

LOKANATH SETHI & ORS. ……..Respondents

CONSTITUTION OF INDIA, 1950 – Art. 227

Writ petition – Order passed by the learned Single Judge exercising powers of Superintendence under Article 227 of the Constitution – Whether Writ Appeal is maintainable against such Order – Held, No. (Para 4)

Case laws Referred to:-

1. 2008 (II), O.L.R-725 :(Mahammed Saud and Ors.-V- Dr.(Maj) Shaikh Mahfooz and Anr.)

For Appellant - M/s. M.D. Burma, S. R. Singh Samanta & P. K. Khuntia

For Res. No. 1- M/s. M. Kanungo, A. Das, S. Das, M. Verma, S. K. Mishra, S. N. Das, P. S. Acharya & A. K. Sahoo

For Res.Nos.2 & 3 - Additional Government Advocate

I. MAHANTY, J. The present writ appeal has been filed by the appellant-Bhagaban Sethi, the returned candidate, who was declared elected as a Sarpanch on polling 1342 votes as against respondent No.1 (writ petitioner) on polling 1337 votes. In other words, the appellant was declared elected for having five extra votes from respondent No.1.

2. Shorn of unnecessary details, it appears from the pleadings of the parties that respondent No.1 prayed for recounting of Booth No.2 of Ward No.2 and the same being illegally rejected, he ultimately filed an Election Misc. Case No.12 of 2012 before the Civil Judge (Junior Division), Puri challenging the election of the present appellant on the ground of corrupt practice, inter alia, on the ground that Prabhat Kumar Pradhan had forcibly taken away the ballot papers of Booth No.2 of Ward No.2 for which, the Presiding Officer-Sri Sankar Jena (respondent No.3) duly informed the Election Officer (respondent No.2), F.I.R. was lodged and G.R. Case No.322 of 2012 has been initiated. The Civil Judge (Junior Division), Puri on a prima facie finding that the ballots have been snatched away after counting and there was cause of action for filing of the election petition, and, after setting aside the election of the present appellant, directed for repoll of Booth No.2 of Ward No.2. This was the subject matter in Election Appeal No.2 of 2012 before the court of the District Judge, Puri, who by judgment dated 08.01.2013 confirmed the order passed by the Civil Judge (Junior Division), Puri and dismissed the Election Appeal. Challenging the said order, the appellant filed W.P.(C) No.1902 of 2013 before this Court. It also came to be dismissed by order dated 11.02.2013. Hence, the present writ appeal.

3. The first issue that arises for consideration relates to as to whether the present writ appeal is maintainable. In W.P.(C) No.1902 of 2013 from which the writ appeal arises, the present appellant (writ petitioner) had made the following prayer "issue a writ in the nature of cetiorari by quashing the judgment and order dated 08.01.2013 passed in Election Appeal No.2 of 2012 by the learned District Judge, Puri as well as the judgment and order dated 23.11.2012 passed in Election Misc. Case No.12 of 2012 by the learned Civil Judge (Junior Division), Puri".

4. The issue regarding maintainability of a writ appeal is no longer res integra, since it has been determined by a Full Bench of this Court in the case of ***Mahammed Saud and Ors. v. Dr. (Maj) Shaikh Mahfooz and another,*** 2008(II) O.L.R.-725. The following conclusions were arrived at in paragraph-47 of the said judgment:

> (1) After introduction of Section 100-A in the Code of Civil Procedure by 2002 Amendment Act, no Letters Patent Appeal is maintainable against a judgment/order/decree passed by a learned Single Judge of a High Court.
>
> (2) The decision of a Division Bench of this Court in Birat Ch. Dagra case (*supra*) has not laid down the correct position of law. On

the other hand, the conclusions arrived at by Division Benches of this Court in V.N.N. Panicker and Ramesh Ch. Das cases (*supra*) are held to be good law and are confirmed.

(3) A Writ Appeal shall lie against the judgment/orders passed by a learned Single Judge in a Writ Petition filed under Article 226 of the Constitution of India. In a Writ application filed under Articles 226 and 227 of the Constitution, if any order/judgment/decree is passed in exercise of jurisdiction under Article 226, a Writ Appeal will lie, whereas no Writ Appeal will lie against judgment/order/decree passed by a Single Judge exercising powers of superintendence under Article 227 of the Constitution.

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

In view of the conclusion arrived at in the aforesaid judgment of the Full Bench of this Court, we are of the considered view that this Writ Appeal is not maintainable since the order of the learned Single Judge impugned before us was passed while exercising powers of superintendence under Article 227 of the Constitution and, accordingly, the same stands dismissed. No cost.

Appeal dismissed.

2013 (II) ILR - CUT- 621

SANJU PANDA, J.

W.P.(C) NO.16007 OF 2006 (Dt.24.04.2013)

BISHNU CHARAN MOHANTY ……..Petitioner

.*Vrs.*

THE MANAGEMENT OF
M/S. SARALA WEAVERS
COOPERATIVE
SPINNING MILLS LTD. ……..Opp.Party

INDUSTRIAL DISPUTES ACT, 1947 – S.2 (oo) (bb)

Retrenchment – Workman engaged in the establishment of the management for a period of two years – While working as such he was arrested by police on the allegation of theft – After acquittal the workman submitted his joining report but he was not allowed to resume duty as his engagement was not against a regular post – Labour Court came to the conclusion that there was no employer and employee relationship between the parties – Held, workman not entitled to any relief. (Para 4)

For Petitioner - M/s. Ramanath Acharya,
B. Barik & P.K. Sahoo.
For Opp.Party - M/s. L.K. Mohanty & R. Das.

S. PANDA, J. The petitioner, who is the workman, has filed this writ petition challenging the award dated 29th May, 2006 passed by the Presiding Officer, Labour Court, Bhubaneswar in Industrial Dispute Case No.220 of 1994. The State Government, in exercise of the powers conferred by sub-section (5) of Section 12 read with clause (c)/(d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947, referred the dispute to the Labour Court for adjudication. The reference is as follows:

> "Whether the termination of service of Sri Bishnu Ch. Mohanty by the management of M/s. Shree Sarala Weavers Co-operative Spinning ills Ltd., Nausira, Tirtol with effect from 2.11.84 is legal and/or justified? If not, what relief he is entitled to?"

2. Learned counsel for the petitioner submitted that the petitioner was engaged in the establishment of the management from 1.10.1982 to 2.11.1984. The workman filed a series of documents in support of his claim with regard to continuity of service. He was engaged at the site of construction of the factory building. His duty was to supply water to the construction work in the Civil Department of the factory. Thereafter, he was posted as a Helper in the Maintenance Department. The Junior Engineer issued an experience certificate on 31.7.1984 to the effect that the petitioner was working from 1.2.1983 to 31.7.1984. While working as such, on 2.11.1984 the petitioner was handed over to the police on the allegation of theft. Basing on the FIR, G.R. Case No.820 of 1984 was registered. Ultimately, he was acquitted from the charges on 11.2.1991. After the order of acquittal, the petitioner submitted the judgment along with his joining report on 20.2.1991 which was accepted by giving proper receipt but he was not allowed to resume the duty. Accordingly, a dispute was raised and as the conciliation failed, the case was referred to the Labour Court for adjudication

of the dispute. He further submitted that though the parties adduced the materials in support of their respective claims, the same were not properly taken into consideration by the Labour Court. Therefore, the impugned award passed by the Labour Court is perverse one. Hence, the same is liable to be set aside.

3. Learned counsel for the opposite party-management, however, submitted that the petitioner-workman was not engaged in a regular post; rather he was posted as a daily wager and was engaged as and when the work was available. His wages were being paid on completion of the work, according to the wages applicable to an unskilled Mullia. As such, there was no employer and employee relationship between the parties. He further submitted that the petitioner was involved in a criminal case having committed theft of valuable electrical goods from the premises of the management for which G.R. Case No.820 of 1984 was registered before the learned S.D.J.M., Jagatsinghpur and subsequently he was acquitted from the said criminal case. Thereafter, he raised the industrial dispute after long delay and taking into consideration the materials available on record, the Labour Court has passed a well reasoned award which need not be interfered with.

4. From the rival submissions of the parties and after going through the record, it appears that the Labour Court had considered the materials available on record and given the findings that the workman was not provided with any E.S.I or E.P.F number. The Mill was closed after Super Cyclone since October, 1999. It was also suggested to the workman that he was caught red handed while stealing the valuable electrical goods box and he was not engaged against the regular post. The establishment was neither functioning during the construction period nor the gate pass was issued to him. After closure of the mill, an official liquidator was appointed on 22.8.2005. Since the petitioner was not an employee under the management, the Labour Court came to the conclusion that there was no employer and employee relationship between the parties. As such, the workman did not succeed in proving the fact with regard to his engagement in the establishment of the management and the workman was not entitled to any relief.

5. Since the Labour Court has taken into consideration all the materials available on record and there is no error apparent on the face of the impugned award, this Court is not inclined to interfere with the same in exercise of the jurisdiction under Article 227 of the Constitution of India. Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2013 (II) ILR - CUT- 624

SANJU PANDA, J.

W.P.(C) NO. 266 OF 2008 (WITH BATCH) (Dt.28.06.2013)

M/S. HOTEL SHEELA TOWERS (P) LTD. ……Appellant

.Vrs.

ORISSA ELECTRICITY REGULATORY COMMISSION & ORS. ……..Respondents

ODISHA ELECTRICITY REFORMS ACT, 1995 - S.39

Hotel Industry – As per Industrial Policy Resolutions 1996, hotels supplied power by charging industrial tariff rate – Such incentive not available in I.P.R. 2001 and 2007 – Order passed by OERC Dt. 22.03.2005 reclassifying the petitioner hotel as commercial tariff instead of industrial tariff is challenged – Held, since the benefits the petitioners are getting under I.P.R. 1996, not extended to them, it is open for the petitioners to challenge the order of the OERC u/s 39 of the Act. (Para 14)

For Appellants - M/s. Siddhartha Ray & S.Dey

For Respondents- M/s. A.K.Mishra, H.M.Das & A.K.Sahoo (O.ps. 4 & 6)
M/s. S.K.Pattnaik, P.K.Pattnaik & N.Satapathy (O.p. 2)
M/s. S.Mohanty & R.K.Sahoo (O.p. 1)

S. PANDA, J. Since common questions are involved in these writ petitions, they were heard together and are being disposed of by this common order. For the sake of convenience, WP(C) No.266 of 2008 is taken up for consideration.

In WP(C) No.266 of 2008

In this writ petition, the petitioner-Hotel has challenged the order dated 22.3.2005 passed by the Orissa Electricity Regulatory Commission, Bhubaneswar, opposite party no.1, rejecting the proposal of the petitioner to be classified under the industrial category and billed at general purpose tariff.

In WP(C) No.12680 of 2000

In this writ petition, the petitioner-Hotel has challenged the letter dated 25.8.2000 issued by the Executive Engineer, Electrical, reclassifying the petitioner-hotel as commercial tariff instead of industrial tariff.

In WP(C) No.8314 of 2003

The petitioner-Hotel has filed this writ petition challenging the letter dated 5.6.2003 issued by the Executive Engineer, Electrical, reclassifying the petitioner-hotel as commercial tariff

In WP(C) No.14033 of 2006

The petitioner-Lodge has filed this writ petition challenging the illegal action of opposite parties 4 and 5 in raising the energy bills by applying general purpose tariff rate instead of industrial tariff.

In WP(C) No.6143 of 2003

The petitioner has filed this writ petition challenging the arbitrary action of the opposite parties in raising the energy bills by applying commercial class instead of industrial class.

2. In these writ petitions, the petitioners have challenged the action of the opposite parties in classifying the petitioners' institution as commercial organisation fixed the commercial tariff rate towards electricity charges instead of industrial tariff rate though the petitioners' organisation are hotels and to be treated as industry as per the different Industrial Policy Resolutions (in short, "the IPR").

3. Pursuant to the Industrial Policy Resolution, 1996 published by the State Government, the petitioner-company has started its hotel business. The petitioner-company has set up its hotel by taking financial assistances from the financial institutions. The hotel of the petitioner has also been approved by the Tourism Department, Government of Odisha which has recommended to the GRIDCO for charging the petitioner at "Industrial Tariff" rate. The petitioner-hotel has also been registered with the General Manager, DIC as a small scale industrial unit. From the very inception, the petitioner-hotel has been charged at industrial tariff rate by opposite party no.4. The Government of Odisha in its Industries Department from time to time declares IPRs for rapid industrialisation and financial growth in the State. In Industrial Policy Resolutions, 1986, 1989, 1992 and 1996, the State of Odisha declared tourism related industries like "Hotels" to be

treated as "Industry" and that will be supplied power by charging industrial tariff rate. For giving effect to the policy decision of the Government declared in the aforesaid IPRs, the Chairman-cum-Managing Director, GRIDCO issued a letter to all the Executive Engineers on 14.5.1996 stating therein that all Hotels (existing and new) will be entitled to have power at industrial tariff rate and not at commercial rate. The Director of Industries in their letter dated 4.3.1997 also issued a clarification to the effect that all existing and new hotels are entitled to get power supply at industrial tariff rate under IPR-1996 from 1.3.1996 onwards.

4. While the matter stood thus, the opposite parties took a decision that the petitioners are liable to pay electricity charges by applying commercial tariff instead of industrial tariff. Hence these writ petitions.

5. Opposite parties 4 and 6, the Distribution Companies, have filed their counter affidavit taking a stand that as per Section 39 of the Orissa Electricity Reforms Act, 1995, if any person is aggrieved by any decision or order of the Commission passed under the Act, may file an appeal before the High Court on any question of law arising out of such order within sixty days of the decision. Since the petitioner was aggrieved with the order of the Orissa Electricity Regulatory Commission (hereinafter referred to as "the O.E.R.C") dated 22.3.2005, it had to file an appeal within the statutory period. The O.E.R.C. was constituted in the year 1996 as per the Orissa Electricity Reforms Act, 1995 (in short, "the Act") and it regulated the electricity business in Orissa. As per the said Act, O.E.R.C. issued license to GRIDCO in the year 1997 and all the four DISTCOs including WESCO in the year 1999 for doing business in their respective license areas for distribution of power supply to different types of consumers. The petitioner-unit comes under opposite parties 4 and 6. As per the reforms process undertaken by the State Government, 51% equity shares of the company had been purchased by a private company and a separate license for supply of power had been granted in favour of the company with effect from 1.4.1999. The Commission has the power to frame regulation for its efficiency purpose. The Commission framed its regulation known as "O.E.R.C Distribution (Conditions of Supply) Code, 1998" to govern the distribution and supply of electricity and procedure thereof, such as, system of billing, modality of payment of bills, powers, functions and obligations of the suppliers and the rights and obligations of consumers and matters connected therewith and incidental thereto. The Distribution Code has its application and binding on all types of consumers and suppliers. Clause-VII of the Code deals with "Classification of Consumers". Clause 80(b) of the Code deals with "commercial category of consumers" which reads as follows:

"**80(b) Commercial-**

> This relates to relax to supply to premises which are used for office, business, commercial or other purposes not covered under any of the category with a contract demand upto but excluding 110 KVA and whereas the non-domestic load exceeds 10% of the total connected load."

Since the demand of the petitioner-hotel is 63 KW, it comes under the category of "commercial tariff". The Government of Odisha has formulated Industrial Policy Resolution to provide incentive to different industries in the State. As per the provisions of the IPR 1986, 1989 and 1992, benefits had been extended by OSEB to different industrial units including the petitioners so far as consumption of electricity was concerned. They availed the benefits of industrial tariff even though they come under the category of "commercial tariff". The said benefit was extended by the State Government and the same was reimbursed by the State Government to OSEB. After formation of GRIDCO, the then Chairman and Managing Director of GRIDCO informed all the Executive Engineers in-charge of the Divisions under GRIDCO vide letter dated 14.5.1996 that the units relating to tourism activities, existing/new hotels are entitled to have the power at industrial tariff rate and not at commercial tariff rate. Modifying its earlier letter, it was further intimated vide letter dated 26.11.1996 that the industrial units, hotels covered under the earlier I.P.Rs continued to have the benefit of such waiver upto the period provided in the concerned IPR. However, such facilities shall not be available to new industries coming under IPR, 1996. It was also intimated in the said letter that the financial loss incurred due to implementation of the directives of the State Government will have to be made good to GRIDCO by the State Government as provided under Section 12(3) of the OER Act, 1995. On the basis of the said communication, the benefits were extended to the petitioner-hotel and they were charged under the industrial tariff category upto 2000. After formation of different supply zones, distribution business of the zone was handed over to the private company and separate license was granted by the O.E.R.C. The Commission regulating the tariff policy notified the tariff for the entire retail supply of Orissa on 30.12.1999 with effect from 1st February, 2000. As per the Code, 1998, the commercial establishments including hotel consumers are coming under Clause 80(b) of the Regulations. The tariff for the commercial category of consumers fixed and mentioned in tariff order dated 30.12.1999 was published in the newspaper circulated in the State of Orissa for information of the general public and all consumers including the petitioners. As such, the action of the opposite parties is not arbitrary. As per the said tariff notification, the tariffs of hotels are covered under commercial

category and not under industrial category. However, they have got the benefit declared by the Government, i.e., waiver of electricity duty as per applicable rates provided in IPR 1996. Since the Government has withdrawn all supports and the private companies are in charge of supplying the electricity and Government did not reimburse the financial loss, the benefit of IPR 1996 was not extended to the petitioner industries as per the orders of OERC dated 30.12.1999.

6. Section 12(1) of the Orissa Electricity Reforms Act provides that the State Government shall be entitled to issue policy directives on matters concerning electricity in the State. Section 12(3) of the Act provides that the State Government shall be entitled to issue policy directives concerning the subsidies to be allowed for supply of electricity to any class or classes of persons or in respect of any areas in addition to the subsidies permitted by the Commission while regulating and approving tariff structure provided that the State Government shall pay the amount to compensate any concerned Bodies or Units affected by the grant of subsidy by the State Government to the extent the subsidy granted.

