THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa and some important decisions of the Supreme Court of India.

Mode of Citation
2020 (III) I L R - CUT.

DECEMBER - 2020

Pages : 577 to 800

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

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sanctioned and authorised for very limited purpose under Article 22(3) (b) with good deal of safeguards – The exercise of that power of preventive detention must be with proper circumspection and due care – In a regime of constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such power is exercised – The legal obligation in this type of case, needs to be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction and such subjective satisfaction has to be based on objective facts – If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence objective facts the satisfaction leading to an order without due and proper application of mind will render the order unsustainable – In view of the above legal position, this court has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective facts – Order of detention quashed.

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MOHAMMAD RAFIQ, C.J & Dr. B.R. SARANGI, J.

W.P.(C) NO. 17069 OF 2020

NARAYAN CHANDRA UDGATA ……Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to validity of Clause-6 of an Executive instruction/order, where under the Government has decided to phase out the issuance of Solvency Certificate and has directed that no Department shall ask for Solvency Certificate for grant of licence or lease and instead, they will ask for IT returns, Bank Guarantee etc. for issuing such licence or lease etc. by overriding the provisions of statutory Rules – Rules provide for solvency certificate – Effect of such executive instruction – Held, the executive instructions cannot be issued overriding the statutory rules and that such executive instructions have no statutory force.

> *"In view of the afore discussed position of law, it must be held that the statutory prescription enumerated in the statutory Rules namely; Rule 27(4) of the OMMC Rules, 2016 read with Clause-3 of FORM-M and Rule 3 and Rule 4 of the Miscellaneous Certificate Rules, 2017 cannot be overridden by mere executive order issued by the Revenue & Disaster Management Department dated 02.01.2020 under Annexure-1. As a logical corollary thereto, the impugned order under Annexure-2 dated 04.07.2020, issued by the Tahasildar, Bonth, being ultra vires of the Rules aforementioned, is wholly incompetent. If the Government were to suitably amend the Rules now, in so far as the present writ petition is concerned, such amendment cannot completely omit the provision of producing the Solvency certificate and require the production of the Bank Guarantee. Even if such provision is brought in the Rules by way of amendment, it shall obviously be applicable only prospectively and not retrospectively. It is the settled proposition of law that executive instructions cannot have the effect of either amending or superseding the statutory rules or adding something thereto. Such orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law." (Paras 11 & 12)*

Case Laws Relied on and Referred to :-

1. AIR 1988 SC 2255 : Union of India Vs. Sri Somasundaram Vishwanath.
2. AIR 2001 SC 1877 : Union of India Vs. Rakesh Kumar.
3. AIR 2001 SC 2353 : Swapan Kumar Pal & Ors. Vs. Samitabhar Chakraborty & Ors.
4. (202) 4 SCC 380 : Khet Singh Vs. Union of India.

5. (2003) 5 SCC 413 : Laxminarayan R. Bhattad & Ors. Vs. State of Maharashtra & Anr.
6. (2004) 2 SCC 297 : Delhi Development Authority Vs. Joginder S. Monga.
7. (2003) 8 SCC 204 : Punit Rai Vs. Dinesh Chaudhaty.
8. (2004) 2 SCC 510 : Union of India Vs. Naveen Jindal.
9. (2004) 3 SCC 429 : State of Kerala Vs. Chandra Mohan.
10. (2007) 15 SCC 129 : State of Orissa & ors. Vs. Prasana Kumar Sahoo.
11. (2004) 2 SCC 297 : Delhi Development Authority Vs. Joginder Singh Monga.

For Petitioner : Mr. Prashanta Kumar Nayak

For Opp. Parties 1 to 4 : Mr. M.S. Sahoo, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 06.10.2020

PER: MOHAMMAD RAFIQ, C.J.

This writ petition filed by the petitioner Narayan Chandra Udgata seeks to challenge the validity of Clause-6 of the order dated 02.01.2020 under Annexure-1, issued by the Government of Odisha in the Revenue & Disaster Management (R&DM) Department, Bhubaneswar, whereunder the Government has decided to phase out the issuance of Solvency Certificate and has directed that no Department shall ask for Solvency Certificate for grant of licence or lease and instead, they will ask for IT returns, Bank Guarantee etc. for issuing such licence or lease etc. The petitioner has also challenged the order dated 04.07.2020 issued by the Tahasildar, Bonth, selecting opposite party No.5 as the successful bidder for Sahupada sand Sairat Source.

2. According to the case set up by the petitioner in the writ petition, the Tahasildar, Bonth-O.P. No.4 on 04.06.2020 issued a tender call notice inviting bids from the interested parties for auction of the sairat sources including Sahupada Sand Sairat source for a period of five years (2020-21 to 2024-25). In paragraph 4 of the said Auction Notice (DTCN), it was mentioned that the applicants are required to submit the Solvency Certificate or Bank Guarantee equivalent to the amount mentioned in the application form as additional charge/royalty. The last date of submission of the bid was 30.06.2020 and the date of opening the bid was on 01.07.2020. It was also stipulated in the DTCN that the bid shall be finalized in presence of the parties and incomplete application shall be rejected. Pursuant to the said tender call notice, the petitioner submitted his bid for Sahupada lease Sairat Source enclosing therewith the Solvency Certificate duly attested by the Sub-Collector, Bhadrak, IT returns and all other required documents as per the

DTCN as well as Orissa Minor Mineral Concessions (OMMC) Rules, 2016. On opening of the bid on 1.7.2020, the petitioner was found to be the highest bidder as his offer was Rs.250/- per Cum for Sahupada Sand Sairat. However, the Tahasildar, Bonth issued sent a letter dated 1.7.2020 (Annexure-5) to the Sub-Collector, Bhadrak seeking clarification with regard to issue of Solvency Certificate stating therein that as per Clause-6 of the order dated 02.01.2020 issued by the Government of Odisha, R&DM Department, Solvency Certificate has been decided to be phased out for grant of licence in quarry lease and the tenderers are required to submit IT returns along with Bank Guarantee for the said purpose. However, Shri Narayan Chandra Udgata (petitioner herein), who was found to be the highest bidder quoting Rs.250/- per Cum for Sahupada Sand Quarry, submitted Solvency Certificate issued by the Addl. Tahasildar, Bonth after being duly approved by the Sub-Collector, Bhadrak, whereas Shri Amrit Sundar Nayak (O.P. No.5 herein) was found to be the 2nd highest bidder having quoted Rs.224.5/- per Cum, but he has submitted Bank Guarantee. Therefore, the Tahasildar, Bonth requested the Sub-Collector, Bhadrak to clarify whether Sri Narayan Chandra Udgata is eligible to get the quarry or not. While giving the clarification to the said query vide letter dated 02.07.2020 (Annexure-6), the Sub-Collector, Bhadrak, on the one hand, expressed concern as to how the Tahasildar, Bonth issued the said DTCN mentioning to submit Solvency Certificate in Clause-4 thereof for long term lease in respect of minor minerals, violating Government orders/instructions, but on the other hand, he stated that when the bidder fulfills all terms and conditions of the DTCN issued by the Tahasildar, there should not be any doubt regarding eligibility of bidders. Accordingly, the Sub-Collector requested the Tahasildar, Bonth to take appropriate steps for long term lease in respect of minor minerals sairat source of Sahupada sand quarry as per the procedure laid down under OMMC Rules, 2016. In spite of this, the Tahasildar, Bonth on 04.07.2020 declared the opposite party No.5, who was the second highest bidder, as the successful bidder in respect of Sahupada Sand Quarry, without giving any opportunity of hearing to the petitioner though he was the highest bidder and was fulfilling all the terms and conditions of the DTCN. On 09.07.2020, the petitioner submitted representations before the Collector, Bhadrak as well as Sub-Collector, Bhadrak ventilating his grievance regarding gross irregularities in the selection of the successful bidder in respect of the said sand quarry, but no action has been taken thereon till date. Hence this writ petition.

3. Mr. P.K. Nayak, learned counsel for the petitioner submitted that the submission of Solvency Certificate was in conformity with the provisions of Rule 27(4)(iv) of the OMMC Rules and Rules 3 and 4 of the Orissa Miscellaneous Certificate Rules, 2017. These Rules have not been amended by the State Government so far. Therefore, the Executive Order issued under Annexure-1 dated 02.01.2020 cannot have the overriding effect over the statutory Rules in force. Learned counsel submitted that this issue has already been set at rest by a recent decision of this Court in the batch of cases in ***Gopinath Sahu & Others etc. Vs. State of Odisha & Others*** (W.P.(C) No. 12518 of 2020 & 161 connected writ petitions decided on 03.08.2020), reported in 2020(II) OLR 559. Relying on the judgment of the Supreme Court in ***Union of India Vs. Sri Somasundaram Vishwanath***, AIR 1988 SC 2255, it is submitted that the Supreme Court in the said judgement has observed that if there is a conflict between the executive instruction and the Rules framed under the proviso to Article 309 of the Constitution, the Rules will prevail over the executive instructions. Similarly placing reliance on the judgments of the Supreme Court in ***Union of India Vs. Rakesh Kumar,*** AIR 2001 SC 1877, ***Swapan Kumar Pal & Ors. Vs. Samitabhar Chakraborty & Ors.***, AIR 2001 SC 2353; ***Khet Singh Vs. Union of India,*** (202) 4 SCC 380; ***Laxminarayan R. Bhattad & Ors. Vs. State of Maharashtra & Anr.,*** (2003) 5 SCC 413; and ***Delhi Development Authority Vs. Joginder S. Monga***, (2004) 2 SCC 297, learned counsel for the petitioner argued that statutory rules create an enforceable rights which cannot be taken away by issuing executive instructions. It is further submitted that an administrative instruction cannot compete with a statutory rule and if there is contrary provisions in the Rule, the administrative instructions must give way and the rule shall prevail, as held by the Supreme Court in C.L. Verma Vs. State of M.P. & Anr., AIR 1990 SC 463.