7. Since the State Government refused to extend for such subsidy to the company, the O.E.R.C is not in a position to provide any subsidy to the petitioners' establishment and the tariff rate was fixed as per the commercial tariff rate instead of industrial tariff rate.

8. While the matter stood thus, considering the power sector reforms and private participation in the distribution sectors, the Government of Orissa abridged/modified the incentive criteria in subsequent IPR 2001. For better appreciation, IPR-2001 is quoted below:

> "**IPR-2001**
>
> **ELIGIBILITY**
>
> 13.2. Industrial Units, hotels, cinema halls etc. covered under earlier industrial policy resolutions shall continue to enjoy the incentives admissible under the said policy except to the extent abridged or modified or enlarged in this policy.
>
> **POWER**
>
> 18.11 Information Technology, Bio-technology and Tourism related activities (existing or new) which are treated as industrial activity will be entitled to have power at industrial and not commercial rate of tariff subject to OERC approval."

9. The Government of Orissa further abridged/modified the incentive criteria in subsequent IPR 2007 which reads as follows:

"**IPR-2007**

ELEGIBILITY

14.2 Industrial units covered under earlier Industrial Policy Resolutions shall continue to enjoy the incentives if admissible under the said policy as per eligibility.

20. POWER

20.1 New Industrial unit other than Thrust sector industries shall be exempted from the payment of electricity duty upto a contract demand of 110 KVA for a period of 5 years from the date of availing power supply for commercial production. New industrial unit in the thrust sector shall be entitled to 100% exemption of electricity duty upto a contract demand or Five Megawatt for a period of 5 years from the date of availing power supply for commercial production.

20.2. New industrial unit setting up captive power plant shall be exempted from the payment of 50% of electricity duty for captive power plant for a period of 5 years for self-consumption only from the date of its commissioning.

20.3 Industries of seasonal nature like sugar, salt industries etc. will be provided the facility of temporary surrender of a part of their connected/sanctioned load subject to approval of OERC."

Under Annexure-1 of IPR

Definitions and Interpretation

17. "Priority Sectors" means-New Industrial units where fixed capital investment commences on or after the affective date and fall within the following categories.

1) Information technology and IT enabled service

2) Tourism related (hotels shall not be eligible for any fiscal incentive other than land at concessional industrial rate. No such concession was extended to the tourism sector as per the said IPR."

10. In view of the above since the hotels shall not be eligible for any fiscal incentive other than land at concessional industrial rate, no such concession was extended to the tourism sectors as per the said IPR. Therefore, the petitioners are not entitled to get any relief.

11. Opposite parties 2 and 3-the State Government have filed their counter affidavit taking similar stand to that of opposite parties 4 to 6. They have further stated that for similar prayer, the petitioner has filed OJC No.12680 of 2000 which is still pending. Therefore, the present writ petition is a repetition. The Government did not provide any subsidy to the hotels declared as an industry and there is no policy to pay any subsidy to the licensee and the distributing companies. The State Government also do not propose to provide energy to the hotels set up under IPR-1996 at the commercial rate by paying any subsidy to the licensing companies either. The Government has cleared the said position while issuing IPR-2001 and 2007. Since O.E.R.C is not ready to supply power tariff to hotels at industrial rate, the petitioners are not entitled to claim any benefit as per IPR 1996 which was for a specific period. The decision of the O.E.R.C dated 22.3.2005 having their own justification in the right direction achieved the desired objectives by launching reforms in power sector which has also not been challenged by any one and the same has become final and binding.

12. This Court has considered the aforesaid facts and the fact that after introduction of IPR-2001 and IPR-2007, the State Government has already abridged/modified the incentive criteria given to the hotels treating them as industries.

13. Sections 108(1) and 65 of the Electricity Act, 2003 being vital; they are extracted below for better appreciation:

> "**108. Directions by State Government**.–(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.
>
> xxx xxx xxx"

> "**65. Provision of subsidy by State Government**.- If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate

the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard."

14. The benefits the petitioners are getting under the said IPR-1996 having not been extended to them, it is open to the petitioners to challenge the order of the O.E.R.C as per the provision of Section 39 of the Act within a period of four weeks from today. In case such an appeal is filed explaining the delay in filing the appeal, the same shall be considered on its own merits. The petitioners may also make representation(s) to the State Government to provide them incentives taking into consideration the development of tourism sectors of the State and in such event the representation(s) of the petitioners may be considered by the State Government sympathetically. With the above directions, the writ petitions are disposed of.

Writ petitions disposed of.

2013 (II) ILR - CUT- 631

S. PANDA, J & DR. B. R. SARANGI, J.

MATA NO. 55 OF 2006 & RPFAM NO.15 OF 2006 (Dt.07.08.2013)

KUNI DEI @ KUNI BEHADI ……Appellant

.Vrs.

PABITRA MOHAN BEHADI & ANR. ……Respondents

HINDU MARRIAGE ACT, 1955 – S.13

Divorce – Ground of adultery – Burden of proof – Burden lies on the person to establish who makes such allegations.

In this case learned Family Judge without considering the plea of the wife relied upon the documents filed by the husband and passed the decree of divorce – One of such documents is Ext.4 the statement of the wife recorded U/s.164 Cr. P.C. on which much reliance has been placed by the learned Family Judge, has not been recorded in accordance with the provisions of law – Held, "adultery" being a serious allegation which affects the chastity of a woman should not be dealt with casually, rather great care and caution should be taken while considering such allegations – Grant of the impugned decree of divorce against the wife being an out come of non- application of mind, is set aside. (Paras 13,14)

CRIMINAL PROCEDURE CODE, 1973 – S.125

Petition for maintenance filed by the wife (Kuni) – Husband remaining separate with three major sons born out of the wed-lock of both the parties – In a proceeding U/s.125 Cr.P.C. major sons have equal responsibility to maintain the parents – Held, the husband as well as the three major sons are duty bound to maintain Kuni by paying maintenance of Rs.400/- P.M. from the date of passing of this order.
(Paras 15,16)

Case laws Referred to:-

1.(1925) P 55 : (Abson -V- Abson)
2.(1952) P. 169 : (Chorlton -V- Chorlton)
3.(1952)2 Q. B648 : (National Assistance Board -V- Wilkinson)
4.(1946) A.C. 588 : (Holmes -V- D.H.P.).
5.AIR 1970 Mad 104 at 105 (SB) : (Dawn Hendereson-V- D.Hernerson)
6.AIR 1966 MP. 130 : (Gira Bai -V- Fattoo)
(1965 MPLJ 559 : 1965 Jab.LJ 663)
7.(2013)5 SCC 226 : (K. Srinivas Rao-V- D.A. Deepa)

For Appellant - M/s. Maheswar Satpathy & D. Sahu.

For Respondent - Mr. Rajani Chandra Mohanty & K.C. Swain.

DR.B.R.SARANGI,J. Husband- Pabitra Mohan Behadi filed Civil Proceeding No.138 of 2000 seeking for a decree of divorce under Section 13 of the Hindu Marriage Act on the ground of adulterous life of his wife Kuni Dei with Nilu.

2. Kuni Dei, the wife filed Criminal Proceeding NO.291 of 2000 under Section 125 of the Cr.P.C. claiming maintenance from her husband Pabitra Mohan Behadi at the rate of Rs.500/- per month on the ground of his

negligence and refusal to maintain her. 3. Since the parties to the dispute is same, learned Judge, Family Court, Cuttack passed an order on 14.12.2001 in C.P. No.138 of 2000 to hear both the matters analogously and accordingly they were heard together and judgment was passed on 21.08.2006 granting ex parte decree of divorce as against the wife Kuni Dei. Against the said judgment, Kuni Dei-wife has preferred an appeal bearing MATA No.55 of 2006 under Section 19 of the Family Courts Act to set aside the ex parte decree of divorce passed against her and also filed RPFAM No.15 of 2006 claiming maintenance of Rs.1500/- per month. Both the matters were heard together with the consent of learned counsel for both the parties.

4. The fact of the case, in nut-shell, is that both Pabitra and Kuni had married in the year 1983. They led happy conjugal life for a period of sixteen years and out of their wed-lock three sons were born. By the time the dispute was filed, these three sons were aged about 13, 10 and 7 years respectively. Pabitra alleged that Kuni had developed illicit relationship with his cousin Nilu and was leading a adulterous life. In spite of several attempts being made to refrain her from such activities, she did not pay any heed to such request of Pabitra. Finding no other alternative, Pabitra filed a complaint case before the learned J.M.F.C., Baramba bearing I.C.C. No.13 of 2000 and the learned Magistrate referred the matter to the police, which was ultimately converted to G.R. Case No.19 of 2000. In the said proceeding, wife-Kuni was examined under Section 164 Cr.P.C., which was marked as Ext.4. Learned Judge, Family Court, Cuttack relying upon the complaint, which was turned to G.R. Case No.19 of 2000 as Ext.1 and Exts.5 to 7, the certified copy of the Panchayat Faisalanama, dissolved the marriage solemnized between Pabitra and Kuni by passing a decree of divorce on 21.08.2006, which is impugned in MATA No.55 of 2006.

5. Though Nilu had appeared and filed written statement, he has been set ex parte on 3.11.2003 whereas Kuni filed written statement denying all the allegations made by Pabitra and also stated that 6-7 months prior to May, 2000 Pabitra physically assaulted her and drove her away from his house and thereafter sent his younger cousin Nilu to her father's house, conveyed his desire to talk with her in her uncle's house. Believing that her husband is attempting to take her back, she went to her uncle's house with Nilu, the cousin of Pabitra. Suddenly, the police appeared with her husband Pabitra and took her along with Nilu and influenced her to tell against Nilu to let her free from blames, as a result her statement was recorded before the Magistrate under Section 164 Cr.P.C. and, as such, she has expressed her ignorance about the statement recorded in the Court and she has completely denied to have adulterous life with Nilu, who is of the age of her elder son.

The reasons for filing of the application by Pabitra is due to the fact that Kuni after giving birth to three children became weak, but Pabitra did not take care of her health rather tried to marry another lady of his choice and started assaulting her. Ultimately Pabitra married to Gita alias Gitarani Pradhan, daughter of Laxmidhar Pradhan of village Ratagarh, Banki in a Durga Tample on 11.07.2000 at village Mahulia, in the district of Cuttack and also enjoyed bigamous married life.

6. Pabitra was serving in a local Spinning Mill and was getting Rs.2,500/- per month. In the maintenance proceeding bearing Criminal Proceeding No.291 of 2000 under Section 125 Cr.P.C. filed by Kuni, the learned Judge, Family Court, Cuttack granted interim maintenance of Rs.200/- per month but she has been denied maintenance due to the judgment passed in C.P. No.138 of 2000, which was allowed in favour of Pabitra under Section 19(i)(1) of the Hindu Marriage Act on the ground of adultery of Kuni. Against no grant of maintenance in Criminal Proceeding No.291 of 2000, Kuni has filed RPFAM No.15 of 2006 claiming maintenance.

7. In order to establish the case of adulterous life of Kuni, Pabitra examined two witnesses, namely, P.W.1, he himself and P.W.2 Raj KIshore Behari, whereas from the side of Kuni, she has only been examined as O.P.W.1. Pabitra relied upon the documents Exts.1 to 9 to establish the case of adultery against Kuni and, as such, he has utilized the complaint arising out of G.R. Case No.19 of 2000, marked as Ext.1 and Ext.4 the certified copy of the statement of Kuni recorded under Section 164 Cr.P.C. in G.R. Case No.19 of 2000 and certified copy of the Panchayat Faisalanama Exts. 5 to 7 to prove his contention of adulterous life of Kuni.

8. On perusal of Ext.4, it is found that the same has not been recorded in accordance with the provision of Section 164 Cr.P.C. rather, the Magistrate had proceeded in a manner contrary to the said provision. So far as reliance placed on the other documents, which are outcome of G.R. Case and utilized against Kuni to get a decree of divorce, is concerned, while considering such documents, learned Judge, Family Court has not applied his mind in proper perspective inasmuch as he has proceeded in a footing as if Kuni has indulged in adultery and finally passed the impugned order granting a decree of divorce against Kuni.

9. Kuni's plea is to the extent that in order to have a second marriage, Pabitra ill-treated and assaulted her and, more so, Pabitra had married to one Gita @ Gitarani Pradhan, daughter of Laxmidhar Pradhan of village Ratagarh on 11.07.2000. Learned Judge, Family Court without considering

the contentions raised by Kuni has passed the decree which is not sustainable in the eye of law.

10. Mr.Satpathy, learned counsel appearing for Kuni relied upon the judgment of various courts such as, 11(2001) DMC 383 (Cal.), 11(1997) DMC, 499, 1(2000) DMC 508 (Kerala), 11(1996) DMC, 356 (P & H), 11(2003) DMC, 275 (Orissa) in his written statement of argument in support of his contention, whereas no citation has been given by the learned counsel appearing for Pabitra.

11. Before going to the merits of the case, it is to be first considered as to what is the meaning of '**adultery**'. '**Adultery**' as per the judicial dictionary means, "Ad to: alter, another person); anciently termed advowtry (quasi ad alterius thorum), the sin of incontinence between two married persons, or it may be where only one of them is married, in which case it may be called single adultery to distinguish it from the other, which has sometimes been called double. It means voluntary sexual intercourse between a married man or married woman and any person other than his or her wife or husband during the subsistence of such marriage (**Abson v. Abson (1925) P 55: Chorlton v. Chorlton, (1952) P, 169)**. Adultery is a ground for judicial separation (q.v.) and for dissolution of marriage (Matrimonial Causes Act, 1950, Section 1(1) (a), See WITNESS, By the Matrimonial Causes Act, 1857, which created a Court for Divorce and Matrimonial Causes (Superseding the Ecclesiastical Court) which would grant to the innocent party a divorce a mensa et thoro on the ground of the others adultery, a husband could obtain a dissolution of his marriage (which previously was only obtainable by a private Act of Parliament) upon the ground of her husband's adultery, or a dissolution of marriage on the ground of his adultery coupled with cruelty or desertion or bigamy, or of his incestuous adultery, provided there was no collusion or connivance, and that the alleged charges had not been condoned. The Matrimonial Causes Act, 1923, gave a wife the right to divorce her husband on the ground of adultery alone. See ACCUSARE NAMO SE DEBET DIVORCE. Under the Statute of Westminister I, 1285, c.34, a wife forfeited unless condoned, by subsequent cohabitation by the husband. Upon the adultery of the wife, the husband's common law liability to supply her with necessaries ceases. It is a good defence to a charge under the Vagrancy Act, 1824. Section 3, of neglecting to maintain here; and unless condoned, to an application against the husband under the National Assistance act, 1948, Section 42, for an order that he shall maintain her **(National Assistance Board v. Wilkinson, (1952) 2 Q.B. 648)**, and also, unless he has condoned, connived at or conduced to the adultery, to a summons against him by the wife for maintenance under

the Summary Jurisdiction (Married Women) Act, 1895, Section 6. If an order has been made under the last-mentioned Act, it may be revoked either upon proof of subsequent adultery by the wife or upon proof of such antecedent adultery as would have been an answer to the application for the order, if it appears either that such antecedent adultery was not within the knowledge of the husband when the order was made or that he was prevented by some sufficient cause, such as illness, from appearing on the hearing of the original application and proving such adultery. Adultery was formerly a tort actionable by a writ of trespass in an action of criminal conversation (q.v.), but now damages for adultery may be claimed by a husband only in proceedings in the divorce Court (Matrimonial Causes Act, 1950, Section 30); where, however, adultery follows upon enticement, damages for the adultery may be recovered in an action for enticement (Menon (1936) p.200). Adultery has always been one of the offences with regard to which the ecclesiastical courts had jurisdiction. That jurisdiction still exists, but is now obsolete. Chapter 10 of the Acts of Parliament of 1950 made adultery a felony, without benefit of clergy, and punishable with death; but this Act which does not seem to have been put in force, was of no effect after the Restoration. Where a man finds another in the act of adultery with his wife (**R.V. Greening, (1913) 3 K.B. 846**) and kills him or her, in the first transport of passion, he is only guilty of manslaughter, but this does not extend to a confession by the wife of past adultery (**Holmes v. D.H.P., (1946) A.C. 588**). The killing of an adulterer deliberately and upon revenge is murder. The word adultery is also used by ecclesiastical writers to describe the intrusion of a person into a bishopric during the former bishop's life. The reason of the application is that a bishop is supposed to contract a sort of spiritual marriage with his church. (See: Earl Jowitt's. The Dictionary of English Law, 2nd Ed. At 67-88).

Adultery is the matrimonial offence, defined in the following manner in standard Treatises, such as Rydon on Divorce, 10th Edn., it is :

> "Consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage". {See Divorce Act, 1869, Section 10-, [**(Dawn Hendereson v. D.Henderson, AIR 1970 Mad. 104 at 105 (SB**)]
>
> A marriage solemnized after the commencement of the Hindu Marriage Act, 1955, in the lifetime of a married spouse, renders, the second marriage null and void ab initio- This is so by virtue of Section 11, read with Section (5)(i) of the Act, the marriage is void opsojure. Such a marriage, is, in law, no marriage at all.

> Sexual intercourse between the husband and the second wife is adultery so as to attract the provisions of Section 10(i)(f) and 13(1)(i) of the said Act. **(Gita Bai v. Fattoo, AIR 1966 MP 130; 1965 MPLJ 559: 1965 Jab. LJ 663**).
>
> In the absence of any definition of the Act itself the Special Bench referred to the meaning of the word "adultery" as given in the English Dictionary, such as Strouds Judicial Dictionary and Tomin Law Dictionary.
>
> Where the evidence justifies the finding that the respondent had sexual intercourse with the co-respondent at any place and point of time as alleged by the petitioner then it will be a clear case of adultery. **[(Subrata Kumar v. Dipti Baneerjee. AIR 1974 Cal. 61 at 65 (SB)]"**

12. Apart from the above, meaning of 'adultery' can only be derived from Section 497, IPC to mean, whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man; such sexual intercourse not amounting to the offence of rape, is the offence of adultery. 'Adultery' is the willful violation of the marriage bed. 'Adultery' is the offence of incontinence by married persons.

13. Now question arises on whom burden lies to establish the allegation of adultery. It is the person, who makes the allegation of adultery, has to establish the same. With the above provisions of law, now it is to be examined in the case in hand, whether the learned Judge, Family Court, Cuttack has followed the principles of law in proper perspective to decide the question of adultery as alleged against Kuni. 'Adultery' being a serious allegation, which affects the chastity of a woman, should not be dealt with casually, rather great care and caution should be taken while considering such allegations. On perusal of the materials available on record, it is found that the learned Judge, Family Court, Cuttack has committed gross error by not considering the plea taken by Kuni and has proceeded to accept the contentions raised by Pabitra by relying upon the documents, which have been marked as exhibits, i.e. Ext.1, the complaint, which has been subsequently turned as G.R.Case, Ext.4, the statement of Kuni recorded under Section 164, Cr.P.C. and Exts.5 to 7, the Faisalanama in the criminal proceeding and by utilizing the same against Kuni, passed the impugned decree of divorce. That apart, Ext.4, the statement recorded under Section 164, Cr.P.C. on which reliance has been placed by the learned Judge,

Family Court, Cuttack to establish the allegation of adultery, has not been recorded in accordance with the provisions of law enshrined under the Code of Criminal Procedure, more particularly, the learned Magistrate while recording such statement has not taken consent from her that if she makes such statement that may be utilized against her and her signature, which has been given in the form of LTI has neither been identified nor the contents of the statement recorded under Section 164, Cr.P.C. which has been recorded by the learned Magistrate, has been read over and explained to her at any point of time, thereby such recording of statement of Kuni in a criminal case under Section 164, Cr.P.C. cannot be utilized against her in the civil proceeding.

14. In view of such position, the finding arrived at by the learned Judge, Family Court, Cuttack granting decree of divorce against Kuni, is absolutely misconceived one inasmuch as the same is an out-come of non-application of mind, thereby the order passed by the learned Judge, Family Court, Cuttack in C.P. No.138 of 2000 is hereby set aside.

15. So far as payment of maintenance under Section 125, Cr.P.C. in Criminal Proceeding No.291 of 2000 is concerned, three sons born out of the wed-lock of Pabitra and Kuni, who were aged 13, 10 and 7 years respectively at the time of filing of the criminal proceeding have in the meantime become 26, 23 and 20 years respectively and have attained the age of majority. On query being made, it has been brought to the notice of this Court that all the three sons are staying with their father Pabitra. In a proceeding under Section 125, Cr.P.C. the major sons have equal responsibility to maintain the parents. Therefore, both Pabitra and his three sons are duty bound under the provisions of law to maintain Kuni by paying maintenance for her sustenance. Reliance is placed on a recent judgment of the apex Court in ***K.Srinivas Rao v. D.A.Deepa***, (2013) 5 SCC 226 wherein it has been held that it is the husband's obligation to maintain the wife so also the major children have also equal obligation to maintain their mother under the provisions under Section 125, Cr.P.C.

16. In the case in hand, since Pabitra and three sons are earning, it would be just and proper to direct them to pay maintenance of Rs.400/- per month from the date of passing of this order and we direct accordingly. Further, Kuni is also entitled to get arrear maintenance of Rs.200/- from 21.8.2006, the date the judgment in C.P. No.138 of 2000 was passed till date as she has not been paid anything because of grant of decree of divorce by the learned Judge, Family Court, Cuttack. Therefore, we direct Pabitra to pay the arrear maintenance of Rs.200/- per month from the date of

the judgment passed in C.P. No.138 of 2000, i.e. 21.8.2006 till date as she was getting interim maintenance during pendency of the said proceeding. Such arrear shall be paid within a period of two months from the date of passing of this order.

17. With the above observation and direction, both MATA No.55 of 2006 and RPFAM No.15 of 2006 are disposed of.

Both the matters disposed of.

2013 (II) ILR - CUT- 639

B.N.MAHAPATRA, J.

F.A.O. NO. 167 OF 2011 (Dt.10.05.2013)

M/S. NEW INDIA ASSURANCE CO.LTD. …….Appellant

.Vrs.

NIM INDRAJIT SINGH & ANR. ……Respondents

(A) MOTOR VEHICLES ACT, 1988 - S. 147

Death of "Helper" of the offending bus – "Any Person" mentioned in Section 147 of M.V.Act, does not cover the employees other than those mentioned in sub-clauses (a), (b) & (c) of Proviso (i) to Section 147(1) of the Act, i.e., the driver and conductor of the vehicle – However the owner of the vehicle is free to secure a policy of insurance providing wider coverage and in that event the liability would cover beyond the requirement of the above provision.

In this case policy issued in respect of the offending bus shows that additional premium of Rs. 50/- has been paid to cover the liability of W.C. to two employees. So here the liability of the Insurance Company also covers the other two employees besides the statutory liability of driver and conductor – Held, the commissioner is justified in

holding that the appellant-Insurance Company is liable to pay the compensation awarded to the legal heir of the deceased-Helper. (Paras 19,20,21)

(**B) EVIDENCE ACT, 1872 - S. 115- r/w O-41, R-27 C.P.C**

Estopel – Insurer neither pleaded nor produced any evidence regarding the policy condition before the Tribunal – Held, in the absence of any pleading the insurer is estopped to raise any plea in the appeal that in the insurance policy the liability of Helper is not covered – Learned Commissioner is justified to fasten liability on the Insurance Company to pay compensation to the claimant-respondent No. 1 for the death of the Helper. (Paras 22,24)

(C) WORKMENS COMPENSATION ACT, 1923 - S. 4-A (3)

Payment of Interest – No appeal filed by the claimant – Whether the insurer is liable to pay interest in the event of default that too with retrospective effect – Held, yes – Direction issued to the Insurance company to pay simple interest on the amount of compensation @ 7.5% per annum from the date of filing of the application till the date of passing of the award and interest at the rate of 12% P.A. thereafter till the compensation amount is deposited before the commissioner within eight weeks from today. (Paras 29,30)

(D) MOTOR VEHICLES ACT, 1988 – S. 145(g)

"Third Party" – Meaning of – It necessarily referred to a party other than those who are parties to the contract of insurance – In a contract of insurance, the insurer is one party to the contract and the policy holder is the other party – The claim made by others in respect of negligent use of motor vehicle may be described as claim by third party. (Paras 20)

Case laws Referred to:-

1. 2004 ACJ 452 : (P.J.Narayan -V- Union of India & Ors.)
2. 1994(I) OLR 88 : (Oriental Insurance Company Ltd.-V- Harapriya Nayak & Ors.)
3. 2003 ACJ 1550 (SC) : (Ramashray Singh.-V- New India Assurance Co. Ltd. & Ors.)
4. 2007 ACJ 526 (Kant) : (Branch Manager, United India Insurance Co. Ltd. -V- Prabhudas & Anr.)
5. 2007 ACJ 1459 (Kant) : (Oriental Insurance Company Ltd. -V- Ananda &

Anr.)
6. (2005) 2 TAC 289 (SC) : (National Insurance Co.Ltd. -V- Prembai Patel & Ors.)
7. 1994 (1) OLR 300 (Ori) (DB) : (New India Assurance Co.Ltd. -V- Suresh Chandra Patra & Ors.)
8. 72 (1991) CLT 495 : (Udayanath Pani -V- Basanti Dalai & Ors.)
9. 1988 ACJ 270 : (National Insurance Co.Ltd. -V- Jugal Kishore & Ors.)
10. 2006 ACJ 1996 : (National Insurance Co.Ltd. -V- Anadi Charan Sahu & Ors.)
11. 2010 (1) OLR (SC) 296 : (Shaym Gopal Bindal & Ors. -V- Land Acquisition Officer & Anr.)
12. (2004) 1 TAC 670 (Ori) : (Oriental Insurance Co.Ltd. Berhampur -V- Bhagya Pradhan & Ors.)
12. (2005) 1 TAC 360 (Ori) : (National Insurance Co.Ltd. -V- Gini Sahu & Ors.)
13. (2009) 3 TAC 598 (SC) : (Oriental Insurance Co.Ltd. -V- Mohd. Nasir & Anr.)

For Appellant - Mr. S.S.Rao
For Respondents - Mr. Biswajit Mohanty (O.P. 1)

B.N. MAHAPATRA, J. This appeal has been filed challenging the award dated 01.03.2011 passed by learned Commissioner for Workmen's Compensation-Cum-A.D.M., Dhenkanal (for short, "the Commissioner") in W.C. Case No.5 of 2007 directing the appellant to pay a sum of Rs.3,25,365/- within 30 days from the date of the award, failing which interest @ 9% per annum is to be paid from the date of filing of the case.

2. The appellant's case in a nutshell is that W.C. Case No.5 of 2007 was filed by respondent no.1-claimant alleging that the Bus bearing Registration No.OR-05-R/7796 belonging to respondent no.1 in which her son Jadab Indrajit Singh was working as Helper, met with an accident on 06.02.2007 and capsized near Chandikhole Odanga. As a result of such accident, the deceased sustained grievous injury and died on the spot. Respondent no.1-claimant claimed that the death of the deceased occurred in course of employment and therefore, she is entitled to a compensation of Rs.3,50,000/- as her deceased-son, who was working as Helper, was getting Rs.3,000/- per month as wages. Further case of the claimant was that the vehicle in question having been insured with opposite party No.2-Insurance Company, it is liable to indemnify the owner by paying the amount of compensation to the claimant.

3. Opposite Party No.2-Insurance Company appeared and filed written statement before the learned Tribunal taking various grounds. Opp. party no.2 had called upon the claimant to prove the case by producing the policy that the vehicle in question was covered by valid policy. A specific stand was taken that opposite party No.2-Insurance Company cannot be fastened with the unlimited liability in the spirit of Section 147 (2) of the M.V. Act, 1988 and sought for protection under Section 149 (2) of the M.V. Act. It is claimed by opposite party No.2 that the wage of the deceased as fixed by the Commissioner is without any basis.

4. During the course of hearing the parties have adduced oral and documentary evidence. The claimant has produced the records of connected Police case arising out of the incident in question. Learned Commissioner held that the claimant is entitled to compensation. The age of the deceased was fixed at 25 years as per the post mortem report. On the basis of Zimanama, opp. party no.2-Insurance Company was found to have insured the offending vehicle and was directed to pay a sum of Rs.3,25,365/- as compensation within a month and in the event of failure to deposit the same, opp. party no.2 was directed to pay interest @ 9% per annum from the date of filing of the case. Being aggrieved with the aforesaid award of compensation, opposite party No.2-Insurance Company has filed the present appeal.

5. Mr. S.S. Rao, learned counsel appearing on behalf of the appellant-Insurance Company submitted that the award passed by the learned Commissioner directing the appellant to pay a sum of Rs.3,25,365/- towards compensation to the claimant is exorbitant, contrary to law and based on no evidence. Learned Commissioner is not justified to fix the wage of the deceased at Rs.3,000/- per month on oral evidence without being supported by any documentary evidence, which is also bad in law. In absence of any documentary evidence, learned Commissioner should have taken the minimum wage as declared by the Government of Odisha in its Labour Department which was Rs. 1875/- per month at the relevant time. Further, the direction of the Commissioner to pay interest @ 9% per annum with retrospective effect from the date of filing of the claim case in the event of failure to pay the amount of compensation within 30 days from the date of order is bad in law and contrary to the verdict of the Hon'ble Supreme Court in the case of *P.J.Narayan Vs. Union of India and others*, 2004 ACJ 452 and judgment of this Court in the case of the *Oriental Insurance Company Ltd. Vs. Harapriya Nayak and others*, 1994(I) OLR 88 wherein it was held that the interest in the event of default that too retrospectively is without jurisdiction. When the appeal period under the law is 60 days, the direction to pay 9%

interest for non-compliance of the order within 30 days from the date of award is nothing but curtailing of the right of the appellant to prefer appeal. There is no material on record to show that the deceased was working as Helper with Respondent No.2; even there has been no registration of employee as workman under law before the competent authority. Neither the complainant nor the owner of the vehicle has pleaded or led any evidence to contend that the appellant-Insurance Company has taken any additional premium to cover any liability in addition to the statutory liability nor copy of the Insurance Policy was filed by either of them. The Commissioner relying on the zimanama (Ext.5) in the connected police case held that the vehicle belongs to respondent No.2 and the appellant was insured covering the period of accident, but he did not touch anything about the coverage by the appellant and the liability under the policy to indemnify the owner.

6. Mr. Rao, further submitted that the appellant produced the true copy of the policy along with an application as an additional evidence under the provisions of Order 41, Rule 27 of CPC as the said document is necessary for complete adjudication. The policy would show that the basic premium for undertaking coverage of any employee other than the driver and conductor was taken. Mr. Rao, further submitted that admittedly the deceased was a Helper in a passenger carrying vehicle. The appellant is not liable to indemnify the owner of the offending vehicle which is a passenger carrying vehicle as the statute of the policy of the insurance does not require covering the Helper. Quantum of compensation is high and excessive. In order to have extra liability the insurer must take a policy by making extra premium which has not been paid by the owner in the instant case. The insurance policy issued by the appellant would clearly show that the vehicle was not insured to cover the liability for the Helper. In absence of the premium paid for that and in absence of acceptance of coverage of Helper by the appellant, the impugned award directing the appellant to indemnify the owner is bad in law.

7. It is further submitted by Mr. Rao that in paragraph 1 of the claim petition the deceased was described as Helper. In the body of the claim petition nothing has been stated about the liability of the Insurance Company except indicating in the cause title the number of policy said to be valid from 30.01.2007. Placing reliance on proviso (i) (a) & (b) to Section147 (1) (b) of the M.V. Act, it is submitted that Helper is not covered under the statutory liability or under contractual liability. Mr. Rao relying on the judgment of the Hon'ble Supreme Court in the case of *Ramashray Singh vs. New India Assurance Co. Ltd. and others, 2003 ACJ 1550 (SC)* submitted that policy is required to cover only those who are specified in the policy. The expression

"any person" mentioned in Section 147 of the M.V. Act does not cover the employees other than those mentioned in the proviso. Placing reliance upon the judgment of the Karnataka High Court in the case of *Branch Manager, United India Insurance Co. Ltd. vs. Prabhudas and another*, *2007 ACJ 526 (Kant)*, Mr. Rao submitted that a maxi-cab cleaner is not covered under the Insurance Policy.

8. Further placing reliance in the case of *Oriental Insurance Co. Ltd. vs. Ananda and another, 2007 ACJ 1459 (Kant),* it is submitted that cleaner in a bus is not covered. Payment of basic premium would cover the liability for driver and conductor only. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. vs. Prembai Patel and others, (2005) 2 T.A.C. 289 (SC)*, Mr. Rao submitted that the effect of proviso to Section 147 is only to cover the liabilities as are there under the Workmen's Compensation Act in respect of the workmen covered under clauses (a), (b) and (c) of proviso to Sec. 147 (1)(b) of the M.V. Act. The Insurance Policy being a contract, it is permissible for an Insurer to take liability to cover the entire liability under clauses (a), (b) and (c) of proviso to Section 147 (1)(b) of the M.V. Act or even the entire liability under an award and in order to cover extra liability the insured must take a policy by making extra premium. Referring to a decision of this Court in the case of *New India Assurance Co. Ltd. vs. Suresh Chandra Patra and others, 1994 (1) OLR 300 (Ori) (DB),* it was submitted that the presumption of taking wider liability would depend on the defence by the owner as to whether he asserted that he has taken an insurance policy with higher risk and in terms of the policy the insurer is liable to indemnify him for any amount beyond the limit prescribed under the statute.

9. Further, placing reliance on the judgment of this Court in *Udayanath Pani vs. Basanti Dalai & Others,* 72 (1991) CLT 495, Mr. Rao submitted that this Court while analyzing the decision of Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. Vs. Jugal Kishore and others,* 1988 ACJ 270 has categorically held that unless positive assertion is made in the claim application or in the objection of the insured, the insurer's taking defence that its liability is not unlimited does not arise. With regard to liability of the insurer, Mr. Rao also placed reliance on the decision of this Court in the case of *Harapriya Nayak and others (supra)*.

10. Further, Mr. Rao also relying upon the judgments of the Hon'ble Supreme Court in the cases of *National Insurance Co. Ltd. vs. Anadi Charan Sahu and others,* 2006 ACJ 1996*;* and *Shaym Gopal Bindal and others vs. Land Acquisition Officer and another,* 2010 (1) OLR (SC) 296 submitted that policy of insurance is a vital document for proper adjudication of the case

and therefore it should be accepted as additional evidence. The document that has crucial bearing on the merit of the claim put forward by the parties needs to be accepted. Further, referring to the decisions in the cases of P.J. Narayan (supra) and Harapriya Nayak and others (supra), Mr. Rao submitted that insurer is not liable to pay interest and the order of paying interest in the event of default that too retrospectively is without any jurisdiction.

11. Mr. B. Mohanty, learned counsel appearing on behalf of claimant-respondent No.1 placing reliance on the judgments of this Court in the cases of *Oriental Insurance Co. Ltd., Berhampur vs. Bhaiga Pradhan and others*, 2004 (1) TAC 670 (Ori); *National Insurance Co. Ltd. vs. Smt. Gini Sahu and others*, 2005 (1) TAC 360 (Ori) submitted that since the insurer neither pleaded nor produced any evidence regarding policy condition in the trial court so, in absence of pleadings insurer is estopped and cannot be permitted to raise such plea at appeal stage. Further, referring to Order 41, Rule 27, CPC Mr.Mohanty submitted that since any of the conditions mentioned in Order 41, Rule 27 is not satisfied, the misc. case filed by the appellant for acceptance of additional evidence is liable to be rejected.