Learned counsel for the petitioner also submitted that as held by the Supreme Court in **Punit Rai Vs. Dinesh Chaudhaty**, (2003) 8 SCC 204; **Union of India Vs. Naveen Jindal**, (2004) 2 SCC 510; and **State of Kerala Vs. Chandra Mohan**, (2004) 3 SCC 429, the executive instructions cannot be termed as law within the meaning of Article 13(3)(a) of the Constitution of India. In M/s. Bishamer Dayal Chandra Mohan Vs. State of U.P. and Ors., AIR 1982 SC 33, the Supreme Court explained the difference in a statutory order and an executive order observing that executive instruction issued under Article 162 of the Constitution does not amount to law.

4. Mr. M.S. Sahoo, learned Addl. Government Advocate appearing for the State opposed the writ petition and submitted that the Government has taken an uniform decision in respect of all the departments and has issued the impugned order by way of a policy decision to phase out the practice of issuing the Solvency Certificates as it consumes a significant amount of time of both of the Citizens and the Revenue Officers. It is clearly mentioned in the said order that no department shall ask for solvency certificate for grant of licence for issuing licences to storage agents, grant or renewal of excise licence, quarry lease etc. Instead, they will ask for IT returns, Bank Guarantee, etc. for issuing such licences or lease etc. It is also submitted by the learned AGA that the government is now in the process of incorporating the appropriate amendments in the OMMC Rules to provide Bank Guarantee in place of Solvency Certificate. It is further submitted that in the meantime the sairat in question has already been settled, therefore, this Court may not interfere at this stage.

5. We have given our thoughtful consideration to the rival submissions and examined the material on record.

6. In order to appreciate the issue involved, we deem it appropriate to first go through the relevant Rules i.e. Rule 27(4) of the OMMC Rules, 2016 for the purpose of deciding the present writ petition, which reads as under:

> "27. **Grant of Quarry Lease**: ……
>
> xxx xxx xxx
>
> (4) Subject to other provisions of these rules for settlement of quarry lease, the intending applicant may apply to the Competent Authority in a sealed cover for grant of quarry lease for such area or areas in Form-M in triplicate accompanied by the following documents and particulars, namely:—
>
> (i) Treasury challan showing deposit of one thousand rupees (non-refundable) towards the application fee;
>
> (ii) An affidavit stating that no mining due payable under the Act and the rules made thereunder, is outstanding against the applicant;
>
> (iii) Proof of payment of earnest money equivalent to five percentum of the minimum amount of additional charges specified in the notice and the amount of royalty, both calculated on the basis of minimum guaranteed quantity for one whole year for the minimum guaranteed quantity of minor mineral to be extracted in one full year; and

(iv) a solvency Certificate or Bank guarantee valid for a period of eighteen months for an amount not less than the amount of additional charge offered and the royalty payable for the minimum guaranteed quantity for one whole year and a list of immovable properties from the Revenue Authority."

7. It is an undisputed fact that the aforesaid Rule, inter alia, subject to other provisions of the Rules, provides that the intending applicant may apply to the Competent Authority in a sealed cover for grant of quarry lease for such area or areas in Form-M in triplicate accompanied by the following documents and particulars, which includes either a Solvency Certificate or Bank Guarantee valid for a period of eighteen months for an amount not less than the amount of additional charge offered and the royalty payable for the minimum guaranteed quantity for one whole year. As per the above Rule 27(4)(iv), an intending applicant has to submit application as per FORM-M, appended to the OMMC Rules, which is the form of application for grant of quarry lease and required to be filled up and submitted by the bidders in triplicate. Clause 3 of the Form-M provides for required particulars to be given, which is reproduced hereunder:

"3. The required particulars are given below:

i) An affidavit stating that no mining due payable under the Act and Rules made there under is outstanding against the applicant.

ii) ii) Where land belongs to private persons, consent of all such persons for grant of quarry lease.

iii) iii) Solvency certificate and list of immovable property from the Revenue Authority."

From the above clause it is also clear that FORM-M, which is the application format appended to the OMMC Rules, corresponding to Rule 27(4) (iv) of the OMMC Rules, also stipulates submission of Solvency Certificate issued by the Revenue Authority and is one of the requirement for the purpose of submission of application.

8. Perusal of Rule 27(4) (iv) makes it clear that an option has been given to the intending applicants to either submit solvency certificate or bank guarantee. Therefore, if he submits solvency certificate, the competent authority cannot decline to accept the same for entertaining his application. This was even clarified in these terms by Government of Odisha in its Department of Revenue and Disaster Management vide letter dated

30.07.2020 referring to order of this court dated 19.03.2020 passed in W.P.(C) No. 9726 of 2020 (Sarat Pradhan vs. State of Odisha) in the terms that the bid of the highest bidder supported by solvency certificate cannot be invalidated merely on the ground of non-submission of bank guarantee since OMMC Rules, 2016 provides for either solvency certificate or bank guarantee. The said clarification letter dated 30.07.2020 of the R&DM Department is reproduced hereunder:

"GOVERNMENT OF ODISHA

REVENUE AND DISASTER MANAGEMENT DEPARTMENT

RDM-MMS-CLRFIC-006-2020-23726 /R&DM Dated 30 JULY 2020

From:

Sri Bhaktiprasad Mohanty,
Deputy Secretary to Government.

To

Collector, Khordha.

Sub: Clarification on acceptance of Solvency Certificate for finalization of bidder in respect of Kalayanpur-A Sand Sairat Source of Bhubaneswar Tahasil.

Ref: Your letter No. 7236 dt. 30.04.2020.
Sir,

In inviting a reference to your letter on the subject noted above I am directed to say that keeping in view the order of the Hon'ble High Court in similar case i.e. W.P.(C) No. 9726 of 2020 filed by Sarat Pradhan Vs. State & Others and after obtaining the view of the Law Department in the matter, it is clarified that the bid of the highest bidder supported by Solvency Certificate cannot be invalidated merely on the ground of non-submission of Bank guarantee since OMMC Rules 2016 provides for submission of Solvency Certificate or Bank Guarantee. Solvency Certificate may be accepted as alternative to Bank Guarantee in finalization of bids for lease of minor mineral sources till OMMC Rules, 2016 is amended.

Appropriate action may be taken in the matter accordingly.

Yours faithfully,
Deputy Secretary to Government."

It was therefore enjoined upon all concerned to accept solvency certificate as an alternative to bank guarantee, in finalization of bids for lease for minor mineral sources till OMMC Rules, 2016 is amended. In view of the above, action of the opposite parties in insisting upon production of bank guarantee cannot be justified.

9. Since Rule 3(1)(iv), 3(3), 4(1)(iv) and 4(3) of the Miscellaneous Certificates Rules 2017, would also be relevant for the purpose of deciding the present writ petition, they are reproduced hereunder:-

> "**3. Categories of miscellaneous certificates:-** (1) Subject to the provisions hereinafter contained, a Revenue Officer shall be competent to grant following categories of miscellaneous certificates, namely:-
>
> (i) xxx
>
> (ii) xxx
>
> (iii) xxx
>
> (iv) Solvency certificate (Form No.IV)
>
> (v) xxx
>
> (v-1) xxx
>
> (vi) xxx
>
> (2) xxx
>
> (3) The solvency certificate for an amount exceeding five lakh rupees shall be granted by the Tahasildar and Additional Tahasildar subject to the approval of Sub-Collector.
>
> 4.(1) Application for miscellaneous certificates:- A person desirous of obtaining a certificate shall file before a Revenue Officer an application,-
>
> (i) xxx
>
> (ii) xxx
>
> (iii) xxx
>
> (iv) for issuance of Solvency certificate, in Form No.4;
>
> (v) xxx
>
> (vi) xxx
>
> (2) xxx
>
> (3) An application for solvency certificate shall be accompanied by the list of immovable properties along with the encumbrance certificate."

10. Even when the matter is examined from the perspective of the Certificate Rules, Rule-3(iv) and Rule 3(3) thereof provide for issuance of Solvency certificate. Rule-4(1)(iv) of the Certificate Rules provides that a person desirous of obtaining a Solvency certificate would apply to the Revenue Officer concerned on application in Form No.IV. Rule 4(3) of these Rules provides that application should be accompanied by an affidavit sworn in before a Magistrate, incorporating the details of immovable properties, the income and source thereof. On receipt of such application, the Revenue Officer shall cause an enquiry and scrutinize the documents furnished by the applicant. After the process of verification is complete, the Revenue Officer concerned by invoking power under Rule-3 (iv) of the Certificate Rules shall issue solvency certificate on Form No.IV.

11. In view of the afore discussed position of law, it must be held that the statutory prescription enumerated in the statutory Rules namely; Rule 27(4) of the OMMC Rules, 2016 read with Clause-3 of FORM-M and Rule 3 and Rule 4 of the Miscellaneous Certificate Rules, 2017 cannot be overridden by mere executive order issued by the Revenue & Disaster Management Department dated 02.01.2020 under Annexure-1. As a logical corollary thereto, the impugned order under Annexure-2 dated 04.07.2020, issued by the Tahasildar, Bonth, being ultra vires of the Rules aforementioned, is wholly incompetent. If the Government were to suitably amend the Rules now, in so far as the present writ petition is concerned, such amendment cannot completely omit the provision of producing the Solvency certificate and require the production of the Bank Guarantee. Even if such provision is brought in the Rules by way of amendment, it shall obviously be applicable only prospectively and not retrospectively.

12. It is the settled proposition of law that executive instructions cannot have the effect of either amending or superseding the statutory rules or adding something thereto. Such orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law.

We may in this connection usefully refer to certain judgments of the Supreme Court. In ***State of Orissa & ors. Vs. Prasana Kumar Sahoo***, reported in (2007) 15 SCC 129. Their Lordships of the Supreme Court, while dealing with a similar situation of conflict between executive instructions and statutory rules, in para-12 of the report, held as under:-

> "12. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of the Constitution of India. A purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions."

In ***Delhi Development Authority Vs. Joginder Singh Monga***, (2004) 2 SCC 297, it is categorically held by the Supreme Court that in a case where a conflict arises between a statute and an executive instruction, indisputable, the statute will prevail over the executive instruction.