Placing reliance on the judgments of the Hon'ble Supreme Court in the cases of *National Insurance Co. Ltd. vs. Prembai Patel and others*; 2005 (2) TAC 289 (SC), National Insurance Company Limited Vs. Lilu Rani Majumdar and others, 2005 (1) TAC 56 (Gau.) and the *Divisional Manager, Oriental Insurance Co. Ltd. vs. Minka Munda and two others*, 2009 (II) OLR 982 (Ori), Mr. Mohanty submitted that Driver and conductor of a passenger bus are automatically covered under the expression "any person" mentioned under Section 147 of the M.V. Act and no extra premium is required to be paid to cover them, any premium, if taken to cover workman's liability that covers other contractual employee. Referring to section 2(5) of the M.V. Act, Mr. Mohanty submitted that 'Conductor' in relation to a stage carriage, means a person engaged in collecting fares from passengers, regulating their entrance into or exit from the stage carriage and performing such other function as may be prescribed. However in the instant case, insurer has not taken any plea or produced any document to prove the nature and use of the offending vehicle as a stage carriage requiring employment of a conductor so the reservation claimed through additional evidence that the employees covered are driver and conductor and not driver and Helper is an afterthought and therefore the same is liable to be rejected.

12. Mr. Mohanty relying upon the judgment of the Hon'ble Supreme Court in the case of *Oriental Insurance Co. Ltd. V. Mohd. Nasir and another,*

2009(3) TAC 598 (SC), further submitted that W.C. Act does not prohibit for grant of interest at a reasonable rate from the date of filing of the claim application till the order/judgment is passed and thereafter at the statutory rate as per Section 4-A (3) of the said Act. This Court in a judgment dated 3.9.2009 passed in FAO No. 519 of 2008 has also granted interest under W.C. Act.

13. On the rival contentions of the learned counsel for both parties, the following questions fall for consideration by this Court:

(i) Whether the liability to pay compensation on the death of Helper is covered under the Insurance Policy issued by the Insurance Company?

(ii) Whether the Commissioner is justified directing the appellant-Insurance Company to pay compensation of Rs.3,25,365/- to the claimant who is the legal heir of the deceased?

(iii) Whether in absence of any pleading or any evidence regarding policy condition before the Tribunal the insurer is estopped and cannot raise any plea at the appellate stage that in the insurance policy the liability of the Helper is not covered?

(iv) Whether the Commissioner is justified to direct payment of interest @ 9% per annum from the date of filing of the case in the event of failure on the part of the Insurance Company to deposit the amount of compensation within 30 days from the date of pronouncement of the order?

14. Question nos. (i) and (ii) being inter-linked, they are dealt with together. There is no dispute that the claimant's son Jadab Indrajit Singh while working as a Helper in a bus bearing Registration No.OR-05-R/7796 met with an accident and died while discharging his duty. The Commissioner framed as many as four issues and issue no.(4) is " whether opposite parties are liable to pay such compensation as is due , if so, by whom payable?

While dealing with issue no.4, learned commissioner has held as under:

> "The applicant/petitioner claimed compensation from the employer O.P.No.1 and O.P.No.2 the insurer. In the claim petition it has been mentioned that the bus of O.P.No.1 bearing Regd. No. OR-05-R/7796 was duly insured with O.P.No.2. The certified copy of zimanama Ext.5 confirms that the R.C.Book of vehicle No.OR-05-

> R/7796 stood in the name of O.P.No.1. Thus it is established that the O.P.No.1 was the employer of the deceased Helper. The zimanama (Ext.5) also confirms that the offending bus of O.P.No.1 was insured under O.P. No.2 vide Policy No. 550303/31/06/01/00002047 valid till 29.1.2008 covering the date of accident. The O.No.2 has not led evidence to the contrary. Hence, I hold that the O.P.No.1 the employer who is primarily liable to pay the compensation in terms of Section 3 of the W.C. Act, 1923 is liable to be indemnified by O.P.No.2 the insurer. In the matter of payment of compensation already assessed at Rs.3,25,365/- (Rupees three lakhs twenty five thousand three hundred sixty five) only and issue no.4 is answered accordingly."

15. Relying on various decisions stated hereinbefore, Mr. Rao submitted that "any person" mentioned in Section 147 of the M.V. Act does not cover the employees other than those mentioned in the proviso. Policy is required to cover only those who are specified in the policy. A further stand of the appellant is that cleaner in a maxi-cab or a bus is not covered. Basic premium paid would cover the liability for driver and conductor only. There is no dispute over the above legal proposition.

16. The Hon'ble Supreme Court in the case of *Ramashray Singh* (supra) held as under: "Any person" mentioned in Sec. 147 of the M.V. Act does not cover the employees other than those mentioned in the proviso." Thus, policy is required to cover only those who are specified in the policy.

17. The Hon'ble Supreme Court in the case of ***National Insurance Company Co. Ltd. Vs. Prembai Patel and others***, (2005) 2 TAC 289 (SC) held as under :

> "13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (*a*) or (*b*) or (*c*) of proviso (*i*) to Section 147(1)(*b*) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy."

18. The Hon'ble Supreme Court in the case of ***Sanjeev Kumar Samrat Vs. National Insurance Company Ltd. and others*** [Civil Appeal No.8925 of 2012 arising out of S.L.P. (Civil) No.17272 of 2006 decided on 12.11.2012] held as under:-

> "The other principle that has been stated is that the insurer's liability as regards employee is restricted to the compensation payable under the 1923 Act. In this context, the question that has been posed in the beginning to the effect whether the employees of the owner of goods would come within the ambit and sweep of the term "employee" as used in Section 147(1), is to be answered. In this context, the proviso to Section 147(1)(b) gains significance. The categories of employees which have been enumerated in the sub-clauses (a), (b) and (c) of the proviso (i) to Section 147(1) are the driver of a vehicle, or the conductor of the vehicle if it is a public service vehicle or in examining tickets on the vehicle, if it is a goods carriage, being carried in the vehicle.
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> 20. It is the settled principle of law that the liability of an insurer for payment of compensation either could be statutory or contractual. On a reading of the proviso to Sub-Section (1) of Section 147 of the Act, it is demonstrable that the insurer is required to cover the risk of certain categories of employees of the insured stated therein. The insurance company is not under statutory obligation to cover all kinds of employees of the insurer as the statute does not show command. That apart, the liability of the insurer in respect of the said covered category of employees is limited to the extent of the liability that arises under the 1923 Act. There is also a stipulation in Section 147 that the owner of the vehicle is free to secure a policy of insurance providing wider coverage. In that event, needless to say, the liability would travel beyond the requirement of Section 147 of the Act, regard being had to its contractual nature. But, a pregnant one, the amount of premium would be different."

19. Thus, the categories of employees who have been enumerated in Sub-clauses (a), (b) and (c) of proviso (i) to Section 147 (1) of the Act, are the driver of a vehicle or if it is a public service vehicle engaged as a conductor of the vehicle or in examining ticket on the vehicle or if it is a goods carriage being carried in the vehicle. Proviso (ii) to Section 147 (1) of the Act covers any contractual liability. Under Section 147, owner of the vehicle is also free to secure a policy of insurance providing wider coverage.

In that event, the liability would cover beyond the requirement of Section 147 of the Act, regard being had to its contractual nature.

20. The appellant has filed a copy of the policy issued by it in respect of the offending vehicle as Annexure-1 to the Misc. Case No. 260 of 2012. On perusal of such annexure, it reveals that the owner has paid the following premium.

O.D. basic		Rs. 4,404.00
T.P.basic		Rs. 3,160.00
Addl. premium towards liable to		
Passenger	-16	Rs. 3,760.00
W.C. to employee	- 2	Rs. 50.00
	Total	Rs.11,374.00

Thus, the T.P. (Third Party) basic premium of Rs.3160/- has been paid to cover all statutory liabilities which include Driver and Conductor of the vehicle. The expression “Third Party” has not been exhaustively defined in the Act, 1988. Section 145(g) provides inclusive definition of “Third Party”. As per Section 145(g) “Third Party” includes the Government. The true meaning and import of the term “third party” necessarily referred to a party other than those who are parties to the contract of insurance. In a contract of insurance, the insurer is one party to the contract and the policy holder is other party. The claim made by others in respect of negligent use of motor vehicle may be described as claim by third party. Premium has also been paid to cover 16 passengers.

Apart from the above, additional premium of Rs.50/- has been paid to cover the liability of W.C. to two employees. Hence, liability of the Insurance Company in the instant case also covers the other two employees besides the statutory liability of driver and conductor.

21. In view of the above, the appellant-Insurance Company is liable to pay the compensation awarded by the Commissioner to the legal heir of the deceased-Helper.

22. Question No.(iii) whether in absence of any pleading or any evidence regarding policy condition before the Tribunal the insurer is estopped and cannot raise any plea at the appellate stage that in the insurance policy the liability of the Helper is not covered.

It may be worth noting that even though in the cause title of the claim petition Respondent no.1-claimant impleaded the Insurance Company as a party and gave Policy number, the Insurer neither pleaded nor produced any

evidence regarding policy condition before the Tribunal. In absence of any pleading, the insurer is estopped and cannot be allowed to raise any plea at the appeal stage that in the Insurance Policy the liability of Helper is not covered.

23. This Court in the case of ***Bhaiga Pradhan and others*** (supra) has held that the Insurance Company had never pleaded that there was collusion between the claimants and the owner. No evidence was led before the Tribunal regarding the collusion. No suggestion was given to P.W.1 during his cross-examination that there was a collusion. In absence of any pleading by the appellant-Insurance Company with regard to the collusion, it cannot be permitted to raise such a plea at the time of appeal. [Also see *Smt. Gini Sahu and others (supra]*

24. In any event, in view of the reasons given in the preceding paragraphs, the learned Commissioner is justified to fasten the liability on the Insurance Company to pay the compensation of Rs.3,25,365/- to the respondent no.1-claimant for death of the Helper Jadab Indrajit Singh.

25. Question no.(iv) is with regard to payment of interest. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Ramashray Singh* (supra) and in the case of *Harapriya Nayak and others* (supra), Mr. Rao submitted that the insurer is not liable to pay interest in the event of default that too with retrospective effect. There is no appeal filed by the claimant-respondents.

26. The Hon'ble Supreme Court in the case of ***Oriental Insurance Co. Ltd. vs. Mohd. Nasir and another***, 2009 (3) TAC 598 (SC), upon which the respondent-claimants relies has held as under:-

> "The said provision, as it appears from a plain reading, is penal in nature. It, however, does not take into consideration the chargeability of interest on various other grounds including the amount which the claimant would have earned if the amount of compensation would have been determined as on the date of filing of the claim petition. Workmen Compensation Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim petition till an order is passed. Only when sub-section (3) of Section 4-A would be attracted, a higher rate of interest would be payable where for a finding of fact as envisaged therein has to be arrived at. Only because in a given case, penalty may not be held to be leviable, by itself may not be a ground not to award reasonable not be held to be leviable, by itself may not be a ground not to award reasonable interest."

27. In view of the ratio of the above cited case, it is clear that clause (3) of Section 4-A of the W.C. Act, 1923 can be attracted, where a default occurs in paying the compensation within one month from the date it fell due. If the awarded amount is not paid within one month from the date of the award, interest at the rate of 12% is leviable on the amount of compensation.

28. In the instant case, the learned Commissioner for Workmen's Compensation vide order dated 01.03.2011 has directed that if the amount awarded is not paid within thirty days from the date of the order, 9% interest per annum shall be paid on the compensation amount from the date of filing of the case till the actual payment. The amount of compensation was deposited before the Commissioner by the appellant-insurer on 28.04.2011.

29. In the case of *Mohd. Nasir (supra)*, the Supreme Court further held that section 4-A(3) does not take into consideration the chargeability of interest on various other grounds including the amount which the claimant would have earned if the amount of compensation would have been determined as on the date of filing of the claim petition. The Workmen's Compensation Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim petition till the order is passed. Considering the above, the Supreme Court in the said case directed payment of interest at the rate of 7½ % per annum from the date of filing of the application till the date of award and, thereafter, as per the impugned award in the said case.

30. This Court, therefore, applying the ratio of the aforesaid case, directs that the Insurance Company shall pay simple interest on the amount of compensation @ 7.5% per annum from the date of filing of the application till the date of passing of the award and interest at the rate of 12% per annum thereafter till the compensation amount is deposited before the W.C. Commissioner within eight weeks from today before the Commissioner. On such deposit being made the same shall also be disbursed along with amount of compensation in favour of the claimants.

31. In the ultimate analysis, the appellant-Insurance Company is not entitled to the relief claimed in the appeal.

Appeal dismissed.

2013 (II) ILR - CUT- 652

B. N. MAHAPATRA, J.

BLAPL NO. 16096 OF 2013 (Dt.30.07.2013)

DR. TIRUPATI PANIGRAHI ……Petitioner

.Vrs.

STATE OF ORISSA …….Opp.party

CRIMINAL PROCEDURE CODE, 1973 – S.439

Bail – Economic offences – Petitioner has duped thousands of innocent investors – Huge loss of public funds posing serious threat to the financial health of the Country – Prayer for bail rejected – Order challenged before Apex Court but the SLP (Cri.) was withdrawn with liberty to move the learned trial Court for bail afresh – Trial Court rejected the application which was affirmed by the learned Sessions Court – Hence this application before this Court after filing of charge sheet.

The Court while granting bail has to consider the nature of accusation, seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses – In this case the I.O. has categorically reported that a prima facie case is made out against the petitioner and others and after filing of charge sheet there is no mitigating factor so far as this petitioner is concerned rather more aggravating circumstances have surfaced – Held, considering the nature of the offence, its magnitude and ramification as alleged, this Court is not inclined to accept the prayer for bail to the petitioner. (Para 30)

Case laws Referred to:-

1.AIR 2011 sc 340 : (State Kerala-V- Raneef)
2.AIR 2008 SC 78 : (Dinesh Dalmia-V- CBI)
3.AIR 1984 SC 372 : (Bhagirathsinh Judeja-V- State of Gujarat)
4.AIR 1980 SC 785 : (Niranjan Singh & Anr.-v- Pravakar Rajaram Kharote & Ors.)
5.2009 AIR SCW 785 : (Vaman Narain Ghiya-v- State Rajasthan)
6.AIR 1978 SC 429 : (Gudikanti Narasimhulu & Ors.-V- Public Prosecutor, High Court Andhra Pradesh)
7.(2003)26 OCR(SC) 802 : (State of Gujarat-V- Salimbhai Abdulgaffar Shaikh & Ors.)

8.(2012)51 OCR(SC) 751 : (Dipak Shubhashchandra Mehta-V- CBI & Anr.)
9.AIR 2012 SC 830 : (Sanjay Chandra-V- CBI.)
10.(2005)31 OCR 640 : (Smt. Sabita Sundari Sahu-V- State of Orissa).
11.(1987)2 SCC 364 : (State Gujarat-V- Mohanlal Jitamalji Porwal & Anr.)
12.AIR 2013 SC 1933 : (Y.S. Jagmohan Reddy-v- Central Bureau of Investigation).

For Petitioner - M/s. J. Pal, A. K. Behera & P.Mohapatra.
For Opp.Party - Mr. V. Narasingh(Addl. Govt. Advocate).

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B.N.MAHAPATRA, J. This bail application under Section 439 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') is presented by the accused-applicant Dr. Tirupati Panigrahi.

2. The petitioner is alleged to have committed offence punishable under Sections 465/467/471/406/411/420/506/ 120-B/34 of the Indian Penal Code, 1860 (in short 'IPC') read with Section 4 of the Prevention of Money Laundering Act, 2002.

3. Facts leading to arrest of the petitioner having been elaborately dealt with in the earlier order dated 04.04.2013 passed in BLAPL No.2282/2013 when the order rejecting BLAPL was passed, there is no need to repeat the same in the present order.

4. The matter was before this Court in BLAPL No.2282 of 2013. By judgment dated 04.04.2013, the application for bail was rejected inter alia with following observations:

(i) Taking into account the nature and magnitude of the offence and its ramification as alleged, it cannot be said that it is a case of breach of contract simpliciter committed by the petitioners and the same would not constitute any offence under Sections 420 and 406, I.P.C. On the other hand, apparently a prima facie case is made out which constitutes offence under Sections 420 & 406, IPC,

(ii) The plea of income tax raid for not transferring the lands to the applicants is not tenable in law,

(iii) The plea of the petitioners that there are some chaka lands which could not be converted to homestead and chaka lands cannot be fragmented into sub-plots for which lands could not be sold to investors who deposited money with petitioners for purchase of land pursuant to public advertisement floated by the petitioners itself prima facie shows the dishonest intention of the petitioners,

(iv) An undertaking before this Court after the petitioners being faced with criminal liability would not wash away the culpability of the petitioners and that cannot be a ground for grant of bail to the petitioners,

(v) As per petitioners' own admission, they are not in possession of genuine transferable/saleable homestead land in question to sell the same to informant and other investors in pursuance of their own promise,

(vi) Considering the nature of offence, its magnitude and ramification as alleged, materials available on record, the rival contentions of the parties and keeping in mind the principle of law laid down by the Hon'ble Supreme Court, the prayer for bail made by the petitioners was rejected.

5. Being aggrieved by the order of rejection dated 04.04.2013, the petitioner preferred SLP (Crl) No.3480 of 2013 before the Hon'ble Supreme Court and subsequently filed an application along with others seeking permission of the Hon'ble Supreme Court for withdrawal of the said SLP and by order dated 09.05.2013 the said petition was allowed giving liberty to the petitioner (s) if they/he so desire(s) to make an application for grant of bail before the Trial Court.

6. After submission of charge sheet, the petitioner filed an application for grant of bail before the learned S.D.J.M., Bhubaneswar, who rejected the bail application on the ground that the charge sheet already submitted does not dilute the gravity of the offence in any manner. The bail pleas of the accused persons have already been negated by this Court earlier. Considering all the materials, the bail petition was rejected. Thereafter, the petitioner moved the learned Sessions Judge, Khurda at Bhubaneswar and the case was transferred to 2nd Additional Sessions Judge, Bhubaneswar, who after taking into consideration the materials available, the gravity of the offence, the nature and character of the accused persons rejected the bail application. Hence, the present bail application has been filed before this Court.

7. After passing of the earlier order of this Court, charge sheet was submitted, a copy of which has been filed before this Court by the petitioner.

8. Mr. J. Pal, learned counsel appearing for the petitioner referring to the written note of submission dated 26.07.2013 submitted that the petitioner was arrested on 25.12.2012 and charge sheet in the said case was filed on 22.04.2013 before learned S.D.J.M., Bhubaneswar in C.T. Case No.53 of 2013 under Sections 465, 467, 471, 406, 411, 420, 506, 120-B and 34, I.P.C. read with Section 4 of the Money Laundering Act. The Investigating Officer prayed for keeping the investigation open under Section 173(8) of the Cr.P.C. The learned S.D.J.M., Bhubaneswar by order dated 22.04.2013 did not take cognizance and

instead directed the Investigating Officer to complete the investigation as soon as possible. Till date no further/additional charge sheet has been filed by the Investigating Agency though in the meantime three months have already passed.

9. Mr. Pal further submitted that after submission of charge sheet there is no necessity and/or justifiable reason for keeping the petitioner in jail custody. It is settled principles of law that the detention in jail custody pending trial is pre-trial detention and that is done only to facilitate the Investigating Agency to collect materials against the accused persons and if they are inside the custody then it will be easier for the Investigating Agency to collect the materials enabling them to file the charge sheet. Once the charge sheet is filed there is no necessity to keep the accused inside custody as the materials have been collected by the Investigating Agency. That is why the protection has been given to the accused who are inside custody and an outer limit has been prescribed under Section 167(2) of Cr.P.C. that if the Investigating Agency failed to file charge sheet within the outer limit prescribed under Section 167(2), Cr.P.C., then right accrues in favour of the accused and the Magistrate has no other option but to admit the accused on bail. In the present case admittedly the charge sheet has been filed and therefore, there is no necessity of keeping the accused behind the bar for indefinite period as it is matter of record that though the charge sheet has been filed since 22.04.2013 but till date no additional evidence or materials have been collected by the Investigating Agency. Therefore, it is a clear case of violation of Article 21 of the Constitution of India, 1950 (in short 'the Constitution').

10. It is further submitted that the settled principle of law is that till a person is convicted finally he is presumed to be innocent and his right to life and right to trade is not taken away on the basis of a mere allegation. Therefore, since the petitioner has remained in custody for more than seven months, there is no necessity of keeping him for further time inside custody as additional charge sheet as sought for, has not yet been filed and there is no chance of trial being concluded in near future. Therefore, no accused person can be detained for unlimited period which clearly violates Article 21 of the Constitution. Hence, it is a fit case that the accused persons should be enlarged on bail on such terms and conditions as this Court may deem just and proper.

11. Mr. Pal further submitted that the Hon'ble Supreme Court in a catena of decisions has held that detailed examination of evidence and elaborate examination of documents on merit should be avoided while passing orders on bail application. Placing reliance upon the decision of the Hon'ble Supreme Court in the case of *State of Kerala vs. Raneef, AIR 2011 SC 340,* Mr. Pal submitted that in deciding bail applications an important factor which should certainly be taken into consideration by the Court is the delay in concluding the

trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, nobody can restore so many years of his life spent in custody. In that event, Article 21, which is the precious of all the fundamental rights of our Constitution, is violated. This is certainly one of the important factors in deciding whether to grant bail. Power to grant bail is not to be exercised as if the punishment before trial is being imposed. The important material considerations in such a situation are whether the accused would be readily available for his trial, whether he is likely to abuse the discretion granted in his favour by tampering with evidence or there is any chance of threatening or tampering with the witnesses and there is chance of his absconding from justice.

12. Mr. Pal further submitted that if there is no prima facie case, there is no question of considering other circumstances but even where a prima facie case is established, the approach of the Court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with the evidence. In the present case, the accused is an established businessman of the State and there is no chance of his absconding and further he is ready and willing to file his undertaking before the Court that he will not tamper with the evidence, he will appear in the Court on each date fixed for trial till conclusion of trial subject to the provisions of Section 317 of Cr.P.C. along with any other conditions that would be imposed on him while enlarging on bail. This is a fit case where this Court can enlarge the petitioner on bail in any terms and conditions as would be deemed proper.

In support of his contentions, Mr. Pal relied upon the decisions of the Hon'ble Supreme Court in the cases of *Dinesh Dalmia vs. CBI, AIR 2008 SC 78; Raneef, (supra); Bhagirathsinh Judeja vs. State of Gujarat, AIR 1984 SC 372; Niranjan Singh & another vs. Pravakar Rajaram Kharote & Others, AIR 1980 SC 785; Vaman Narain Ghiya vs. State of Rajasthan, 2009 AIR SCW 785; Gudikanti Narasimhulu & Others vs. Public Prosecutor, High Court, Andhra Pradesh, AIR 1978 SC 429; State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and others, (2003) 26 OCR (SC) 802; Dipak Shubhashchandra Mehta Vs. CBI and another, (2012) 51 OCR (SC) 751 and Sanjay Chandra vs. CBI, AIR 2012 SC 830* and decisions of this Court *Smt. Sabita Sundari Sahu vs. State of Orissa, (2005) 31 OCR 640.*

13. Mr. Pal further submitted that total collection from the land projects is Rs.80,94,82,102/- and not Rs.315,96,49,943/-.

14. Mr.V.Narsingh, learned Additional Government Advocate appearing for the State submits that taking into account the magnitude of offence and

its ramifications, investigation was taken up in the right earnest. During the course of investigation, it came to the fore that the petitioner as the Director, and other petitioners as Managing Director and Director have duped thousands of innocent investors and committed fraud in an organized manner in making false promises and thereby induced people to part with their money which were subsequently misappropriated and converted to their own use.

15. It is further submitted that the present Bail Application relates to Kunja Vihar Project. During the course of investigation, it has come to light in the similar fashion that the petitioner along with others had floated four more projects, namely, (i) Bhagya Nagar, (ii) Kalyan Vihar Phase-II, (iii) Puspanjali Enclave and (iv) Kalyan Vihar and adopting similar modus operandi has cheated persons who made investment in response to their advertisement. After investigation, charge sheet was filed and keeping in view the magnitude of the scam permission was sought to keep the investigation open. Learned S.D.J.M., Bhubaneswar has preferred to wait to take cognizance after gathering more evidence. He has not discharged the accused persons for want of evidence. Rather, considering the evidence available, he has rejected the bail application of the accused persons. Learned Additional Sessions Judge, Bhubaneswar while rejecting the bail application of the accused persons had also considered the materials available, gravity of the offence and the nature and character of the accused persons. This Court, considering the bail applications of the accused persons prior to submission of the charge sheet has rejected the bail petition observing that apparently prima facie case is made out which constitutes offence under Sections 420 and 406, IPC. Filing of charge sheet prima facie establishes the guilt of the accused persons. Taking of cognizance is inconsequential so far proviso to Section 167(2), Cr.P.C. is concerned. The evidence gathered so far clearly establishes that the accused persons had collected huge amount in Crores and on being asked did not furnish the details of utilization of the same. The learned S.D.J.M., Bhubaneswar has taken cognizance of the offence in EOW P.S. Case No.01 of 2013 corresponding to C.T. Case No.53 of 2013 of S.D.J.M., Bhubaneswar. Accused persons have falsely shown the amount of Rs.5.32 crores, which was given as advance for purchase of land and transaction of which is already over since long. Several other persons whose addresses have not been furnished are yet to be examined. Once the petitioner is enlarged on bail, it would not be possible to trace those persons for the obvious reasons they will be shielded by the petitioner.

16. Mr. Narsingh submitted that in EOW PS Case No.01/13, the accused persons had threatened the complainant and other witnesses, which is clearly mentioned in the “Calendar of Evidence” submitted in t he Court. Considering

the money and muscle powers, it is firmly believed that the accused persons if released on bail would resort to their old ways of terrorizing the witnesses. Petitioner has also criminal antecedents. Those are Mancheswar PS Case No.33 dated 29.11.2010 under Sections 420/506/323/34, IPC. Similarly, Lalbag P.S. Case No.43 dated 16.03.2013 under Sections 447/468/471/ 420/34 I.P.C. has been registered against Madhusudan Panigrahi and others on the allegation that fraudulently a sale deed has been registered in respect of the land belonging to the informant in favour of M/s. Hi-tech Estates & Promoters Pvt. Ltd., represented by its Director Sri Madhusudan Panigrahi.

17. Mr.Narsingh further submitted that because of the means and the standing of the accused persons, their potentiality of interfering with the ongoing investigation need not be restated.

18. Placing reliance on the judgment of the Hon'ble Supreme Court in the Case of *Prahalad Singh Bhatti Vs. NCT*, (2001) 4 SCC 280, it is submitted that while granting bail what is to be considered is that there is reasonable grounds for believing that the offence has been committed. In the instant case, the test of reasonable ground for believing that the offence u/s.420, I.P.C. and allied offences have been committed is established beyond iota of doubt. Further, reliance is also placed on the judgment of the Hon'ble Supreme Court in the case *of Mukesh Jain Vs. CBI*, (2010) 88 AIC 319.

19. On the rival contentions of the parties, the questions that fall for consideration by this Court are :-

(a) Whether in the facts and circumstances after submission of charge sheet there is any necessity of detaining the petitioner in jail custody ?

(b) Whether in the facts and circumstances, the petitioner has made out a case for grant of regular bail to him?

20. Since both the questions are inter-linked, there are dealt with together.

21. I am conscious that detailed examination of evidence and elaborate examination of documents on the merit should be avoided while passing order on a bail application. In the present case, considering the nature of stand taken, the argument advanced by the petitioner and the reply of the State, I am constrained to deal with those in the interest of justice.

22. The main contention of the petitioner is that where no prima facie case is made out there is no question of considering other circumstances for grant of bail to an accused, but where prima facie case is established, the approach of the Court in the matter of bail is as to whether presence of accused persons is

available for trial or it is likely to abuse discretion granted in his favour by tampering with evidence and/or influencing the witnesses. Since in the present case, the petitioner is an established businessman of the State, there is no chance of his absconding.

23. At this juncture, it is relevant to refer to the concluding paragraph of Charge sheet dated 22.04.2013, which reads as follows:-

> "Under the facts and circumstances, a prima-facie case is well made out against the accused persons Sri Tirupati Panigrahi, Sri Tirupati Choudhury, Sri Madhu Sudan Panigrahi, M/s. Hi-Tech Estate & Promoters (P) Ltd. and M/s. Rajdhani Systems & Estates Pvt. Ltd. represented by their MD Sri Tirupati Panigrahi u/s 465/ 467/ 471/ 406/ 411/ 420/ 506/120(B)/34 IPC/4 of the Prevention of Money Laundering Act 2002. The stipulated custodial period of 120 days is going to be completed by 23.04.2013 in respect of aforementioned accused persons. Hence, I submitted Charge Sheet vide No.01 dt. 22.04.2013 U/S 465/ 467/ 471/ 406/ 411/420/506/120(B)/34 IPC/4 of the Prevention of Money Laundering Act 2002. keeping investigation open u/s-173(8) Cr.P.C. since, the retrieval of data by CFSL Kolkata is still awaiting, the money trail of the accused persons are to be made in detail, many more investors are to be examined, the complicity of other accused persons are to be verified, the details of scrutiny of bank documents are to be made, other persons are to be examined in respect of sold and purchased of land by the accused persons for Kalyan Vihar Phase-II and for tracing the amount misappropriated by the accused persons."

Thus, the Investigating Officer categorically reported that a prima facie case is well made out against the accused persons Sri Tirupati Panigrahi, Sri Tirupati Choudhury and Sri Madhusudan Panigrahi, Managing Directors of Hi-Tech Estate & Promoters (P) Ltd. and M/s. Rajdhani Systems & Estates Pvt. Ltd., represented through their Managing Director, Sri Tirupati Panigrahi under Sections 465/467/471/406/411/420/506/120-B/34, IPC read with Section 4 of the Prevention of Money Laundering Act, 2002.

24. This Court while rejecting bail petition filed earlier before submission of charge sheet has observed that apparently a prima facie case is made out which constitutes the offence under Sections 420/406, IPC. Now on perusal of the charge sheet, the materials support the earlier views, as sufficient and concrete materials highlighting and establishing the role of the accused persons have been collected and referred to therein. There is no change in the circumstances from what existed earlier when the first order rejecting the bail application was passed.

25. Now, the question arises as to whether the petitioner is to be admitted to bail despite a prima facie case is made out against him for commission of alleged offence. For the reasons stated hereinafter this Court is of the view that the petitioner is not entitled to be enlarged on bail.

(i) As per the allegation of the prosecution, the accused persons have collected Rs.315.96 crores (according to the petitioner, it is Rs.80,94,82,102/-) from the innocent and gullible investors and the available balance in freezed 185 accounts is only Rs.4.14 crores and the rest amount is to be traced. The accused persons had withdrawn Rs.101 crores from 20 accounts of the two Companies and in spite of notice no details of utilization of such withdrawal have been furnished. During the course of investigation, it came to fore that the petitioner who is the Director and other accused persons who are Managing Director and Directors have duped thousands of investors and committed fraud in an organized manner and derived huge wrongful gain and in the process they caused immense wrongful financial loss to the innocent investors. While floating the alleged plotting schemes, the Company in the name and style of Hi-tech Estates and Promoters Pvt. Ltd. and M/s Rajadhani Systems and Estates Private Limited through public advertisements floated the plotting Scheme with a dishonest intention, making false promises and thereby induced people to part with their money which were subsequently misappropriated and converted to their own use.

(ii) Further stand of the State is that in EOW Bhubaneswar P.S. Case No.02/13 the accused had threatened the complainant and other witnesses when they insisted for sale of land in their favour as per agreement. In respect of its contention the State has filed statements of some of the investors recorded under Section 161 Cr.P.C. One of such investors, namely, Shri Lokanath Dash, S/o. Late Jagannath Dash in his statement recorded on 23.12.2012 under Section 161 Cr.P.C. has stated that when he met the accused persons and asked them to sell the plot to him as per the agreement, the petitioner and other accused persons threatened to kill him and forced him to take back his money. Similarly, one Ajaya Kumar Nayak, S/o. Damburudhar Nayak in his statement recorded on 23.12.2012 has stated that the petitioner has not sold the land to him as per the agreement though he time and again has gone to the office of the petitioner situated at Saheed Nagar, Bhubaneswar and met the Managing Director and other staff and requested them to sell the land as per the agreement. Taking different pleas they did not register the land but told him that the land is chakka land which has not yet been converted. Thereafter, he met and told to the Managing Director, Dr. Tirupati Panigrahi, Directors Mr. Tirupati Choudhury and Madhusudan Panigrahi tha t why they have

taken money from him to sell the chakka land. Hearing this, the aforesaid persons got angry and asked him to leave that place and threatened that if he would speak more, they will take his life. The statement of one Mantu Das, S/o. Nikhil Chandra Das recorded on 23.12.2012 under Section 161 Cr.P.C. reveals that several times he and his brother visited the head office of Hi-Tech and met Dr. Tirupati Panigrahi, Sri Tirupati Choudhury and Sri Madhusudan Panigrahi as well as other staff of the company and apprised them to give the plot as he and his brother have already paid the total instalments. On every occasion he was assured to be given possession of the plot. On one occasion, when he met Dr. Tirupati Panigrahi and his employees and asked as to why they are not giving him the plot when the instalments have already been paid as per the agreement, they said there are some difficulties in conversion of the chakka land and therefore, this was not possible to register the plot in their favour. When he said why did they collect money when the plot is non-convertible, they threatened him with dire consequences.

Another investor namely, Bibhuti Bhusan Mohapatra, S/o. Kailash Chandra Mohapatra has also stated in his statement recorded under Section 161 Cr.P.C. that after payment of the total instalments the company did not transfer the land in his favour though he has visited several times to the head office of Hi-Tech and met the petitioner and other accused persons. It has been further stated that he has also been threatened with dire consequence if he insists for the land.

Another person namely, Sri Jayanta Kumar Panda, S/o. Late Arjuna Kumar Panda in his statement recorded under Section 161 Cr.P.C. has stated that after paying the full amount, he had gone to the office of the Hi-Tech at Saheed Nagar, Bhubaneswar several times and met Tirupati Panigrahi, Tirupati Choudhury and Madhusudan Panigrahi and requested them to register the land in his name. They took the plea that the Income Tax people had taken away all the original land documents in the year 2005 for which they are unable to register the land in his name. They had started taking money from him from 13.03.2006 i.e. after Income Tax raid for selling the plot and at the time of receiving money they had not intimated him about any income tax problem. The aforementioned persons were not listening to his request and they were threatening him with dire consequence if he again comes to their office for the above purpose.

One Malaya Kumar Mishra, S/o. Sarat Kumar Mishra in his statement has stated that after payment of the total instalments the company did not register the land in his favour though he has gone to their Saheed Nagar Office several times. He met Tirupati Choudhury, Tirupati Panigrahi and

Madhusudan Panigrahi so also other employees of the company and requested them to register the plot in his favour, since he had already paid the total instalments. On every occasion they returned him in empty hands on different pleas and assured him to give the plot shortly. Once, he met Tirupati Panigrahi and asked as to why they are not giving him plots when he has already paid the total instalments as per the agreement. Hearing this it was replied that since there is some difficulties in conversion of the chakka land it is not possible to register the plot in his favour. When he told why they have taken money when the plot is non-convertible, he was threatened with dire consequences.

(iii) One Narendra Kumar Barik in his FIR has stated that when he asked the petitioner and others to register the sale deed in his favour as per the agreement, they threatened to kill him.

(iv) Calendar of Evidence submitted by Mr. Narsingh shows that a number of persons have been interrogated and several documents have been examined by the Investigating Agency, who/which will be produced at the time of trial.

(v) In course of hearing, Mr. Narsingh brought to the notice of this Court that there are criminal antecedents of the accused persons. P.S. Case No.33 dated 29.01.2010 under Sections 506, 323 and 34 I.P.C. was registered against Tirupati Panigrahi and other accused persons on the report of one Sri Ankur Tyagi of Kolkata, who is a student of Hi-tech Medical College and Hospital. The accused was on anticipatory bail and the case is under investigation. A copy of the FIR is filed before this Court. Similarly, another P.S. Case No.43 dated 16.03.2013 under Sections 447, 468, 471, 420/34 I.P.C. has been registered against Madhusudan Panigrahi and others on the allegation that fraudulently a sale deed has been registered in respect of the land belonging to the informant at D.S.R., Cuttack on 26.04.2010 in favour of M/s Hi-tech Estates and Promoters Pvt. Ltd., Sahid Nagar, Bhubaneswar represented by its Director, Sri Madhusudan Panigrahi, the petitioner.