13. It may be pertinent to mention here that in the present case, the DTCN issued by the Tahasildar, Bonth prescribed submission of Solvency Certificate/Bank Guarantee and by abiding such terms and conditions of the DTCN, the petitioner submitted the Solvency Certificate along with the Application Form and other required documents. But when he was found to be the highest bidder in respect of the sand quarry in question, the Tahasildar, Bonth sought clarification from the Sub-Collector, Bhadrak. The Sub-Collector clarified that when the bidder fulfills all terms and conditions of the DTCN issued by the Tahasildar, there should not be any doubt regarding eligibility of bidders. Accordingly, the Sub-Collector required the Tahasildar, Bonth to take appropriate steps for long term lease in respect of minor minerals sairat source of Sahupada sand quarry as per the procedure laid down under OMMC Rules, 2016. However, the Tahasildar, Bonth on 04.07.2020 declared the opposite party No.5, who was the second highest bidder, as the successful bidder in respect of Sahupada Sand Quarry, even though the petitioner was the highest bidder and was fulfilling all the terms and conditions of the DTCN, which is in our view is unjust, unreasonable and not in accordance with law.

14. In view of the foregoing discussion, we hereby allow the writ petition. Accordingly clause-6 of the impugned order dated 02.01.2020 under Annexure-1, issued by the Government of Odisha in the Revenue & Disaster Management (R&DM) Department, Bhubaneswar, and the order dated 04.07.2020 under Annexure-2 issued by the Tahasildar, Bonth, are quashed and set aside. Matter is remitted to the opposite party No.4-Tahasildar, Bonth to take fresh decision taking into consideration bid of the petitioner vis-à-vis opposite party no.5 along with all other bids.

Compliance of the judgment shall be made within one month from the date of production of a copy of this order before the opposite party No.4. There shall be no order as to costs.

2020 (III) ILR - CUT- 587

MOHAMMAD RAFIQ, C.J & Dr. B.R. SARANGI, J.

WRIT PETITION (CIVIL) NO. 11405 OF 2020

M/s. JASODA ROADLINES AND ANR. .....Petitioners

.V.

ORISSA STATE WAREHOUSING CORPORATION & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Challenge is made to the order of termination of a contract – Plea that an express clause of arbitration contains in the agreement – Plea considered – Held, since there is an express arbitration clause is contained in the agreement and there is no dispute that petitioner no.1-contractor had not entered into agreement for handling and transportation contract, any claim made by the contractor shall govern by the agreement executed between the parties and any breach thereof has to be adjudicated in terms of the said agreement.

"In the above premises, this Court is of the considered view that since disputed questions of fact are involved in the matter and more so the matter arises out of a contract and, as such, when the contract itself provides a forum for adjudication by way of reference to arbitrator, this Court should refrain from exercising the extraordinary jurisdiction under Article 226 of the Constitution of India." *(Paras 9 & 18)*

Case Laws Relied on and Referred to :-

1. AIR 2017 (NOC) 447 (RAJ.) : Premier Printing Press, Jaipur Vs. State of Rajasthan.
2. (2011) 5 SCC 697 : Union of India Vs. Tantia Construction Private Ltd.
3. (2003) 2 SCC 107 : Harbanslal Sahania Vs. Indian Oil Corpn. Ltd.
4. (1991) 1 SCC 533 : IOCL Vs. Amritsar Gas.
5. (2004) 3 SCC 533 : ABL International Vs. Export Credit Guarantee Corporation of India Ltd,
6. (2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa.
7. (2017) 4 SCC 170 : JSW Infrastructure Ltd. Vs. Kakinada Seaports Ltd.
8. (1996) 4 SCC 69 : Union of India Vs. Jesus Sales Corporation.
9. (2013) 10 SCC 114 : A.S. Motors Pvt. Ltd. Vs. Union of India.
10. (2006) 8 SCC 776 : P.D. Agrawal Vs. State Bank of India.
11. (1996) 6 SCC 22 : State of U.P. Vs. Bridge & Roof Company (India) Ltd.
12. (1980) 4 SCC 556 : Smt. Rukmanibai Gupta Vs. Collector, Jabalpur.
13. (1977) 4 SCC 145 : The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh.
14. (2008) 2 SCC 280 : Oriental Bank of Commerce Vs. Sunder Lal Jain.

15. (1977) 3 SCC 457 : M/s. Radhakrishna Agarwal Vs. State of Bihar.
16. (1998) 8 SCC 1 : Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai.
17. (1985) 2 SCC 537 : Bhagwant Singh Vs. Commissioner of Police.
18. 2010 SCC OnLine Del 4736 : Vijay Trading & Transport Co. Vs. Central Warehousing Corporation.
19. 2020 SCC OnLine SC 874 : State of U.P. Vs. Sudhir Kumar Singh.
20. AIR 1987 SC 1668 : Shri Balagansan Metals Vs. M.N. Shanmugam Chetty.
21. AIR 1994 SC 787 : Lucknow Development Authority Vs. M.K. Gupta.
22. AIR 2006 SC 1883 : Rane Narang Vs. Rama Narang.
23. AIR 2007 SC 788 : Associated Indian Mechanical Pvt. Ltd. Vs. W.B. Small Industries Development Corporation Ltd.
24. (1995) Supp. (4) SCC 684 : Mohanlal Vs. Kartar Singh.

For Petitioners : Mr. A.K. Mishra, M/s. D. Mohapatra, M.R. Pradhan, J.M. Barik and P.K. Singhdeo.

For Opp. Parties : Mr. A.K.Panigrahi,M/s. B.K. Dash, R. Dash, S.R. Dash, R.C. Sethy, K.K. Nayak and D. Mahajan. [O.Ps. No. 1 to 4]

M/s. D. Nayak, S.K. Sahu, R.C. Pattnaik and S.K. Mulia [O.P. No.5]

JUDGMENT Date of Hearing: 12.11.2020 : Date of Judgment :18.11.2020

PER: Dr. B.R. SARANGI, J.

Petitioner no.1-M/s. Jasoda Roadlines, a proprietorship firm having its registered office at Santia, PO/PS-Jaleswar, Dist.-Balasore, Odisha, is engaged in the business of handling and transportation, and petitioner no.2 is its proprietor. They have filed this writ petition seeking following reliefs:-

> *"It is, therefore, humbly prayed that this Hon'ble Court may graciously be pleased to issue a Rule Nisi calling upon the Opposite Parties to show cause as to why the order of termination dated 25.04.2020 under Annexure-7 issued by the Opposite Party No.1, OSWC shall not be set aside/quashed and if the Opposite Parties fail to show cause or show insufficient case make the said Rule absolute.*
>
> *And*
>
> *Be further pleased to issue a writ in the nature of Mandamus directing the Opposite Parties to continue with the respective agreements executed between the petitioner no.1 firm and Opposite Parties.*
>
> *And*
>
> *Pass such other order/orders, direction/directions as this Hon'ble Court may deem fit and proper."*

2. The factual matrix of the case, in hand, is that Orissa State Warehousing Corporation (OSWC) issued a notice inviting e-tender on

30.01.2019 for appointment of regular handling and transportation contractor of food grain stock at various locations for a period of two years. Subsequently, the Corporation issued a corrigendum to the e-tender on 13.02.2019 with certain changes. The said tender notice comprised of seven zones with 21 locations and in the process the petitioner no.1 was declared L1 and successful bidder in respect of nine locations, namely Jagatpur (Internal, Jatani (Internal & RH), Dumerpani (Internal & RH), A. Katapali (Internal & RH), Nagenpali-I (Internal & RH), Nagenpali-II (Internal & RH), Kendpali (Internal & RH), Attabira (Internal & RH) and Godbhaga (Internal & RH). In those nine locations, the price and quantity of materials were different, for which separate agreements in the nature of work order for specific locations were drawn for administrative convenience. But in the work order it has been specified that the terms and conditions of the MTF would be applicable. On 21.05.2019, the Corporation issued a common work order in favour of petitioner no.1-contractor whereby it was to operate FCI stocks at nine locations.

2.1 The Ministry of Home Affairs (MHA) issued a standing order on 07.04.2020 under the Disaster Management Act, 2005, wherein it advised all States to take urgent steps to prevent malpractices so as to ensure availability of essential goods and also advised to take action against offenders. The General Manager, FCI reported on 21.04.2020 that one rake was under loading from railhead Bargarh to FSD, OJM (CFDA) on the very same day and 38 trucks loaded with Fair Average Quality (FAQ) rice stock were handed over by the Superintendent of Corporation to the Supervisor of the petitioner no.1-contractor for transportation to the railhead Bargarh and loading to wagons. At the time of loading, it was noticed that 200 bags of rice loaded in a truck bearing registration no. OR-17C-3923, transit pass no. 538/26887, dated 21.04.2020 was found to be of non-FAQ quality (i.e. sub-standard). The truck was initially loaded with FAQ rice stock, which was delivered by one M/s. Gitanjali Rice Mills, as intimated by the Divisional Manager, FCI, Sambalpur. But, however, the said truck arrived at railhead Bargarh containing sub-standard quality rice which got detected at the railhead point. When non-FAQ rice was found in the truck (OR-17C 3923), it was detained and in lieu of that another truck without any registration number and transit pass arrived at the railhead with 200 bags of rice. The rice bags in the truck, without registration number, were having stencil mark of Samleshwari Rice Mill with lot no. 3 & 4 which were already issued out from the State Warehousing Corporation, Kendpali on 14.04.2020, resulting in the

material had been replaced, for which petitioner no.1-Contractor is solely responsible, as it was engaged for transportation of materials for the godown in Kendpali to railway siding in Bargarh by the vehicle/trucks employed by it. The Corporation, on being intimated on 21.04.2020 by the FCI, immediately lodged an FIR which was registered as Bargarh Sadar P.S. Case No. 115/2020 dated 21.04.2020 under Sections 420/407/120-B/34 IPC and Section 7 of the Essential Commodities Act, 1955 against petitioner no.1-contractor.

2.2 The Corporation issued a show cause notice on 22.04.2020 against the H&T Contractor and called upon to explain as to why stringent measures shall not be initiated for suspension of the H&T contract of SWC, Kendpali including other eight locations. So as to ensure that there was no disruption of essential services to the needy States due to the illegal act of the H&T Contractor, the Corporation forthwith issued a suspension order with regard to Kendpali site. Petitioner no.1-contractor gave its reply to the show cause notice dated 22.04.2020 and stated that it was duty of the FCI Railways siding in-charge or representative of the Corporation to ascertain the facts, verify the receipt of the materials and make necessary entries in that regard. The duty of petitioner no.1-contractor was to transport the materials from the godown and unload the same to the wagon at the railways siding. Challenging the notice of show cause and order of suspension dated 22.04.2020, the petitioners moved to this Court by filing the present writ petition.

2.3 During pendency of this writ petition, reply of the petitioner no.1-contractor to the show-cause notice was thoroughly examined by a committee constituted by the Corporation with regard to the allegations made by the FCI. The committee observed that petitioner no.1-contractor has committed the following irregularities:-

> *"(i) The H & T Contractor M/s. Jasoda Roadlines has grossly violated the terms and condition of the agreement made on 20.05.2019 as well as the terms and condition of the Model Tender Format for handling & transportation of the goods.*
>
> *(ii) The H & T Contractor has violated the condition specified the tender i.e. Clause No.XXI (Duties & Responsibility of the contractor).*
>
> *(iii) He as violated the Prevention of Food Adulteration Act*
>
> *(iv) He has not provided proper escort at the time of dispatch of stock from SWC, Kendpalli to RH Bargarh for which such an incident occurred.*

> *(v) That the H & T contractor has committed criminal action by exchanging the FAQ rice to non-FAQ Rice which is meant for PDS.*
>
> *(vi) The action of the H & T Contractor is not acceptable during the period of Covid-19 crisis.*
>
> *(vii) The action of the H & T Contractor has tarnished the image of the OSWC. Its further continuance with the OSWC may be detrimental to the interest of the Corporation in future."*

After finding out the above irregularities, the committee opined that it was not satisfied with the show-cause reply submitted by petitioner no.1-contractor in regard to its alleged involvement in the serious criminal activity in connivance with some millers and accordingly suggested that the contracts made with petitioner no.1-contractor may be terminated in respect of all the 9 locations for the interest of the OSWC and the FCI and legal action may be initiated against it. Pursuant to report of the committee, the Managing Director of the Corporation invoked Clause-XI(b) of the MTF and terminated the H&T contract of petitioner no.1-contractor for all the 9 locations/warehouses, vide order dated 25.04.2020. In pursuance thereof, the petitioners filed two interlocutory applications; one for amendment of the writ petition and the other for grant of interim order staying operation of the termination order.

2.4 While entertaining the writ petition on 29.04.2020, this Court passed the following order:-

> *"Heard Mr. S.K.Padhi, learned Senior Advocate along with Mr.Dillip Kumar Das, learned counsel for the petitioner.*
>
> *An IA is filed in Court for amendment of the writ petition, which be registered as such.*
>
> *Having heard learned counsel for the petitioner, prayer for amendment is allowed.*
>
> *It is submitted that consolidated copies of the writ petition have already been filed serving copy thereof on other side.*
>
> *Accordingly, the I.A. for amendment is disposed of.*
>
> *Issue notice.*
>
> *Since Mr.Bijay Kumar Dash, learned counsel appears on behalf of the Caveator - opposite party-Orissa State Warehousing Corporation, let five extra copies of the writ petition be served on him.*

Learned counsel for the petitioner files an unnumbered IA seeking inter alia for a direction to stay operation of order of termination dated 25.04.2020 under Annexure-7 and further not to execute any agreement with any third party in respect of handling and transportation work awarded to the petitioner No.1 Firm as per work order dated 21.05.2019.

The said IA be registered by assigning a number.

W.P. (C) No. No. 11405 of 2020 2 Mr.Dash, learned counsel for the opposite partyCorporation seriously objects to the above prayers stating that taking into consideration the situation and exigency of uninterrupted food supply, the Corporation after giving adequate opportunity to the petitioner, suspended and thereafter cancelled the work order granted in favour the petitioner. It is his submission that the handling and transportation of food grains will be made departmentally to avoid any disruption.

Upon hearing learned counsel for the parties it prima facie appears that the Corporation was haste in cancelling the handling and transportation contract of the petitioner for all nine Warehouses without any reasonable justification although the allegation is against only one Warehouse, namely SWC, Kendpali.

Taking into consideration the exigency of pandemic of COVID-19, as an interim measure, it is directed that the petitioner shall be allowed to operate the contract except the Warehouse at SWC Kendpali, under supervision of District Police Administration. It is made clear that the cost of supervision shall be borne by the petitioner.

The above order shall be subject to the result of the writ petition. We make it clear that we have not expressed any opinion on the FIR stated to have been lodged by the Corporation against the petitioner. The Corporation is also free to proceed against the petitioner departmentally and to take necessary steps to 3 prevent pilferage/substitution of grain/rice given for transportation from different warehouses to the petitioner to deliver the same in different destinations, by any substandard grain/rice, as alleged."

The Corporation challenged the said interim order dated 29.04.2020 by way of SLP (C) No.6766/2020 and the apex Court, vide order date 15.05.2020, though initially issued notice and stayed operation of the order dated 29.04.2020, but subsequently disposed of the aforesaid SLP, vide order dated 15.06.2020, by passing the following order:-

"The order passed by this Court on 15.5.2020 shall be the interim order in the pending writ petition. We therefore allow this appeal and set aside the order under appeal.

However, the department shall not finalize any award of tender in favour of any person till the matter is disposed of by the High Court and shall continue to do the job of handling and transportation departmentally."

3. Mr. A.K. Mishra, learned counsel appearing along with Mr. D. Mohapatra, learned counsel for the petitioner argued with vehemence contending that the order of termination dated 25.04.2020 passed by the Managing Director, Odisha State Warehousing Corporation, Bhubaneswar is not only arbitrary, unreasonable and illegal but also suffers from gross violation of the principles of natural justice. It is further contended that even though there is availability of alternative remedy by way of arbitration clause, that itself cannot preclude this Court to exercise power under Article 226 of the Constitution of India. It is further contended that the allegation made against petitioner no.1-contractor relates to contract of Kendpali, but by issuing the impugned order dated 25.04.2020 all the 9 contracts have been cancelled without due compliance of the principles of natural justice, although each contract is separate, as would be evident from the agreements and the work orders. As such, there is no breach of terms and conditions of the contract, therefore, the termination of the same without any rhyme or reason is illegal apart from being arbitrary, unreasonable and violative of the principles of natural justice. So far it relates to contract of Kendpali, the show-cause notice did not mention the particular clause for breach of which the notice was issued. If clause-XXI of MTF is taken into consideration as a whole, though same has been referred as part in the order of termination, no case is made out against petitioner no.1-contractor. It is further contended that the power vested with the Managing Director in clause-XI ought to be exercised judiciously. Therefore, if the action taken by the opposite parties is arbitrary and unreasonable and exercised in a contractual matter, that deserves to be set aside. It is further contended that though MTF contains arbitration clause, which is to be exercised by way of alternative remedy, but that itself is not an absolute bar to adjudicate the matter in exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

It is further contended that police have submitted charge-sheet wherein petitioner no.1-contractor has not been impleaded as accused. Rather, petitioner no.1-contractor is the whistle blower, which has brought the irregularities to the notice of the authority, but it has been penalized by cancelling the contract in respect of 9 locations. It is further contended that for the alleged error committed in respect of one location at Kendpali, the termination made in respect of 9 locations is harsh. Thereby, the order impugned cannot sustain in the eye of law and the same should be quashed.

To substantiate his contentions, though several citations have been mentioned in the written note of arguments submitted by learned counsel for

the petitioners, but specifically he has relied upon the judgments in ***Premier Printing Press, Jaipur v. State of Rajasthan***, AIR 2017 (NOC) 447 (RAJ.); ***Union of India v Tantia Construction Private Ltd.***, (2011) 5 SCC 697; ***Harbanslal Sahania v. Indian Oil Corpn. Ltd.***, (2003) 2 SCC 107; ***IOCL v. Amritsar Gas***, (1991) 1 SCC 533; and ***ABL International v. Export Credit Guarantee Corporation of India Ltd***, (2004) 3 SCC 533.

4. Mr. A.K. Panigrahi, learned counsel appearing for opposite parties no. 1 to 4 raises preliminary objection with regard to maintainability of the writ petition, due to availability of alternative remedy of arbitration under the MTF, and contended that in view of arbitration clause-XIX of the terms and conditions of the agreement (MTF) any dispute arising between the tenderers/contractors and Odisha State Warehousing Corporation concerning the contract, the same shall be decided and resolved by way of arbitration. As such, if remedy is available under the agreement itself, the petitioners, without availing the same, could not have approached this Court by filing this writ petition. It is further contended that there is no violation of any of the principles of natural justice and more specifically, it arises out of a contract, which is a commercial transaction and, as such, evaluating tenders and awarding contracts are essentially commercial functions. Thereby, principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

It is further contended that petitioner no.1-contractor was communicated with the allegations and was called upon to show cause. In response thereto, petitioner no.1-contractor submitted its reply, which was placed before a committee for consideration and the committee finding out the irregularities suggested for termination of contracts of petitioner no.1-contractor. Consequentially, the Managing Director passed the impugned order of termination and, thereby, there is compliance of principle of natural justice. As regards personal hearing, it was not required to be given, as petitioner no.1-contractor had been given adequate opportunity to give reply to the notice of show cause. It is further contended that the order of termination has been passed by the Managing Director by invoking the power under clause-XI (b), which provides for summery termination.