(vi) Further case of the prosecution is that after submission of charge sheet, they have received several complaints which are to be investigated. The money trial of the accused persons are to be made in detail; many more investors are to be examined; the complexity of other accused persons are to be verified; many other persons are to be examined and amount misappropriated by the accused persons is to be traced.

(vii) The petitioner in its written submission has stated that the petitioner and other accused persons are established businessmen of the State. The apprehension of the prosecution is that considering the money and muscle power, it is firmly believed that the accused persons if released on bail would resort to their old ways of terrorizing the witnesses. Therefore, if the accused persons are released on bail, possibility of influencing the witnesses cannot be ruled out. At this stage, the stand of the State cannot be lightly brushed aside. At the time of trial, this aspect can be appropriately dealt with.

26. At this juncture, it is beneficial to refer to some of the decisions of the Hon'ble Supreme Court.

In the case of ***State of Gujarat v. Mohanlal Jitamalji Porwal and another,*** (1987) 2 SCC 364, the Hon'ble Supreme Court held as under:

> "The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."

27. In ***Prahalad Singh Bhati (supra),*** the Hon'ble Supreme Court held as under:

> "8..... While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable ground for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce

prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

28. The Hon'ble Supreme Court in the case of ***Dipak Shubhashchandra Mehta (supra)*** held as under**:**

> "32. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. The court granting bail has to consider, among other circumstances, the factors such as (a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (c) prima facie satisfaction of the court in support of the charge. In addition to the same, the court while considering a petition for grant of bail in a non-bailable offence, apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted."

29. The Hon'ble Supreme Court in the case of ***Y.S.Jagmohan Reddy Vs. Central Bureau of Investigation,*** *AIR 2013 SC 1933* held as under:-

> "13. Learned senior counsel appearing for the appellant pointed out that after the order dated 05.10.2012, the CBI is not justified in prolonging the same just to continue the custody of the appellant. It was also highlighted that even according to the CBI, several Ministers and IAS officers are involved, but no one has been arrested so far. As far as those allegations are concerned, it is the claim of the CBI that considering the huge magnitude of transactions, various beneficiaries, companies/persons involved with A-1 and his associates, the CBI is taking effective steps for early completion of the same. Though learned senior counsel for the appellant submitted that in view of non-compliance of Section 167 of the Code the appellant is entitled to statutory bail, in view of enormous materials placed in respect of distinct entities, various transactions etc. and in the light of the permission granted by this

Court in the order dated 05.10.2012, we are unable to accept the argument of learned senior counsel for the appellant.

14. On going into all the details furnished by the CBI in the form of Status Report and the counter affidavit dated 06.05.2013 sworn by the Deputy Inspector General of Police and Chief Investigating Officer, Hyderabad, without expressing any opinion on the merits, we feel that at this stage, the release of the appellant (A-1) would hamper the investigation as it may influence the witnesses and tamper with the material evidence. Though it is pointed out by learned senior counsel for the appellant that since the appellant is in no way connected with the persons in power, we are of the view that the apprehension raised by the CBI cannot be lightly ignored considering the claim that the appellant is the ultimate beneficiary and the prime conspirator in huge monetary transactions.

15. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

16. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.

17. Taking note of all these facts and the huge magnitude of the case and also the request of the CBI asking for further time for completion of the investigation in filing the charge sheet(s), without expressing any opinion on the merits, we are of the opinion that the release of the appellant at this stage may hamper the investigation. However, we direct the CBI to complete the investigation and file the charge sheet(s) within a period of 4 months from today. Thereafter, as observed in the earlier order dated 05.10.2012, the appellant is free to renew his prayer for bail before the trial Court and if any such petition is filed, the trial Court is free to consider the prayer for bail

independently on its own merits without being influenced by dismissal of the present appeal.

18. With the above observation, the appeal is dismissed."

30. In my considered view, after filing of charge sheet, there is no mitigating factor so far as the petitioner is concerned. On the other hand, more aggravating circumstances have surfaced.

Considering the nature of offence, its magnitude and ramification as alleged, materials available on record, the rival contentions of the parties and keeping in mind the principle of law laid down by the Hon'ble Supreme Court, I am not inclined to accept the prayer for bail to the petitioner. It is, however, made clear that the observations made above are in the context of prayer for bail and shall not be treated to be conclusive and determinative for the purpose of trial, if any.

31. There is no quarrel over the decisions of the Hon'ble Supreme Court relied upon by Mr.Pal, learned counsel for the petitioner. They are mostly based on the concept of Article 21 of the Constitution and broad principles as to where bail can be granted. For the reasons stated in the preceding paragraphs, they are of no assistance to the petitioner.

32. Accordingly, the bail application is rejected.

Application rejected.

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S. C. PARIJA, J.

W.P.(C) NO.1859 OF 2013(Dt.14.08.2013)

THE SECRETARY, BIRANARA SINGHPUR SEVASAMABAYA SAMITI, PURI ……Petitioner

.Vrs.

NILAKANTHA SARANGI ……Opp.Party

INDUSTRIAL DISPUTES ACT, 1947 – S.33-C (2)

Workman's application U/s.33-C(2) of the I.D. Act 1947 for payment of differential wages on the basis of the minimum wages prescribed by the State Government – Labour Court allowed the application – Management filed writ petition challenging maintainability of such application before the Labour Court – Held, the application is maintainable – Impugned order needs no interference except the amount of Rs.40,500/- computed by the Labour Court is modified and reduced to Rs.36,000/- as claimed by the workman in his affidavit.

Case laws Referred to:-

1.(1984) II-LLJ : (Somiben Mathurbai Vasava-V- Lalji Hakku Parmar Leather Works Company).
2.AIR 1991 SC 520 : (Manganese Ore (India) Ltd.-V- Chandi Lal Saha & Ors.)

For Petitioner - M/s. Nithish Ku. Mishra
For Opp.Party - Mr. Pramod Ki. Chand

This writ petition has been filed by the petitioner-Management, challenging the order dated 03.05.2012, passed by the Labour Court, Bhubaneswar, in Industrial Disputes Misc. Case No.86 of 2010, allowing the application of the workman-opposite party, filed under Section 33-C (2) of the Industrial Disputes Act, 1947 ("I.D.Act" in short), computing the claim of the workman towards differential wages for the period from 01.05.2007 to 31.10.2010 at Rs.40,500/- and directing the Management to pay the same.

The case of the petitioner-Management is that as the claim of the workman made under Section 33-C (2) of the I. D. Act for payment of differential wages on the basis of the minimum wages notified by the State Government from time to time, the same could not have been adjudicated by the Labour Court. It is the plea of the petitioner-Management that the application filed by the workman under Section 33-C(2) of the I.D. Act for implementing the minimum wages cannot be adjudicated by the Labour Court and the proper procedure is for the workman to approach the prescribed authority under the Minimum Wages Act. In this regard, it is submitted that as the claim made by the workman is required to be adjudicated upon by the prescribed authority under the Minimum Wages Act, the same cannot be the subject matter of an application under Section 33-C(2) of the I.D. Act and only the admitted claim and/or entitlement can be adjudicated by the Labour Court. It is the further plea of the petitioner-

Management that as it is a Cooperative Society, the minimum wages notified by the State Government is not applicable to the employees of the Cooperative Societies.

Learned counsel for the petitioner-Management submits that even other wise as the workman had filed an affidavit in evidence before the Labour Court claiming Rs.36,000/- towards differential amount as per the minimum wages fixed by the State Government for the period from 01.05.2007 to 31.10.2010, the impugned order computing the same to be Rs.40,500/- and directing the petitioner-Management to pay the same is not proper and justified.

Learned counsel appearing for the workman-opposite party while supporting the impugned order submits that the notifications of the State Government in the Labour and Employment Department dated 28.04.2007 and 26.02.2009, punished in the Orissa Gazette, prescribing the nature of employment, categories of employees and the minimum wages payable shows that the "Cooperative Societies" come within the ambit of the said notifications and therefore the minimum wages prescribed therein is payable to the workman-opposite party.

Learned counsel for the workman-opposite party has relied upon a decision of the Gujarat High Court in ***Somiben Mathurbai Vasava Vs. Lalji Hakku Parmar Leather Works Company, (1984) II-LLJ 381 Gujarat,*** where in a similar case, the Hon'ble Court has held that there cannot be any doubt that the Labour Court has the jurisdiction to entertain application for recovery of minimum wages and there is no provision in the Minimum Wages Act, which bars the jurisdiction of the Labour Court under Section 33-C of the I.D. Act.

As regard the adjudication of the applicability of minimum wages, Hon'ble Court has held as under :-

> "It was also contended that since the liability was disputed by the employer the application under S.33C was not maintainable. When minimum rates of wages have been statutorily fixed by notification under S.5, there is a clear direction to the employer under S.12 that the employer shall pay to every employee wages at the rates not less than minimum rates of wages fixed by the notification. Therefore what could be otherwise fixed by agreement, settlement or award, has been fixed by the notification and there is no question of resolving any disputes and fixing any liability. The liability has been fixed statutorily and the only question that would arise would be regarding implementation and recovery in pursuance of the same. Therefore, S.33C is a proper remedy in cases like the present one."

Learned counsel for the workman-opposite party has also relied upon the decision of the apex Court in ***Manganese Ore (India) Ltd. vs. Chandi Lal Saha and others, AIR 1991 SC 520,*** where in the Hon'ble Court has held as under :

> "In the present case there was no dispute regarding the rates of wages and it is admitted by the parties that the minimum rates of wages were fixed by the Government of India under the Act. The workmen demanded the minimum wages so fixed and the appellant denied the same to the workmen on extraneous considerations. Under the circumstances the remedy. Under Section 20 of the Act was not available to the workmen and the Labour Court rightly exercised its jurisdiction Under Section 33-C (2) of the Industrial Disputes Act, 1947."

In view of the above, the plea raised by the petitioner-Management that the application of the workman filed under Section 33-C (2) of the I. D. Act for payment of differential wages on the basis of the minimum wages prescribed by the State Government is not maintainable, cannot be accepted. However, as the affidavit in evidence of the workman filed before the Labour Court, Bhubaneswar goes to show that the workman had claimed Rs.36,000/- towards differential amount, as per the minimum wages fixed by the State Government from 01.05.2007 to 31.10.2010, he is entitled to the said amount only.

In view of the above, I do not find any infirmity in the impugned order so as to warrant any interference. However, the amount of Rs.40,500/- computed by the Labour Court is modified and reduced to Rs.36,000/-, as had been claimed by the workman-opposite party in his affidavit in evidence.

The petitioner-Management is directed to pay the modified amount of Rs.36,000/- to the workman within eight weeks hence. The writ petition is accordingly disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 670

B. K. PATEL, J.

CRLA NO.454 OF 2006 (Dt.03.07.2013)

KURSA PANGI @ KRUSU PANGI …….Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S.376.

Rape – Trial Court sentenced the accused to undergo R.I. for 10 years and to pay a fine of Rs.5000/- and in default to undergo further R.I. for 2 years – Conviction and sentence challenged – No allegation that the appellant assaulted or threatened the victim of any assault – Evidence of the doctor shows that the victim had not sustained any external injury – Trial Court pointed out that the appellant hails from lower strata of the society – Held, while maintaining the conviction, only the sentence of R.I. for ten years imposed on the appellant is modified to R.I. for eight years. (Paras 7 & 8)

For Appellant - M/s. J.K. Panda & A. K. Dei
For Respondent - Addl. Govt. Advocate.

B.K. PATEL, J. This appeal is directed against the judgment and order dated 18.7.2006 passed by learned Ad hoc Additional Sessions Judge, Jeypore in Criminal Trial No.8 of 2006/C.T. No.30 of 2006 of Sessions Judge convicting the appellant under Section 376 of the Indian Penal Code (for short 'the I.P.C.') and sentencing him to undergo R.I. for ten years and to pay a fine of rupees five thousand in default to undergo further R.I. for two years. It has further been directed that in case of realization of fine, rupees three thousand shall be paid to the victim as compensation.

2. Allegation in the case relates to commission of rape by the appellant on victim P.W.1. The appellant happens to be P.W.1's maternal uncle. It is alleged that in the occurrence night when P.W.1 was alone in her house appellant committed forcible sexual intercourse on her. When P.W.1 raised shout, P.W.2, P.W.3 and others came to the spot. P.W.1 narrated regarding the occurrence to them. On return of P.W.1's mother P.W.4 and father, she narrated regarding the occurrence before them also. On the basis of report lodged by P.W.4, case was registered by P.W.7, the Officer-In-Charge of Koraput Town Police Station. In course of investigation witnesses were

examined. Victim girl and appellant were medically examined by the doctors P.Ws.5 and 6 respectively. On completion of investigation, charge-sheet was submitted under Section 376 of the I.P.C. against the appellant.

3. The appellant took the plea of denial.

4. In order to establish the prosecution case, seven witnesses were examined. All the witnesses have already been introduced. Prosecution also placed reliance on the documents marked Exts.1 to 11. No evidence, oral or documentary, was adduced from the side of the defence.

On an appraisal of evidence on record, the trial court held the prosecution to have proved the charge on the basis of evidence of P.W.1 corroborated by medical evidence and evidence of post-occurrence witnesses.

5. Learned counsel for the appellant categorically submits that in view of nature of evidence available on record, there is no scope on the part of the appellant to assail the finding of the trial court that prosecution has established the charge of commission of offence under Section 376 of the I.P.C. against the appellant beyond reasonable doubt. Sri J.K. Panda, learned counsel for the appellant, however, submits that the appellant confines the appeal only to the quantum of sentence imposed on the appellant. It is contended that medical evidence available from P.Ws.5 and 6 does not indicate that there was external injury on the person of victim girl P.W.1 which goes to show that the appellant did not assault or commit violence except committing sexual intercourse without her consent and against her will. No injury was also found from the portion of the victim girl. In the impugned judgment itself it has been pointed out by the trial court that the appellant comes from the lower strata of the society. The appellant has already served sentence for more than seven years in the meanwhile. In such circumstances, the appellant ought to be awarded lesser sentence.

6. In reply, learned counsel for the State submits that the trial court has considered all the aspects relevant for the purpose of award of sentence while imposing substantive sentence to undergo R.I. for ten years on the appellant. There is no cogent reason to interfere with the same.

7. Having perused the evidence on record, it is found that P.W.1 does not allege that the appellant assaulted or threatened her of assault or any physical harm. Evidence of P.W.5 who medically examined P.W.1 indicates that victim had not sustained any external injury. P.W.5 deposed that there was no injury on or around the private part and the body of the victim girl

except the rupture of the hymen. It has been pointed out by the trial court that the appellant hails from lower strata of the society. In such circumstances, in view of the fact that minimum sentence prescribed to be awarded under Section 376 of the I.P.C. is imprisonment of either description for a term which shall not be less than seven years, this Court is of the considered view that imposition of substantive sentence to undergo R.I. for eight years shall meet the ends of justice.

8. Accordingly, the appeal is allowed in part. While maintaining the conviction of the appellant under Section 376 of the I.P.C, sentence imposed on the appellant is modified to the extent that the appellant is sentenced to undergo R.I. for eight years and to pay a fine of rupees five thousand in default to undergo R.I. for two years. In case of realization of fine, rupees three thousand shall be paid to the victim girl as compensation.

Appeal allowed in part.

2013 (II) ILR - CUT- 672

B. K. NAYAK, J.

CRL.REV. NO.161 OF 2012 (Dt.04.04.2013)

KISHORE PALLEI .....Petitioner

.Vrs.

ARUNA KUMAR PANDA .....Opp.Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss.138, 143

Complaint Case U/s. 138 N. I. Act – In normal Case trial has to be conducted in summary procedure – Summary procedure may be dispensed with only if the Magistrate in terms of the Second proviso to Section 143 (1) N.I. Act after hearing the parties passes an order to the effect that the nature of the case is such that a sentence exceeding one year may have to be passed or for any other reason it is undesirable to try the case summarily and any departure from such procedure would vitiate the trial – The passing of an order not to follow the summary

procedure of trial may be passed suo moto or on the application of either of the parties and both parties must be heard before such order is passed – But where ever evidence from both sides has already been closed or complaints already disposed of, the matter shall not be re-opened for fresh trial by the Magistrate or as the case may be by the appellate or revisional Court.

In the present case since evidence from both sides has already been recorded by following summons procedure, direction given by the learned JMFC, Khallikote in the impugned order for denovo trial is quashed – Learned JMFC is directed to hear arguments and dispose of the complaint case within two months.

Case laws Referred to:-

1.AIR 2011 SC 3076 : (Nitinbhai Saevatilal Shah & Anr.-V- Manubhai Manjibhai Panchal & Anr.).
2.(2010)3 SCC 83 : (Mandvi Cooperative Bank Ltd.-V- Nimesh B. Thakore).

For Petitioner - M/s. A.K. Mishra, T. Mishra, T.K. Biswal & A.K. Nandy.
For Opp.Party - Mr. A. Tripathy.

B.K.NAYAK, J. Order dated 17.02.2012 passed by the learned J.M.F.C., Khallikote in I.C.C. No.2 of 2006 directing the complainant to come ready with his witnesses on the next date for evidence de novo has been assailed in this criminal revision.

2. The complaint case in question is one under Section 138 of the Negotiable Instruments Act,1981 (in short "the N.I. Act"). The trial of the complaint case began on 22.08.2008 by following summons procedure as contained in Chapter-XX of the Code of Criminal Procedure,1973 by the then J.M.F.C. When the complaint case had been fixed for argument after closure of evidence from both sides, the present J.M.F.C., Khallikote joined on transfer in place of his predecessor-in-office. Without hearing arguments, the learned J.M.F.C. passed the impugned order holding that in terms of Section 143 (1) of the N.I. Act a complaint case under Section 138 of the said Act is to be tried in summary procedure as provided in Sections 262 to 265 of the Cr.P.C. and that departure from summary procedure is possible only when the requirement of the second proviso to Section 143(1) of the N.I. Act is satisfied, that is to say, if the Magistrate passes an order after hearing both parties that the nature of the case is such that a sentence of imprisonment

for a term exceeding one year may have to be passed or for any other reason it was undesirable to try the case summarily. The learned J.M.F.C. has stated in the order that neither at the commencement nor in course of trial under the section any such order has been passed. He, therefore, instead of hearing arguments, fixed the complaint case for de novo trial to 29.02.2012 and directed the complainant to come ready with his witnesses in view of the provision prescribed in Section 326(3), Cr.P.C.