Therefore, once it is a summary termination and opportunity was given to petitioner no.1-contractor to give reply to the allegations made against it, in that case the Managing Director is well justified in passing the order impugned, which does not require interference of this Court at this stage. It is further contended that out of 21 locations, petitioner no.1-contractor participated in respect of 15 locations, which arose out of one tender and was composite in nature and out of those 15 locations, petitioner no.1-contractor was selected being the L1 in respect of 9 locations, and that though separate agreements were executed in respect of different locations because of the price, but one work order was issued in favour of petitioner no.1-contractor. Thereby, termination of the contract in respect of 9 locations, in view of the allegations made against the location Kendpali, cannot be construed to be harsh. If it is a composite contract and arising out of a single tender, even if error is committed in respect of one location, the tenders awarded in respect of other locations are to be set aside and accordingly, the Managing Director has passed the order impugned, which is well within its competence, otherwise it would have persuaded petitioner no.1-contractor to commit further mistakes in respect of other locations causing difficulties to general public who are the ultimate beneficiaries under the PDS system.

It is further contended that there are many factual disputes available on record itself which are required to be adjudicated by invoking arbitration clause arising out of the contract. More so, such disputed questions of fact are not susceptible to judicial review under Article 226 of the Condition of India. As per clause- XXI, the contractor shall be responsible for the safety of the goods while in transit in his trucks/carts/any other transport vehicles and for delivery of quantity dispatched from the railhead/godowns. If said clause is alleged to be violated, in that case petitioner no.1-conractor has to establish that there was no such violation, which cannot be decided in a writ petition. More so, there is no violation of fundamental rights nor is there any violation of principle of natural justice, and the order so passed or proceedings is completely within jurisdiction of the authority concerned. In that case, this Court should not exercise the extraordinary jurisdiction under Article 226 of the Constitution of India.

It is further contended that much reliance has been placed on the charge sheet submitted in a criminal proceeding, but as a matter of fact the report submitted by the investigating officer dated 06.07.2020 is not conclusive and it is still open to the Magistrate to take cognizance under

Section 190 Cr.P.C. by rejecting the opinion of the investigating officer and, as such, these opposite parties have a right to raise protest against such report and, thereby, no conclusion can be drawn with regard to the report submitted by the investigating officer.

It is further contended that clause XI(b) of the contract, by which the Managing Director has been vested with the power to terminate the contract which is summary in nature, was examined and upheld by the Delhi High Court, therefore, the contention raised that the power invoked by the Managing Director is arbitrary, unreasonable and contrary to the provisions of law, cannot sustain in the eye of law.

Although various judgments have been referred to in the written note of submissions, but in course of argument he has relied upon the judgments in ***Jagdish Mandal v. State of Orissa,*** (2007) 14 SCC 517; ***JSW Infrastructure Ltd. v. Kakinada Seaports Ltd.*** (2017) 4 SCC 170; ***Union of India v. Jesus Sales Corporation,*** (1996) 4 SCC 69; ***A.S. Motors Pvt. Ltd. v. Union of India,*** (2013) 10 SCC 114; **P.D. Agrawal v. State Bank of India,** (2006) 8 SCC 776; ***State of U.P. V. Bridge & Roof Company (India) Ltd.,*** (1996) 6 SCC 22; ***Smt. Rukmanibai Gupta v. Collector, Jabalpur,*** (1980) 4 SCC 556; ***The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh,*** (1977) 4 SCC 145; ***Oriental Bank of Commerce v. Sunder Lal Jain,*** (2008) 2 SCC 280; ***M/s. Radhakrishna Agarwal v. State of Bihar,*** (1977) 3 SCC 457; ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai,*** (1998) 8 SCC 1; ***Bhagwant Singh v. Commissioner of Police,*** (1985) 2 SCC 537; ***Vijay Trading & Transport Co. v. Central Warehousing Corporation,*** 2010 SCC OnLine Del 4736; and ***State of U.P. v. Sudhir Kumar Singh,*** 2020 SCC OnLine SC 874.

5. Mr. D. Nayak, learned counsel appearing for opposite party no.5-FCI also raised a preliminary objection with regard to maintainability of the writ petition contending that the termination order dated 25.04.2020 issued by the Managing Director arises out of a contractual matter and, as such, nothing has been revealed in the writ petition that may justify exercise of extraordinary jurisdiction, and in absence of the same the petitioners have to pursue the alternative remedy available under the contract, for which the writ petition is not maintainable, especially against opposite party no.5. It is further contended that neither there is any privity of contract nor any legal relation between petitioner no. 1-conractor and opposite party no.5. If at all the

petitioners seeks relief, the same is against opposite parties no.1 to 4, who entered into the contract with petitioner no.1-conractor and have legal relationship. Thereby, the writ petition, so far as opposite party no.5 is concerned, should be dismissed.

It is further contended that opposite party no.5 is a statutory Corporation established under the Food Corporation Act, 1964 and a nodal organization of the Government of India to implement the National Food Policy to ensure delivery of food grains to every corner of the whole of India through public distribution system. To fulfill and maintain the above objectives, FCI has to store and facilitate movement of food grains across the country. The storage of food grains is also effected by entering into contracts with Central Warehousing Corporation (CWC) and State Warehousing Corporations (SWCs). Thereby, the FCI hires storage space in the godowns/warehouses of the CWC or the SWCs for storage of food grains and also hires their handling and transport. Therefore, FCI, CWC and SWCs are independent contractors. The petitioner-firm was involved in handling and transportation of FCI rice stock stored in the OSWC godowns at 9 different locations across the State of Odisha, including the OSWC godown at Kendpali from where rice was being transported to West Bengal from Bargarh railhead on 21.04.2020, pursuant to the Central Government's directions, to mitigate any risk of shortage of food grains in the country due to COVID-19 pandemic. During supervision of the rake operation at the Bargarh railhead to transport the FCI rice stock on 21.04.2020 by the concerned FCI officials, it was noticed that there was a shortage of 200 full bags of rice and that the quality of rice in one truck was sub-standard. After the preliminary enquiries, it was established prima facie that the entire stock in the truck had been replaced along the way with sub-standard rice by petitioner no.1-conractor. When petitioner no.1-conractor's representative on site was informed on such facts, he brought another un-numbered truck loaded with rice bags claiming the same to be the original stock. It was also discovered during inspection that the sub-standard stock brought on 21.04.2020 in truck number OR-17-C-3923 contained bags from a lot of rice stock that had already been dispatched on 14.04.2020. The original rice stocks were replaced by some other stock that had escaped detection on the very same day. Basing on this information, the OSWC, with whom the FIC had entered into a contract for storage of FCI stock and their handling and transportation, filed an FIR and follow up action was taken by terminating the contract of petitioner no.1-conractor. It is further contended that the action so taken

against petitioner no.1-conractor by opposite parties no.1 to 4 cannot be said to be illegal, which may not be interfered with in this proceeding.

6. This Court heard Mr. A.K. Mishra, learned counsel appearing for the petitioners; Mr. A.K. Panigrahi, learned counsel appearing for opposite parties no.1 to 4 and Mr. D. Nayak, learned counsel appearing for opposite party no.5 through virtual mode. Pleadings have been exchanged between the parties, in compliance of the order passed by the apex court and with the consent of learned counsel for the parties the matter is being disposed of finally at the stage of admission by giving opportunity of hearing to all the parties.

7. In view of preliminary objection raised by both the learned counsel appearing for opposite parties no.1 to 4 and opposite party no.5, this Court, instead of delving into the merits, proceeded to decide the question of maintainability of the writ petition.

8. For just and proper adjudication of the above question, the relevant clauses of the instructions to the tenderers for e-procurement along with general information to tenderers are extracted hereunder:-

> "***XI. Summary Termination***
>
> *xxx* *xxx* *xxx*
>
> *b) The Managing Director shall also have, without prejudice to other rights and remedies, the right, in the event of breach by the contractors of any of the terms and conditions of the contract, to terminate the contract forthwith and to get the work done for the unexpired period of the contract, at the risk and cost of the contractors and/or forfeit the security deposit or any part thereof for the sum or sums due for any damages; losses, charges, expenses or costs that may be suffered or incurred by the Corporation due to the contractor's negligence or unwork-man like performance of any of the services under the contract.*
>
> *c) The contractor shall be responsible to supply adequate and sufficient labour, scales/trucks/carts/any transport vehicle for loading/unloading, transport and carrying out any other services under contract in accordance with the instructions issued by the Managing Director or an officer acting on his behalf. If the contractor fails to supply the requisite number of labour, scales and trucks/carts, the Managing Director shall, at his entire discretion without terminating the contract be at liberty to engage other labour, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation all additional charges, expenses, cost or losses that the Corporation may incur or suffer thereby. The contractor shall not, however, be entitled to any gain resulting*

from entrustment of the work to, another party. The decision of the Managing Director shall be final and binding on the contractor.

xxx *xxx* *xxx*

XIX. Laws governing the contract & dispute Resolution:

(a) The contract shall be governed by the laws of India for the time being in force.

(b) (i) Arbitration

Any dispute arising between the Tenderers/ Contractors and Odisha State Warehousing Corporation pertaining to any of the matters concerning the contract, the same shall be decided and resolved by way of arbitration.

The arbitration shall be held following the procedure prescribed under the provisions of Arbitration & Conciliation Act, 1996 as amended from time to time. The bidder while participating in the tender process specifically agrees that the entire dispute shall be determined through Arbitration by the Sole Arbitrator to be appointed by the Managing Director of Odisha State Warehousing Corporation keeping in view the provisions under Section-12(5) & the corresponding SEVENTH SCHEDULE of the Arbitration & Conciliation Act, 1996. Place of Arbitration shall be in Bhubaneswar and language of Arbitration in English.

In case any dispute arises pertaining to any of the matters concerning the Contract, the affected party shall give notice to the General Manager(C) of the Corporation for amicable resolution of the dispute sitting across the table. After receiving notice if the General Manager (C) of the Corporation fails to resolve the dispute within a period of three months, the affected party shall give a notice of Arbitration to the Managing Director of the Corporation specifically mentioning his claims, grievances. For the purpose, the affected person shall give 30 days prior notice to the Managing Director of Odisha State Warehousing Corporation, who on receipt of the notice shall take steps for appointment of Sole Arbitrator to decide the matter. While appointing the Sole Arbitrator, the Managing Director of Odisha State Warehousing Corporation shall act in terms of provisions under Sectioin-12(5) and the corresponding schedule-VII of the Arbitration & Conciliation Act, 1996.

All such notices for arbitration shall be given either by registered post or through official acknowledgment.

(ii) Jurisdiction

Any dispute that arises between the parties to this tender, the court at Bhubaneswar only shall have jurisdiction to entertain the proceedings. No other courts except the courts at Bhubaneswar shall have jurisdiction to adjudicate any dispute, entertain any proceeding pertaining to the tender/ contract in question.

xxx *xxx* *xxx*

XXI: DUTIES AND RESPONSIBILITIES OF THE CONTRACTOR

xxx xxx xxx

21. The contractor shall be responsible for unloading/loading the wagons within the free period allowed by the Railways and also for loading/unloading the trucks/carts/any other transport vehicles expeditiously. The contractor shall be liable to make good any compensation demurrage/wharfage as per railways rules in force during the period of contract, or other charges or expenses that may be incurred by the Corporation on account of delays in loading/unloading of truck/carts and loading/unloading of wagons unless the delay is for reasons beyond the contractor's control. The decision of the Managing Director in this respect shall be final and binding on the contractor.

xxx xxx xxx

27. The contractor shall be responsible for the safety of the goods while in transit in his trucks/carts/any other transport vehicles and for delivery of quantity dispatched from the Railhead/Godowns etc; as the case may be to the destination or to the recipients to whom the grain etc; is required to be transported by the contractor. He shall provide tarpaulins on decks of the trucks, so as to avoid loss of the grain etc; through the holes/cervices in the decks of the trucks. He shall also exercise adequate care and take precautions to ensure that the foodgrain bags are not damaged while in transit in their trucks/carts/any other transport vehicles. He shall deliver the number of bags and the weight of foodgains etc; received by them and loaded on their trucks. The contractor shall be liable to make good the value of any shortage, wastage losses or damage to the goods in transit at twice the average acquisition cost as applicable from time to time for all foodgrains and commodities other than sugar and thrice the average acquisition cost as applicable from time to time in respect of sugar except when the Managing Director (whose decision shall be final) decides that the difference between the weight taken at the dispatching and receiving ends is negligible and is due to the discrepancies between the scales, gain or loss in moisture or other causes beyond contractors control. Such recovery shall be effected without prejudice to the right of OSWC to initiate civil/ criminal proceedings against the defaulting contractor wherever it is suspected that the shortages/ losses occurred due to deliberate/ willful omission, theft, misappropriation, irregularities etc. committed by the contractor or his representatives/employees."

9. Admittedly, there is an express arbitration clause contained in clause-XIX of the agreement (MTF) and there is no dispute that petitioner no.1-contractor had not entered into agreement for handing and transportation contract. Thereby, any claim made by petitioner no.1-contractor shall govern by the agreement executed between the parties and any breach thereof has to be adjudicated in terms of the said agreement. A bare perusal of the above noted clauses would indicate that clause-XIX(b)(i) provides an arbitration

clause which clearly specifies that any dispute, arising between the tenderers/contractors and Odisha State Warehousing Corporation pertaining to any of the matters concerning the contract, shall be decided and resolved by way of arbitration. Thereby, a mechanism has been prescribed under the contract itself to resolve the dispute arising between the tenderers/contractors and Odisha State Warehousing Corporation.

10. By using the word "**any**" in the beginning of the clause, it clarifies that it has got several meanings, according to the circumstances, it may mean "all", "each", "every", "some", "or one or more out of several".

In **Judicial Dictionary of Words and Phrases** (**Fifth Edition by John S. James**), the word "**any**" is defined as a word which excludes limitation or qualification.

In ***Black's Dictionary*** (Fifth Edition), it has been specifically mentioned that the word 'any' has the following meaning- some, one out of many; an infinite number, one indiscriminately of whatever kind or quantity; or may be employed to indicate 'all' or 'every' as well as 'some' or 'one'. It is often synonymous with 'either', 'every' or 'all'. This meaning has been taken into consideration by the apex Court while considering Section 10(3)(c) of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 in the case of ***Shri Balagansan Metals v. M.N. Shanmugam Chetty***, AIR 1987 SC 1668.

In ***Lucknow Development Authority v. M.K. Gupta***, AIR 1994 SC 787, the use of word '**any**' in the context it has been used in wider sense extending from one to all.

In ***Rane Narang v. Rama Narang***, AIR 2006 SC 1883, the apex Court, while considering Section 2(b) of Contempt of Courts Act, held that the word '**any**' in Section 2(b) of the Act indicates wide nature of the power under the Act.

In ***Associated Indian Mechanical Pvt. Ltd. v. W.B. Small Industries Development Corporation Ltd.***, AIR 2007 SC 788, while considering Section 2(c) of the West Bengal Tenancy Regulation Act, 1976, the apex Court held that the word '**any**' used in the opening part of the Section 2(c) of the Act is a word of very wide meaning and prima facie the use of it excludes limitation.

11. Applying the above meaning to the present clause-XIX(b)(i), it can be safely construed that any dispute in relation to such clause indicates wide nature of power and, as such, it excludes the limitations. Thereby, any matter arising out of the contract can be adjudicated in an arbitration proceeding.

12. In ***Smt. Rukmanibai Gupta*** (supra), the apex Court in paragraph-10 held as under:-

> *"10. .....Arbitration Act, 1940, is a self-contained exhaustive code.* ***Relief sought by the appellant by invoking extraordinary jurisdiction of the High Court under Article 226 could have been obtained by proceeding in accordance with the relevant provisions of the Arbitration Act.*** *In this situation, if the High Court declined to entertain the writ petition, no exception can be taken to it. Further the indenture of lease constitutes a contract between the parties. Right to excavate lime stone from leased area and obligation to pay royalty under the relevant Minor Mineral Rules arise from the contract.* ***The contract provided for resolution of dispute arising out of the carrying out of contract. The writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligation voluntarily incurred*** *(see Har Shankar . The Dy. Excise and Taxation Commissioner)."*

13. In ***Bridge & Roof Company (India) Ltd.*** (supra), the apex Court in paragraph-21 held as follows:-

> *"There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter a1ia for settlement of disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as questions of law.* ***When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extra-ordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extra-ordinary jurisdiction under Article 226.*** *The said Article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra."*

14. The law laid down by the apex Court clearly indicates that when a contract provides for resolving the dispute arising out of a contract, there is

no reason why the party should not follow and adopt that remedy and invoke the extra ordinary jurisdiction under Article 226 of the Constitution of India. The existence and effect of alternative remedy in the present case is provided in the contract itself under clause-XIX(b)(i). Therefore, there is no justifiable reason to interfere with the same by invoking extra-ordinary jurisdiction of this Court.

15. In ***Sudhir Kumar Singh*** mentioned supra, the apex Court clearly laid down the principles of natural justice summarized as follows:-

> *"The principles of natural justice can be summarised as follows: (i) it is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused. (ii) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. The prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest but also in public interest. (iii) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the court finds on facts that no real prejudice can be said to have been caused to the person complaining of the breach of natural justice. (iv) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person. (v) The prejudice exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."*

16. In the facts of the present case, it cannot be said that there was breach of natural justice. Therefore, it would be futile to exercise the writ jurisdiction under Article 226 of the Constitution of India. As a matter of fact, in the present case, when irregularities were brought to the notice of the authority, consequentially show cause was called for from petitioner no.1-contractor, who in response thereto submitted reply, and the matter was placed before the committee for adjudication. Thereafter, the committee, after due adjudication, came to a conclusion that irregularities were committed by petitioner no.1-contractor and on that basis invoking clause-XI(b) the Managing Director has passed the order impugned. It is of relevance to note that nomenclature of clause-XI is "summary termination". The word "summary" prefixed to "termination" has got its own meaning.

17. As per ***Webster Dictionary***, "summary" is defined to mean short, concise, reduced into a narrow compass or into a few words.

In ***Mohanlal v. Kartar Singh***, (1995) Supp. (4) SCC 684, the apex Court held that the word 'summary' implies a short and quick procedure instead of or, as an alternative to, the more elaborate procedure ordinarily adopted or prescribed for deciding a case.

18. In the above premises, this Court is of the considered view that since disputed questions of fact are involved in the matter and more so the matter arises out of a contract and, as such, when the contract itself provides a forum for adjudication by way of reference to arbitrator, this Court should refrain from exercising the extraordinary jurisdiction under Article 226 of the Constitution of India.

19. In the facts and circumstances of the case as well as the settled position of law, as discussed above, since there is availability of an alternative efficacious remedy available to the petitioner, this Court, without expressing any opinion on the merits, disposes of the writ petition permitting the petitioners to approach the appropriate forum, by availing alternative remedy under the contract itself, in accordance with law.

20. The writ petition is thus disposed of. There shall be no order as to costs.

As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed vide Court's Notice No.4587 dated 25.03.2020.

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2020 (III) ILR - CUT- 604

MOHAMMAD RAFIQ, C.J & C.R. DASH,J.

WRIT PETITION (CIVIL) NO.16516 OF 2020

M/s. MILLENNIUM SUPPLIERS PVT. LTD. & ANR. ……..Petitioners

.V.

MAHANADI COALFIELDS LTD. & ORS. ……..Opp. Parties

AND

WRIT PETITION (CIVIL) NO.17676 OF 2020

M/s. KIPL-PNMPL JV ……..Petitioner

.V.

MAHANADI COALFIELDS LTD. & ORS. ……...Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Award of Govt. contracts/Tenders – Principles to be followed – Indicated. (Para 6)

Law on the subject is well settled and no more res integra.