3. The learned counsel for the accused-petitioner contended that since the trial of the complaint case was held by following summons procedure and not summary procedure, Section 326 (3) of the Cr.P.C. was not a bar for the learned J.M.F.C. to proceed further from the stage of argument of the case. It is also his submission that adoption of summary procedure in terms of section 143(1) of the N.I. Act for trial of the complaint case is not mandatory in view of the expression, "as far as may be" occurring in sub Section (1) of Section 143 of the Act read with the second proviso, and therefore, the trial conducted in the instant complaint case by following summons procedure cannot be said to be illegal and, therefore, the impugned order directing for de novo trial is unsustainable.

The learned counsel appearing for the complainant-opposite party also supports the contention raised by the learned counsel for the petitioner.

4. Since the matter relates to interpretation of the provisions of the N.I. Act, particularly Section 143 thereof, the learned Advocate General was requested to address the Court. According to him, the mandate of sub Section (1) of Section 143 is to adopt summary procedure for trial of complaint case under Section 138 of the N.I. Act and the only exception has been carved out in the second proviso to Section 143(1) which visualizes two contingencies for departing from summary procedure at the commencement or at any stage of trial only if the Magistrate passes an order to that effect after hearing the parties.

5. In the instant case for coming to the conclusion that he cannot act upon the evidence recorded by his predecessor-in-office, the learned J.M.F.C. has held that since his predecessor-in-office commenced the trial by following summons procedure without passing any order as required under the second proviso to Section 143 (1) of the N.I. Act, the procedure so adopted shall be regarded as evidence being recorded under Chapter-XXI of the Cr.P.C., that is, summary procedure and, therefore, in view of the bar contained in Section 326(3) of the Cr.P.C. he cannot act upon the evidence recorded by his predecessor-in-office and hence a de novo trial was

required. For the applicability of Section 326 (3) of the Cr.P.C., the learned J.M.F.C. has relied upon the decision of the apex Court reported in ***AIR 2011 SC 3076: Nitinbhai Saevatilal Shah & Anr. V. Manubhai Manjibhai Panchal & Anr.***

6. In ***Nitinbhai Saevatilal Shah*** (supra), the apex Court was considering the legality of a conviction under Section 138 of the N.I. Act recorded by a Magistrate on the basis of evidence recorded by his predecessor-in-office adopting summary procedure of trial. Therefore, the apex Court considering the applicability of sub Section (3) of Section 326 of the Cr.P.C. held as under :

> "**14.** The mandatory language in which Section 326(3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub Sections (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326 (3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice."

7. Having held that a succeeding Magistrate cannot act on the evidence recorded by his predecessor-in-office in a trial conducted in summary procedure as because he is not competent to do so in view of the provision of Section 326 (3) of the Cr.P.C., the apex Court held that it would not merely be a case of irregularity but of want of competency.

Nitinbhai Saevatilal Shah (supra) did not decide the question whether Section 143 (1) of the N.I. Act is mandatory or directory, nor such question arose for consideration.

In the instant case admittedly the trial commenced by adopting the procedure contained in Chapter-XX of the Cr.P.C., i.e., summons procedure. However, in view of the provision for summary trial engrafted in sub section (1) of Section 143 of the N.I. Act., the learned J.M.F.C. has stated that the said provision being mandatory the evidence recorded by his predecessor-in-office must be regarded to have been done under Chapter-XXI of the Cr.P.C., i.e., by following summary procedure. This reasoning is totally fallacious as because violation of a mandatory provision of law may render the proceeding vitiated by illegality and, therefore, void, but it cannot be treated or regarded as following the procedure mandated by law.

8. Since the observation of the learned J.M.F.C. in the impugned order that Section 143(1) of the N.I. Act is mandatory in nature is under challenge and that it was brought to the notice of this court by the learned members of the Bar that there is no uniformity in the procedure adopted by the competent Judicial Magistrates of the State in trying complaints under Section 138 of the N.I. Act, it has become incumbent to settle the position with regard to the true import of Section 143(1) of the N.I. Act.

9. In order to appreciate the issue, it is essential to see the relevant provisions of the Act along with the objects and reasons for their enactment. Sections 138 to 142 of the N.I. Act were brought into existence by way of amendment by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act,1988. Section 138, thus brought into the statute book, made provision for punishing the drawer of a cheque with imprisonment up to one year or with fine extending to twice the amount of the cheque or with both if the cheque is dishonoured. For filing the complaint against the drawer of the cheque certain safeguards were also provided.

10. Sections 143 to 147 of the N.I. Act were inserted in the Act in 2002 by way of amendment by Negotiable Instruments (Amendment and Miscellaneous Provisions) Act,2002. The amendment also brought out a number of changes in the existing provisions of Sections 138 to 142. The reasons for which Sections 143 to 147 were introduced in the Act have been noticed by the apex Court in paragraphs 16 to 18 of the judgment reported in ***(2010) 3 SCC 83: Mandvi Cooperative Bank Limited v. Nimesh B. Thakore*** in the context of deciding the scope and ambit of Section 145 of the Act, which run as under :

"**16.** Complaints under Section 138 of the Act came to be filed in such large numbers that it became impossible for the courts to handle them within a reasonable time and it also had a highly adverse effect on the courts' normal work in ordinary criminal matters. A remedial measure was urgently required and the legislature took action by introducing further amendments in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act,2002. The 2002 Amendment inserted in the Act for the first time Sections 143 to 147 besides bringing about a number of changes in the existing provisions of Sections 138 to 142.

17. Section 143 gave to the court the power to try cases summarily; Section 144 provided for the mode of service of summons; Section 145 made it possible for the complainant to give his evidence on affidavit; Section 146 provided that the bank's slip would be prima facie evidence of certain facts and Section 147 made the offences under the Act compoundable.

18. The statement of Objects and Reasons appended to the Bill stated as follows :

"The Negotiable Instruments Act,1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act,1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negoitable Instruments Act,1881, namely, Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, *the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The courts are unable to dispose of such cases expeditiously in a time-bound manner in view of the procedure contained in the Act.*

2. A large number of cases are reported to be pending under Sections 138 to 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act pending in various courts, a working group was constituted to review Section 138 of the Negotiable Instruments

Act,1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.

3. The recommendations of the Working Group along with other representations from various institutions and organizations were examined by the Government in consultation with Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill,2001 was introduced in the Lok Sabha on 24.07.2001. The Bill was referred to the Standing Committee on Finance which made certain recommendations in its report submitted to Lok Sabha in November,2001.

4.Keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act,1881, namely:-

(i) to increase the punishment as prescribed under the Act from one year to two years;

(ii) to increase the period for issue of notice by the payee to the drawer from 15 days to 30 days;

(iii) to provide discretion to the court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act;

(iv) to prescribe procedure for dispensing with preliminary evidence of the complaint;

(v) to prescribe procedure for servicing of summons to the accused or witness by the court through speed post or empanelled private couriers;

(vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;

(vii) to make the offences under the Act compoundable;

(viii) to exempt those Directors from prosecution under Section 141 of the Act who are nominated as Directors of a company by virtue of their holding any office or employment in the Central Government or State

Government or a financial corporation owned or controlled by the Central Government, or the State Government, as the case may be;

(ix) to provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees;

(x) to make the Information Technology act,2000 applicable to the Negotiable Instruments Act,1881 in relation to electronic cheques and truncated cheques subject to such modifications and amendments as the Central Government, in consultation with the Reserve Bank of India, considers necessary for carrying out the purposes of the Act, by notification in the Official Gazette; and

(xi) to amend definitions of 'bankers' books' and 'certified copy' given in the Bankers' Books Evidence Act,1891.

5. The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques, enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee Director from prosecution under the Negotiable Instruments Act,1881.

6. The Bill seeks to achieve the above objects."

11. Section 143 of the Act, which is relevant for the purpose of this case is extracted hereunder:

"143. *Power of court to try cases summarily.*-(1) Notwithstanding anything contained in the Code of Criminal Procedure,1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."

12. Sections 143 to 147 of the Act introduced by way of amendment relate to the procedure. In ***Mandvi Cooperative Bank Limited*** (supra) with respect to the nature of such provisions, the apex Court held as under :

"**20.** It may be noted that the provisions of Sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of Section 146 similarly depart from the principles of the Evidence Act. Section 143 makes it possible for the complaints under Section 138 of the Act to be tried in the summary manner, except, of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily.

21. It is, however, significant that the procedure of summary trials is adopted under Section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process. Even while following the procedure of summary trials, the non obstante clause and the expression "as far as possible" used in Section 143 coupled with the non obstante

clause in Section 145 allow for the evidence of the complainant to be given on affidavit, that is, in the absence of the accused. This would have been impermissible (even in a summary trial under the Code of Criminal Procedure) in view of Sections 251 and 254 and especially Section 273 of the Code. The accused, however, is fully protected, as under sub-section (2) of Section 145 he has the absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination.

25. It is not difficult to see that Sections 143 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and Sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial. Here we must take notice of the fact that cases under Section 138 of the Act have been coming in such great multitude that even the introduction of such radical measures to make the trial procedure simplified and speedy has been of little help and cases of dishonoured cheques continue to pile up giving rise to an unbearable burden on the criminal court system."

13. Section 143(1) of the Act starts with a non-obstante clause expressly overriding the provisions of the Cr.P.C. inasmuch as the legislative intent is to adopt summary procedure of trial of the complaint under Section 138 of the N.I. Act. But for the provision of Section 143(1) of the Act, the procedure under Chapter-XX of the Cr.P.C., i.e., summons procedure, would be adopted for trial of a complaint case under Section 138 of the N.I. Act. Having regard to the provision of Section 143(1) with its legislative intent and the observation of the apex Court in the case of ***Mandvi Cooperative Bank Limited*** (supra) it is to be held that Section 143 (1) of the N.I. Act providing for summary procedure of trial is mandatory in nature subject to the exception carved out in the second proviso thereof. In other words, trial of a complaint case under Section 138 of the N.I. Act has to be conducted in summary procedure in normal course. However, the summary procedure may be departed from or dispensed with only if the Magistrate in terms of the second proviso to Section 143 (1) of the N.I. Act, after hearing the parties passes an order to the effect that the nature of the case is such that a sentence exceeding one year may have to be passed or for any other reason it is undesirable to try the case summarily. Without an order being

passed to this effect the Magistrate cannot depart from the summary procedure. Any departure from such procedure will render the trial vitiated by illegality. The passing of an order not to follow the summary procedure of trial may be passed suo motu or on the application of either of the parties, but both the parties must be heard before such order is passed. This view of mine also finds support from the decision of the ***Madras High Court in Crl. RC. (MD) No.2 of 2011: Swaminatha Pillai v. Mr. A.Senthil Kumar*** decided on 17.02.2011.

14. It is brought to the notice of this Court that the Judicial Magistrates in the State often adopt the summons procedure for trial of complaint under Section 138 of the N.I. Act without passing an order in accordance with the second proviso to Section 143(1). This Court therefore directs that a copy of this order be forwarded to all the Sessions Judges, Chief Judicial Magistrates and Judicial Magistrates First Class for future guidance. The Judicial Magistrates First Class shall henceforth conduct trial of complaints under Section 138 of the N.I. Act, keeping in view the observations made herein above in all cases in which evidence from both sides has not been closed. Wherever evidence from both sides has already been closed or complaints already disposed of the matters shall not be re-opened for fresh trial by the Magistrates, or as the case may be by the appellate or revisional court.

15. So far as the instant complaint case is concerned since evidence from both sides has already been recorded by following summons procedure, the direction given by the learned J.M.F.C. Khallikote in the impugned order for de novo trial is quashed. The learned J.M.F.C. is directed to hear arguments immediately and dispose of the complaint case within a period of two months from today. The CRLREV is disposed of. The interim order of stay of the complaint case stands vacated. Send back the L.C.R. forthwith.

Revision disposed of.

2013 (II) ILR - CUT- 682

B. K. NAYAK, J.

CRL. REV. NO.126 OF 2013 (Dt.17.04.2013)

MIR MASUK ALLI & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA ……..Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.216

Framing of additional charge U/s. 304-B I.P.C. and Section 4 D.P. Act, challenged – Evidence on record does not make out a prima facie case that soon before her death the deceased was subjected to cruelty and harassment in connection with demand of dowry – Three months before her death the deceased made a solitary phone call to her parents that the petitioners were demanding Rs.3.00 lakhs as dowry – No material to the effect that any torture or ill-treatment was meted out to the deceased within that three months – Allegation of harassment in the form of not providing food three months before the death can not be said to be "soon before death" – Held, impugned order relating to framing of additional charge U/s.4 D.P.Act is maintained and framing of additional charge U/s.304-B I.P.C. is set aside.

(Paras 6,7,8)

For Petitioner - M/s. M.B. Das, L. Pradhan, Sk. Akhmal, B.C. Sahoo, D. Mohanty, B. Roy, K.Vicky & L. Sahoo.
For Opp.Party - Learned Addl. Standing Counsel.

B.K.NAYAK, J. Order dated 22.1.2013 passed by the 2nd Additional Sessions Judge, Cuttack, in S.T.Case No.432/2011 directing framing of additional charges under Sections 304-B, I.P.C. and 4 of D.P. Act against the petitioners is challenged in this Criminal Revision.

2. The petitioners were facing trial in the sessions case for charges under Sections 498(A), 302, 406 and 34 of I.P.C., for which Police had filed chargesheet even though F.I.R. was lodged for commission offences under those Sections along with Sections 304-B, I.P.C. and 4 of D.P.Act. The Investigating Officer however did not submit chargesheet for the offences under Sections 304-B, I.P.C. and 4 of D.P.Act. At the stage of argument in the sessions case, a petition was filed on behalf of the prosecution under Section 216, Cr.P.C. for addition of charges under Sections 304-B, I.P.C. and 4 of D.P.Act. The impugned order has been passed accepting the prayer of the prosecutor and directing for addition of charges under Sections 304-B, I.P.C. and 4 of D.P.Act by the court below on the basis of statements given by P.Ws.1 & 9, the father and mother of the deceased respectively.

3. Learned counsel for the petitioners submits that the statements of P.Ws.1 & 9, which were taken into consideration by the court below, only relate to a bald statement by them to the effect that three months before the death, the deceased had made a phone call to her mother stating that the accused persons were demanding a sum of Rs.3.00 lakhs from her and that she was not being provided with food. It is also his submission that F.I.R. was lodged by P.W.1 on 5.6.2011, i.e., one day after the death of the victim though on the previous date, i.e., on the date of death of the victim, P.Ws.1 & 9 have furnished their opinion in the inquest report that the death of the deceased occurred due to accidental burn while cooking food. It is also his submission that the main ingredient of the offence under Section 304-B, I.P.C. that the deceased was subjected to cruelty soon before her death on the ground of demand of dowry is wanting as there is absolutely no evidence in support thereof, and therefore, framing of additional charges is bad in law.

4. Learned Additional Standing Counsel contends that in view of the evidence of P.Ws.1 & 9 to the effect that three months before of her heath, the deceased made a phone call to her father (P.W.1) and intimated about the demand of dowry by the petitioners, there is nothing wrong in the impugned order framing additional charges.

5. The admitted prosecution case is that the deceased eloped with a Muslim boy on 14.12.2010 with a cash of Rs.2.00 lakhs and some gold ornaments from the house and later she married the said boy and continued to stay in the house of the in-laws. The evidence of P.Ws.1 & 9 reveal that they never lodged report before the Police about the elopement or kidnapping of the deceased. It only transpires from their evidence that on 9.3.2011 the deceased informed P.W.1 over telephone that her husband and in-laws were demanding a sum of Rs.3.00 lakhs. Neither P.W.1 nor any of his family members ever visited the deceased in her matrimonial home nor did the deceased ever come to the house of her parents after elopement. The evidence reveals that the deceased died on 4.6.2011 in the hospital for burn injuries after four days of hospitalization and on that day P.W.1 and his family members came to the hospital knowing about her death and in their presence, inquest was held by the Mangalabag Police, who recorded the statements of P.Ws.1 & 9. In the inquest report as well as their statements the said P.Ws. stated that while engaged in cooking the deceased caught fire on her wearing apparel accidentally and received burn injuries. It also transpires from the evidence of P.W.1 that except on 9.3.2011 on no other occasion they received any call or information from the deceased. P.W.9 has stated that three months after her elopement, the deceased had made a phone call and informed that her husband and in-laws were demanding

Rs.3.00 lakhs and were not providing food to her. P.W.1 does not state that during phone call on 9.3.2011 the deceased informed that her in-laws were not providing food to her.

6. It is thus clear that only on one occasion, i.e., three months before her death and about four months after her elopement, the deceased had made a solitary phone call to her parents when she disclosed that the petitioners were demanding Rs.3.00 lakhs. There is no material to the effect that any torture or ill-treatment was meted out to the deceased within three months between 9.3.2011 and the date of her death. Ill-treatment to a married lady by the in-laws or husband soon before her death for demand for dowry is the essential ingredient of the offence of dowry death. Of course, the expression "soon before her death" is not susceptible to precise definition. It varies from case to case depending upon the peculiar facts and circumstances of the case. Admittedly it was a love marriage of the deceased with petitioner no.1 and she eloped with him and married him without the knowledge of her parents. Except the solitary statement of P.W.9 that during phone call on 9.3.2011 the deceased stated that the petitioners were not providing food to her, which is also not supported by P.W.1, there is no allegation of any other cruelty or ill-treatment or harassment of the deceased in connection with demand of dowry. Considering the facts and circumstances of the case, the alleged harassment in the form of not providing food three months before the death cannot be said to be "soon before death". The other witnesses, who were neighbours, do not depose any sort of ill-treatment meted out to the deceased by the petitioners. On the contrary, the day before lodging F.I.R., P.Ws.1 & 9 have stated before Police and in the inquest report that the deceased died due to accidental fire while cooking food.