Taking into consideration a catena of its own earlier decisions, Hon'ble Supreme Court, in B.S.N. JOSHI & SONS LTD. v. NAIR COAL SERVICES LTD. (2006) 11 SCC 548, have delineated the following legal principles, which are applicable to the award of Government Contracts /Tenders :-

(i) The requirements in a tender notice can be classified into two categories : those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition. (Para 61)

(ii) If there are essential tender conditions, the same must be adhered to. If a party fails and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. [Paras 66(i) and 69)

(iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

[Paras 66(ii) and 69]

(iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of

such tender conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a conditions which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction. [Paras 66(iii) & (iv)]

(v) When a decision is taken by the appropriate authority upon due consideration of the tender documents submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with. [Para 66(v)]

(vi) The bidding contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match the rates quoted by the lowest tender, public interest would be given priority. [Para 66(vi)]

(vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint. [Para 66(vii)]

(viii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. (Para 69)

(ix) A contract need not be given to the lowest tenderer and the employer is the best judge therefor; the same ordinarily being within the employer's domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities. (Paras 56 & 68)

(x) Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hardand- fast rule can be laid down therefor. (Paras 67 and 23)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Tender matter – Seeking relaxation of tender condition after participation – Effect of – Held, after participating in the tender

process, accepting the conditions in the NIT, raising a submission for waiver of a condition as non-essential, is not sustainable in the eye of law. (Para 10.8)

Case Laws Relied on and Referred to :-

1. (2006) 11 SCC 548 : B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd.
2. 2019 SCC OnLine SC 89 : Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala.
3. (2016) 16 SCC 818 : Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.
4. (2019) 10 SCC 738 : Municipal Council, Neemuch Vs. Mahadeo Real Estate & Ors.
5. MANU/SC/0002/1996 : (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.
6. MANU/SC/0770/1998 : (1999) 1 SCC 492 : Raunaq International Ltd. Vs. I.V.R. Construction Ltd.
7. MANU/SC/3402/2000 : (2000) 2 SCC 617 : Air India Limited Vs. Cochin International Airport Ltd.
8. MANU/SC/0234/2005 : (2005) 4 SCC 456 : Karnataka SIIDC Ltd. Vs. Cavalet India Ltd.
9. MANU/SC/0300/2005 : (2005) 6 SCC 138 : Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.,
10. MANU/sc/0090/2007 : (2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa.
11. MANU/SC/0662/2012 : (2012) 8 SCC 216 : Michigan Rubber (India) Ltd. Vs. State of Karnataka and Ors.
12. MANU/SC/1003/2016 : (2016) 16 SCC 818 : 2016 KHC 6606 : Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.
13. MANU/SC/1313/2016 : AIR 2016 SC 4946 : Montecarlo Vs. . NTPC Ltd.
14. MANU /SC / 0293/2018 : (2018) 5 SCC 462 : Municipal Corporation, Ujjain and Anr. Vs. BVG India Ltd. and Ors.
15. 2019 (6) SCALE 70 : Caretel Infotech Limited Vs. Hindustan Petroleum Corporation Limited and Ors.
16. (2000) 2 SCC 617 : Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.
17. (2008) 16 SCC 215 : Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors.
18. (2009) 6 SCC 171 : Meerut Development Authority Vs. Association of Management Studies & Anr.

W.P.(C) NO.16516/ 2020

For Petitioner(s) : M/s. Gouri Mohan Rath, A.P. Rath, S.S. Padhy & P. Rath.
Mr. Ashok Mohanty, Sr. Adv.

For Opp. Party(s) : M/s. Rakesh Sharma, P.R. Patnaik, R.K. Ray, S.N. Barik and K.P. Mukhi (for Opp. Parties 1 and 2).
Mr. B.P. Das (for Opp. Party No.3)

W.P.(C) NO.17676/ 2020

For Petitioner(s) : M/s. Debendra Kumar Dwibedi, S. Dwibedi, S. Das, D. Sethy & P. Behera.

For Opp. Party(s) : Mr. Rakesh Sharma, P.R. Patnaik, R.K. Ray, S.N. Barik and K.P. Mukhi (for Opp. Parties 1 and 2). Mr. B.P. Das (for Opp. Party No.3)

JUDGMENT Date of Hearing : 11.11.2020 : Date of Judgment : 22.12.2020

PER : C.R. DASH.J.

1. Both the Writ Petitions relate to selfsame e-Tender Call Notice, i.e. Notice Inviting Tender ("NIT" for short). Therefore, both the cases are taken up together for disposal by this common judgment.

2. The bids of the Petitioners in both the Writ Petitions having been rejected during technical evaluation, the Petitioners in their respective Writ Petitions have assailed such decision of the authority concerned in the Tender process.

Facts common to both the Writ Petitions :-

3. Opposite Party No.2 on behalf of Opposite Party No.1 floated e-Tender Notice vide NIT No.805/2020/185 dated 26.05.2020 for Mechanical Transfer of Coal / Coal Measure Strata into Tipping Trucks by Pay-Loaders and transportation of the same to Pit Head Stock / Sardega Railway Siding Nos. 1 & 2 / Reject Dump Yard as per the requirement, from Departmental Surface Miner Face to Garjanbahal OCP, Basundhara Area, MCL, for a quantity of 226,00,000 Te of Coal and 82,95,420 Te of Rejects.

3.1 The Petitioners in both the Writ Petitions along with private Opposite Party Nos.3 to 6 in these Writ Petitions submitted their respective bids pursuant to the aforementioned NIT. After submission of bids, the Technical Bids of the bidders were opened and during the technical evaluation, it was seen that certain clarifications were required from the Petitioners in both the Writ Petitions, and accordingly the evaluators of the NIT on 26.06.2020 uploaded online seeking clarifications from the Petitioners.

3.2 During the Technical Evaluation, the bid of the Petitioner in W.P. (C) No.16516 of 2020 was rejected on the following grounds :-

(i) Digital Signature Certificate ('DSC' for short) Authorization at the time of bid is not available ;

(ii) The Power of Attorney was executed on 26.06.2020, whereas the bid submission date was 16.06.2020.

So far as the Petitioner in W.P. (C) No.17676 of 2020 is concerned, its Technical Bid was rejected on the ground of inadequate Work Experience. It is worthwhile to mention here that the total Work Experience Value certified in favour of the Petitioner Company comes to Rs.7,50,14,129/- as against the required experience value of Rs.36,52,65,140/-.

The bid of the Petitioners having been rejected on the ground as aforesaid during Technical Evaluation, they have preferred these Writ Petitions for issuance of mandamus directing Opposite Party Nos.1 and 2 to allow them to participate in the Financial Bid.

Facts peculiar / relevant to W.P. (C) No.16516 of 2020

4. The Evaluator of the NIT, during technical evaluation on 26.06.2020 uploaded online seeking clarification from the Petitioner as per Annexure-4 to the Writ Petition. One of the clarifications which was asked by Opposite Parties 1 and 2 in the clarification uploaded on 26.06.2020 (Annexure-4) is that, in the Affidavit dated 10.06.2020 which has been uploaded by the Petitioner along with its bid, it is not specified or mentioned regarding the authorization to use DSC of Petitioner No.2 on behalf of the bidding Company, i.e. Petitioner No.1. The discrepancy, as pointed out by Opposite Party Nos.1 and 2 during the Technical Evaluation, is stated to be contravening Clause 14 (5) of the NIT.

4.1 The Petitioners' case is that, Mr. Kamalpat Dalmia (Petitioner No.2) is the Director of the Bidder Company – Petitioner No.1 and he had been duly authorized by Resolution of the Board of Directors dated 05.06.2020 to sign and submit the bid on behalf of the Company. Accordingly, Petitioner No.2 had submitted bid by using his Digital Signature Certificate. Further it is the case of the Petitioners that, the Central Public Procurement Portal of the Govt. of India has clarified that DSC is not required by Companies in its own name in case of e-Tender. Under such circumstances it is argued by Mr. Ashok Mohanty, learned Senior Counsel that there is no infirmity in the bid submitted by the Petitioner and, as such, rejection of the bid of the Petitioner on the ground of contravening Clause 14 (5) of the NIT is illegal, arbitrary and a fragrant defect in the Tender Process.

4.2 In the counter affidavit filed by Opposite Party Nos.1 and 2 dated 04.08.2020, the decision of the Technical Evaluation Committee in rejecting the bid of the Petitioners has been supported on the following grounds :-

(i) Petitioner No.2 being not the bidder himself and he having participated in the bidding on behalf of Petitioner No.1 Company, it was incumbent on him to have an Authorization / Power of Attorney from the Company to use his DSC for bidding as per Clause 14 (5) of the NIT.

(ii) The Power of Attorney by Petitioner No.1 Company to use the DSC submitted by Petitioner No.2 pursuant to Clarification dated 26.06.2020 by Opposite Party Nos.1 and 2 having been executed on 26.06.2020, the last date of submission of bid being 16.06.2020, rejection of the bid on the ground of non-availability of DSC Authorization at the time of bid is just and proper.

4.3 On the face of rival contentions of the parties, the issue that arises for determination is, whether rejection of the bid of the petitioner on the ground of non-availability of DSC Authorization at the time of bid is just and proper.

Facts relevant in W.P. (C) No.17676 of 2020 :-

5. Petitioner is a Joint Venture Enterprise consisting of two Companies, namely M/s. Kiansara Infra Project Pvt. Ltd. and M/s. Pranabnaman Minerals Pvt. Ltd. It participated in the bid along with the Petitioner in another Writ Petition and Opposite Party Nos.3 to 6. During the Technical Evaluation, Opposite Party No.1 found certain deficiency with the documents uploaded by the Petitioners and thereby vide email dated 25.06.2020 directed the Petitioner to cure such deficiency by providing confirmatory documents as per Clause 15 (B). The Petitioner is stated to have complied with all the instructions and directions of Opposite Party Nos.1 and 2. In spite of such cooperation, the Petitioner has been debarred from participating in the Financial Bid on the ground that it lacks requisite Work Experience in terms of the Value of Work and Quantity of Work.

5.1 Opposite Party Nos.1 and 2 have filed Counter Affidavit, and in detail they have underlined the following defects in the bid of the Petitioner :-

(i) Experience regarding Start Date and End Date of the work is not commensurate with the requirement of Opposite Party No.1 – Company and it was not in accordance with Clause 8 (A), (i), (ii), (iii), (v) and (vi) of the NIT.