7. While framing charge under Section 228, Cr.P.C. the Court is to take into consideration the record of the case and the documents submitted therewith, which essentially includes the statement of witnesses recorded by the Investigator, so as to find out whether there is sufficient ground for proceeding against the accused. But at a stage when prosecution evidence has already been recorded and the Court is called upon to consider framing of additional charges, it is the totality of the evidence under oath available on record, which is to be taken into consideration and not the statements of witnesses recorded by the investigator during investigation to find out whether there is justification for framing additional charges.

8. The evidence on record does not make out a prime facie case that soon before her death the deceased was subjected to cruelty and

harassment in connection with demand of dowry. Therefore, no additional charge under Section 304-B, I.P.C. could be framed against the petitioners. However, in view of the consistent statements of P.Ws.1 & 9 that the deceased during her phone call intimated that the petitioners were demanding dowry, no exception to the framing of additional charge under 4 of D.P. Act can be taken. In the result, this Criminal Revision is partly allowed and the impugned order insofar as it relates to framing of additional charge under Section 304-B, I.P.C. is concerned, is set aside.

Revision partly allowed.

2013 (II) ILR - CUT- 686

S. K. MISHRA, J.

W. P. (C) NO. 2316 OF 2013 (Dt.20.06.2013)

DINABANDHU JANI .....Petitioner

.Vrs.

HEMANTA KANHAR & ORS. .....Opp.Parties

ODISHA G. P. ELECTION RULES, 1965 – RULES 44,51

Recounting of votes – Trial Court rejected the petition on the ground that there is no pleading in the original Election Petition for recounting of votes and there has been non-compliance of Rules 44, 51 of the Rules, 1965 – Hence this writ petition.

In this case there are specific pleadings that votes have been Cast in the name of dead persons and on the date of declaration of the result, the petitioner due to his sudden illness, approached O.P.3 through his authorized agent for recounting of votes – Moreover there can not be any prayer for recounting of votes in the main election petition – The learned trial Court failed to take into consideration various criteria required to dispose of the application for recounting of votes – Held, the impugned order being factually in correct is set aside

– The matter is remitted back to the learned trial Court for reconsideration of the application and to pass a reasoned order.

(Paras 5,6,7)

Case laws Referred to:-

1.AIR 2004 SC 309 : (Chandrika Prasad Yadav-V- State of Bihar & Ors.)
2.AIR 1975 SC 2117 : (Bhabhi-V- Sheo Govind and Ors.)

For Petitioner - M/s. Amit Prasad Bose, R.K. Mahanta, N. Hota, S.S. Routray & V. Kar.
For Opp.Parties- M/s. Tusar Kumar Mishra, S.K. Mohanty, S.K. Sahoo (for Opp.Party No.1).

S.K. MISHRA,J. In this writ petition, the petitioner, who happens to be the election petitioner in Election Petition No.1 of 2012 of the court of Civil Judge (Junior Division), Phulbani has assailed the order passed by the said court on 16.01.2013 rejecting the application to call for the ballot papers, counter foils and to summon the Anganwadi Worker to produce the Birth and Death Register.

2. The petitioner and opposite party no.1 were the candidates for the post of Sarpanch of Dutipada Gram Panchayat in the district of Kandhamal. The petitioner challenged the election of opposite party no.1, i.e. returned candidate on the ground that by using muscle power the returned candidate has managed to obtain fake votes in his favour and also has cast vote in the names of some dead persons. At the beginning of the trial the election petitioner filed an application for calling for the counter foils, ballot papers etc. but the same was rejected by the learned Civil Judge (Junior Division), Phulbani holding that the petition has been filed at a premature stage. Thereafter, the petitioner led evidence, examined 25 witnesses and exhibited several documents. Thereafter, the returned candidate also examined witnesses on his behalf. When the case was posted for argument the petitioner filed an application to call for certain documents like ballot papers, counter foils etc and also to direct Anganwadi Worker to produce the birth and death register of the Jamojhori Anganwadi Centre. Such application was resisted by the returned candidate on the ground that the petition is not maintainable as no step has been taken by the election petitioner under Rules 44 and 51 of the Orissa Grama Panchayat Election Rules, 1965 (for short 'the OGP Election Rules') and that the petition is based on conjecture and surmise.

3. The learned Civil Judge (Junior Division), Phulbani rejected the petition on the ground that in the original election petition there is no prayer

for recounting of votes and production of ballot papers, counter foils and attendance register of the voters. Secondly, he further held that the petitioner has not examined the polling agents to prove that the opposite party no.1 won the election by casting fake votes in the name of dead and absentee voters.

4. In assailing the order passed by the learned Civil Judge (Junior Division), Phulbani, the learned counsel for the petitioner submitted that the order is based on wrong appreciation of facts. It is submitted that there is adequate pleading in the election petition regarding the cast of fake votes in favour of voters by dead persons. It is further submitted that such fact has already been shown adequately by the petitioner by leading evidence to that effect. The learned counsel for the opposite party no.1, on the other hand, submitted that the petition for calling for the document is without merit as there has been non-compliance of Rules 44 and 51 of the O.G.P. Election Rules and there was no objection at the time of counting of votes regarding such fraudulent practice adopted by the returned candidate. It is further submitted by learned counsel for the opposite party no.1 that the petition filed by the petitioner does not satisfy the requirements of the law laid down by the Supreme Court for calling for the ballot papers and counter foils and, therefore, the same should be rejected.

5. In course of hearing attention of the Court was drawn to the petition filed by the petitioner. At paragraph-9 of the petition, the petitioner specifically pleaded that the votes have been cast in the name of dead persons like Jogindra Mallick, Suratha Digal and Saraswata Digal, whose names have been placed in the electoral roll at Sl. Nos.85, 170 and 175 and subsequently the same has been elaborated. It is submitted that on the date of declaration of the result, i.e. on 21.02.2012, due to sudden illness the petitioner was unable to attend the office of the opposite party no.3 and approached him for recounting through his authorized agent, but such request was turned down by the opposite party no.3 for reasons best known to him. It is further averred at Paragraph-17 that unless the ballot papers cast in the different wards of Dutipada Gram Panchayat are called for, for recounting by the Court along with the counter foils of the used ballot papers, the election petition cannot be properly adjudicated and the petitioner shall be highly prejudiced. In view of such clear pleading on the records, the learned Civil Judge (Junior Division), Phulbani has committed an error on record by holding that there is no pleading for recounting of votes and production of ballot papers and counter foils and attendance register of voters. Moreover, there cannot be any prayer for recounting of votes in the main application as in the main application the petitioner shall pray for declaring election of the returned candidate to be illegal. Thus, the order

passed by the learned Civil Judge (Junior Division) on that count is not sustainable. The learned counsel for the opposite party no.1 submitted that in case of non-compliance of Rules 44 and 51 of the OGP Election Rules, 1965 the election petitioner cannot at a later stage pray for recounting of votes or inspection of the ballot papers. The learned counsel for the petitioner in this connection relies on ***Chandrika Prasad Yadav vs. State of Bihar and others,*** AIR 2004 SC 0309 wherein the Hon'ble Supreme Court has examined the scope and ambit of Rule 79 of the Bihar Panchayat Election Rules, 1995 and has held that it may be true that only because such application has not been filed before the returning officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing direction for recounting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. The Hon'ble Supreme Court in Paragraph-27 of the said case further held that if no sufficient explanation is furnished by the election petitioner as to why statutory remedy was not availed of, the Election Tribunal may consider the same as one of the factors for accepting and rejecting for recounting and order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether the prima facie case for issuance of direction for recounting has been made out. Relying on this ratio this Court comes to the conclusion that the petitioner has pleaded at Paragraph-15 of the petition regarding the approach made by him through his agent before the opposite party no.3 for recounting of votes, which has not been acceded to. Thus, it cannot be said that there is total non-compliance of Rules 44 and 51 of the Orissa Grama Panchayat Election Rules, 1965 and on the basis of same the prayer made by the election petitioner cannot be rejected *in limine.*

6. The Hon'ble Supreme Court in ***Bhabhi vs. Sheo Govind and others,*** AIR 1975 SC 2117 has held that before the Court can order inspection of ballot papers in an election petition, the following conditions are imperative.

(i) That it is important to maintain the secrecy of ballot paper which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegation; (ii) That before inspection is allowed, the allegations made against the election candidate must be clear and specific and must be supported by adequate statements of materials facts; (iii) That the Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for recount; (iv) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties; (v) That the discretion conferred on the Court should not be exercised in such a way so

as to enable the applicant to indulge in roving inquiry with a view to fish materials for declaring the election to be void; and (vi) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for recount, and not for the purpose of fishing out materials.

7. Examining the case in the aforesaid perspective laid down by the Hon'ble Supreme Court, it is seen that the order passed by the learned Civil Judge (Junior Division), Phulbani does not take into consideration the various criteria required for consideration of an application for calling for records for recounting of votes, etc. Thus, this Court comes to the conclusion that in view of the fact that the order passed by the learned Civil Judge (Junior Division), Phulban is based on factually incorrect statement of facts, the petition should be reconsidered by the learned Civil Judge (Junior Division) and he should pass a reasoned order thereon.

The writ petition is, therefore, succeeded. The order dated 16.01.2013 passed by the learned Civil Judge (Junior Division), Phulbani is hereby set aside. The matter is remitted back to the court of Civil Judge (Junior Division), Phulbani for reconsideration of the application dated 16.01.2013. The parties are directed to appear before the said court on 08.07.2013

Writ petition allowed.

2013 (II) ILR - CUT- 690

RAGHUBIR DASH, J

R.F.A NO. 68 OF 2005 (Dt. 02.08.2013)

BADANI PARIDA .....Appellant

.Vrs.

MAHANGA PARIDA & ORS. .....Respondents

CIVIL PROCEDURE CODE, 1908 – O.9, R-13 & Sec. 96

Application to set aside exparte decree – Dismissal of application – Appeal filed – Appellant took the ground that he engaged

one K. K. Swain, Advocate who did not take steps in the case for which he was set exparte and he was also completely bedridden during that period – It is well settled that a party should not suffer for the inaction of his counsel but in this case there is nothing on record to show that Sri K. K. Swain, Advocate was engaged as appellant's Counsel, so the question of the lawyer's fault does not arise – There is also no material to show that the appellant was completely bedridden during that period – Furthermore the application under Order 9, Rule 13 C.P.C having been rejected, the same question cannot be re-agitated in appeal from the decree – Held, appeal being devoid of any merit is dismissed.

Case laws Referred to:-

1. 1920 AIR Mad 962 : Asethu -V- Kesavayya)
2. 1975 AIR Andhra Pradesh 366 : (Munassar Bin-V- Fatima Begum)
3. 1987AIR Bombay 87 : (M/s. Mangilal Rngta, Calcutta-V- Manganese Ore (India) Ltd., Nagpur
4. 1981AIR SCC 1400 : (Rafiq and Anr-V-Munshilal & Anr.)
5. (1981) 4 SCC 574 : (Goswami Krishna Murailal Sharma- Dhan Prakash & Anr.

For Appellant - M/s. D. Mishra, S. Satpathy, S. K. Mishra, & D. Rath

For Res. No. 1 - M/s. B.K.Samal, R.K.Behura, B. Samal & D.K.Behera

For Res. Nos. 2 to 4 - M/s. R.K.Mohanty, D.K.Mohanty, A. P. Bose, P.K.Mohanty, S.N.Biswal, S.K.Mohanty & S. Mohanty

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R. DASH, J. This is an appeal against the judgment and decree dated 20.2.1999 and 1.3.1999 passed by the learned IInd Additional Civil Judge (Senior Division), Cuttack in T.S. No.527 of 1992.

2. Respondent No.1 is the plaintiff in the suit. The original appellant, namely, Kunja Parida, who is the brother of plaintiff-respondent No.1 is the defendant No.1 and Respondent Nos.2 to 6 are the defendant Nos.2 to 6 in the suit. Respondent No.1 filed the suit for setting aside Registered Sale Deeds bearing Nos.4660 and 4661 dated 8.11.1989 in favour of Respondent Nos.2 to 4 alleging that the latters, in collusion with the deceased-appellant, had managed to obtain the former's signatures on the Sale Deeds in respect of plaint schedule 'B' property by application of fraud and misrepresentation. Schedule 'A' property is the entire suit property

consisting of one plot measuring Ac.0.385 decimals in area. Schedule 'B' property is a part of Schedule 'A' property in respect of which the impugned sale deeds have been executed. Claiming schedule 'A' property to be the joint family homestead of herself and the deceased appellant, each having 8 annas share therein, Respondent No.1 made an additional prayer for partition of the property.

Despite of due service of summons, the deceased appellant, so also respondent Nos.5 and 6, did not appear before the learned court below to take part in the proceeding of the suit. Respondent Nos.2, 3 and 4 appeared and filed a joint written statement denying the alleged fraud and misrepresentation and claiming that the plaintiff-respondent No.1 and the deceased appellant had jointly executed the two Registered Sale Deeds on their own free will and that the same were acted upon.

3. During pendency of the suit, the plaintiff-respondent No.1 on one hand, and Respondent Nos.2 to 4 on the other, entered into a compromise. Their compromise petition was taken up by the learned trial court at the time of final disposal of the suit and so far schedule 'B' property is concerned, dismissed the suit inasmuch as it is acknowledged by the plaintiff-Respondent No.1 in the compromise petition that she had executed the sale deeds on her own free will. In respect of the remaining area of schedule 'A' property, i.e., Ac.0.225 decimals, the trial court decreed the suit preliminarily with a direction to divide the same equally between R.1 and the original appellant.

4. Since the suit was decreed ex parte against the original appellant, he filed a petition under Order 9 Rule 13 C.P.C. which was registered as CMAPL No.89 of 2003 to set aside the ex parte decree which was heard and dismissed by the learned trial court. Hence the present appeal under Order 41 Rule 1 read with Section 96 of the C.P.C.

5. The sole ground taken in the memo of appeal is that the learned trial court deviated from the course of a fair trial inasmuch as the appellant was not allowed to contest the case for no fault of his own but for the fault of his counsel. It is specifically pleaded that the appellant, having been noticed in the suit had approached Sri K.K. Swain, Advocate, and appointed him as his lawyer paying fees to him so that the lawyer would appear in the suit on his behalf. But, ultimately, the lawyer played treachery and did not appear to fight out the suit as a result of which the appellant was set ex parte and the suit was decreed ex parte. It is the further case of the appellant that at the relevant period he was suffering from multiple diseases like T.B., paralysis,

bronchitis etc. and was totally bedridden.

6. Thus, it is found that the appellant does not challenge the ex parte decree on its merit, but takes a ground to justify his non-participation in the proceeding of the suit contending that he was prevented by sufficient cause from appearing before the learned trial court when the suit was taken up for hearing. In the memo of appeal he has sought for the relief of setting aside the ex parte decree and remanding the matter for re-trial. Learned counsel for the appellant submits that a party should not suffer for misdemeanor or inaction of his counsel. He reiterates that the appellant had engaged Sri K.K. Swain, as his Advocate paying him suitable fees but the learned Advocate did not appear in the suit which fact the appellant could not know as he was completely bedridden on account of multiple diseases that he was suffering from. Save and except the bald assertion that the appellant had engaged one Advocate who did not appear before the learned trial court, there is no material in support of this contention. It is not asserted that a duly executed Vakalatnama engaging Sri K.K. Swain as Advocate was in existence and that the same was presented before the learned trial court. Therefore, it is not possible to accept the appellant's plea that an Advocate engaged by the appellant was negligent in conducting the appellant's case before the learned trial court for which he was set ex parte. There is also no material showing that during the relevant period the appellant was completely bedridden. Therefore, on the sole ground that the appellant should not be allowed to suffer on account of misdemeanor of his counsel, the impugned judgment and decree cannot be set aside and the matter cannot be remanded for a re-trial.

7. It is the case of the appellant that he had made an application under Order 9 Rule 13 C.P.C. for setting aside the ex parte decree which was registered as CMAPL No.89 of 2003 but the same was dismissed by the learned lower court. The case record of the CMAPL is not available with the L.C.R. It is quite probable that the appellant had taken the ground of his Advocate's misdemeanor along with the plea of his illness to justify that he had sufficient cause for having not appeared before the trial court when the suit was called on for hearing. If that be so, then the appellant cannot re-agitate the same ground here in an appeal under Order 41, Rule 1 read with Section 96 of C.P.C. This view is supported by the decision of a Bench of the Madras High Court in ***Asethu v. Kesavayya (AIR 1920 Mad 962)*** referred to in ***Munassar Bin v. Fatima Begum***, reported in ***AIR 1975 Andhra Pradesh 366*** wherein it has been held that where an application to set aside the ex parte decree has been rejected under Order 9, Rule 13 it is not open to the defendant to have the question reagitated in the appeal from

the decree itself and such a right is not given by Section 105 of the C.P.C. The Bombay High Court in ***M/s. Mangilal Rungta, Calcutta v. Manganese Ore (India) Ltd., Nagpur***, reported in ***AIR 1987 Bombay 87*** has also given concurrence to the same view.

8. Learned counsel for the appellant has relied on two decisions of Hon'ble Supreme Court (1) ***Rafiq and another v. Munshilal and another (AIR 1981 Supreme Court 1400)*** and (2) ***Goswami Krishna Murarilal Sharma v. Dhan Prakash and others {(1981) 4 Supreme court Cases 574)*** in support of his contention that for the fault of his Advocate, the appellant should not be allowed to suffer. In both the cases it was not in dispute that the parties concerned had engaged their respective counsel. But in the case at hand, the appellant has not shown that one Sri K.K. Swain, Advocate was engaged as his lawyer to participate in the suit on behalf of the appellant. While the very engagement of the lawyer is not on record, the question of lawyer's fault does not arise.

9. In the result, the First Appeal being devoid of any merit is dismissed with cost.

Appeal dismissed.