(ii) The Petitioner lacks adequate experience so far as Value of Work and Quantity of Work, as required by Opposite Party No.1 – Company, is concerned.

5.2 On the face of rival contention, the issue that emerges in the present writ petition is more an issue of facts than an issue of law or issue of mixed question of fact and law. It is to be decided simply, as to whether the petitioner has been debarred owing to the defects in the decision making process.

6. Law on the subject is well settled and no more *res integra.*

Taking into consideration a catena of its own earlier decisions, Hon'ble Supreme Court, in **B.S.N. JOSHI & SONS LTD. *v.* NAIR COAL SERVICES LTD. (2006) 11 SCC 548,** have delineated the following legal principles, which are applicable to the award of Government Contracts / Tenders :-

(i) The requirements in a tender notice can be classified into two categories : those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition.
(Para 61)

(ii) If there are essential tender conditions, the same must be adhered to. If a party fails and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others.
[Paras 66(i) and 69)

(iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.
[Paras 66(ii) and 69]

(iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of such tender conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such relaxation should not ordinarily be

allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a conditions which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction. [Paras 66(iii) & (iv)]

(v) When a decision is taken by the appropriate authority upon due consideration of the tender documents submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with. [Para 66(v)]

(vi) The bidding contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match the rates quoted by the lowest tender, public interest would be given priority. [Para 66(vi)]

(vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint. [Para 66(vii)]

(viii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it.

(ix) A contract need not be given to the lowest tenderer and the employer is the best judge therefor; the same ordinarily being within the employer's domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities. (Paras 56 & 68)

(x) Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor. (Paras 67 and 23)

Out of the principles delineated supra, principle Nos.(i), (ii), (iii), (v), (vii), (viii), (ix) and (x) may be relevant for our purpose in the present case.

6.1 Hon'ble Supreme Court, in the case of **Vidarbha Irrigation Development Corporation *v.* Anoj Kumar Garwala, 2019 SCC OnLine SC 89,** in paragraph-15, have quoted some of the aforesaid principles with approval.

6.2 Hon'ble Supreme Court, in the case of **Afcons Infrastructure Ltd. *v.* Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818,** in paragraphs 14 and 15, have ruled thus :-

> "14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty *v.* International Airport Authority of India [Ramana Dayaram Shetty *v.* International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, **that the words used in the tender documents cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance.** In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.
>
> 15. We may add that **the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.** It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given." (emphasis supplied by us)

It is clear, on reading of the aforesaid judgment, that the words used in the Tender Documents cannot be ignored or treated as redundant or superfluous. They must be given meaning and their necessary significance.

6.3 Hon'ble Supreme Court, in the case of **MUNICIPAL COUNCIL, NEEMUCH *vs.* MAHADEO REAL ESTATE AND OTHERS, (2019) 10 SCC 738,** while discussing the scope of judicial review of administrative action, has ruled that the scope of judicial review of an administrative action is very limited. Unless the Court comes to a conclusion that the decision-maker has not understood the law correctly, that regulates his decision-making power or when it is found that the decision of the decision-maker is vitiated by irrationality and that too on the principle of "Wednesbury unreasonableness" or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision-making process. It is not permissible for the Court to examine the validity of the decision but the Court can examine only the correctness of the decision-making process.

It is settled that Constitutional Courts are concerned only with the lawfulness of the decision and not its soundness. *[see* ***Central Coalfields***

Limited & Anr. Vs. SLL-SML (Joint Venture Consortium) & Anr., (2016) 8 SCC 622] . To put it differently, Courts ought not to sit in appeal over the decision of the employer and plausible decision need not be overturned.

6.4 In **Tata Cellular *vs.* Union of India, MANU/SC/0002/1996 : (1994) 6 SCC 651,** it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are : -

> **94……**
>
> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the *invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.
>
> Normally peaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

6.5 In **Raunaq International Ltd. *vs.* I.V.R. Construction Ltd., MANU/SC/0770/1998 : (1999) 1 SCC 492,** Hon'ble Supreme Court held that superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.

6.6 In **Air India Limited *vs.* Cochin International Airport Ltd., MANU/SC/3402/2000 : (2000) 2 SCC 617,** Hon'ble Supreme Court once again stressed the need for overwhelming public interest to justify judicial

intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

6.7 In **Karnataka SIIDC Ltd. *vs.* Cavalet India Ltd., MANU/SC/0234/2005 : (2005) 4 SCC 456,** it was held that while effective steps must be taken to realize the maximum amount, the High Court exercising its power under Article 226 of the Constitution is not competent to decide the correctness of the sale affected by the Corporation.

6.8 In **Master Marine Services (P) Ltd. *vs.* Metcalfe & Hodgkinson (P) Ltd., MANU/SC/0300/2005 : (2005) 6 SCC 138,** it was held that while exercising power of judicial review in respect of contracts, the Court should concern itself primarily with the question, whether there has been any infirmity in the decision-making process. By way of judicial review, Court cannot examine details of terms of contract which have been entered into by public bodies or State.

6.9 In **Jagdish Mandal *vs.* State of Orissa, MANU/sc/0090/2007 : (2007) 14 SCC 517,** it was held :-

> **22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound".** When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold…… (emphasis supplied by us)

6.10 In **Michigan Rubber (India) Ltd. *vs.* State of Karnataka and Ors., MANU/SC/0662/2012 : (2012) 8 SCC 216,** it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

6.11 In **Afcons Infrastructure Ltd. *vs.* Nagpur Metro Rail Corporation Ltd., MANU/SC/1003/2016 : (2016) 16 SCC 818 : 2016 KHC 6606,** it as held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

6.12 In **Montecarlo *vs.* NTPC Ltd., MANU/SC/1313/2016 : AIR 2016 SC 4946,** it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

6.13 In **Municipal Corporation, Ujjain and Anr. *vs.* BVG India Ltd. and Ors., MANU /SC / 0293/2018 : (2018) 5 SCC 462,** it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/

company to carry out the work. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work.

6.14 Most recently, Hon'ble Supreme Court, in **Caretel Infotech Limited *vs.* Hindustan Petroleum Corporation Limited and Ors., 2019 (6) SCALE 70,** observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

6.15 Going further, in **Air India Ltd. *vs.* Cochin International Airport Ltd. & Ors., (2000) 2 SCC 617,** while relying on its several earlier decisions on the law relating to award of contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government, the Hon'ble Supreme Court observed as under :-

> "7…….The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

6.16 Hon'ble Supreme Court, in the case of **Siemens Public Communication Networks Pvt. Ltd. & Anr.** ***vs.*** **Union of India & Ors., (2008) 16 SCC 215,** while dealing with the scope of judicial review of the constitutional courts, held that, in matters of highly technical nature, a high degree of care, precision and strict adherence to requirements of bid is necessary. Decision making process of Government or its instrumentality should exclude remotest possibility or discrimination, arbitrariness and favoritism. It should be transparent, fair, bona fide and in public interest. However, the Supreme Court clearly held therein that it is not possible to rewrite entries in bid document and read into the bid document, terms that did not exist therein, nor is it permissible to improve upon the bid originally made by a bidder. Power of judicial review can only be exercised when the decision making process is so arbitrary or irrational that no responsible authority acting reasonably or lawfully could have taken such decision, but if it is bona fide and in public interest, court will not interfere with the same in exercise of power of judicial review even if there is a procedural lacuna. Principles of equity and natural justice do not operate in the field of such commercial transactions.

6.17 Further, Hon'ble the Supreme Court, in the case of **Meerut Development Authority** ***vs.*** **Association of Management Studies & Anr., (2009) 6 SCC 171,** held that, the tender is an offer, which invite and is communicated to notify acceptance. It must be an unconditional, must be in the proper form, and the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to a judicial scrutiny because the invitation to tender is in the realm of contract. Only a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tender in a transparent manner and free from hidden agenda. The authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons. The action taken by the authorities in awarding contracts can be judged and tested in the light of Article 14 of the Constitution of India and the Court cannot examine details of the terms of the contract entered into by public bodies or State. The Court has inherent limitations on the scope of any such enquiry.

7. Having understood the law relating to Bid and Tender, we shall now advert to the case on merit. For convenience, Writ Petition (Civil) No.17676 of 2020 is taken up first.

7.1 Clause 8 of the NIT, which deals with the Eligibility Criteria to apply for the Tender, clearly stipulates as under :-

> **"8. Eligibility Criteria :**
>
> A. Work Experience **:** The bidder must have experience of works (includes completed / ongoing) of similar nature (as per definition of similar nature of work given below) valuing 50% of the annualized estimated value of the work put to tender (for period of completion over 1 year)/ 50% of the estimated value of the work (for completion period up to one year) put to Tender in any year (consecutive 365 days) during last 7 (seven) years ending last day of the month previous to the one in which bid applications are invited.
>
> "Annualised Value" of the work shall be calculated as the Estimated value / Period of Completion in Days x 365".
>
> The value of executed works shall be given a simple weightage to bring them at current price level by adding 5% for each completed year (total number of days / 365) after the end date of experience till the last day of month previous to one in which e-tender has been invited.
>
> The definition of similar work shall be as follows :-
>
> Loading of coal / any mineral / soil / ash / stone / rejects by Pay Loaders / Excavator into railway wagons / tippers / trucks and Transportation of excavated / stacked / crushed coal / any mineral / soil / ash / stone / rejects by Tippers / Trucks will be considered to be of similar work. Transportation of consumer goods, etc. will not be considered.
>
> In respect of the above eligibility criteria, the bidders are required to furnish the following information on-line :
>
> I. Start date of the year for which work experience of bidder is to be considered for eligibility.
>
> II. Start date and end date of each qualifying experience (similar nature)
>
> III. Work Order Number / Agreement Number of each experience.
>
> IV. Name and address of Employer / Work Order Issuing Authority of each experience.

V. Percentage (5) share of each experience (100% in cae of an Individual / proprietorship firm or the actual % of share in case of a Joint Venture / Partnership firm).

VI. Executed Value of work against each experience.

VII. In case the bidder is a Joint Venture, the work experience of any one, two or three of the individual partners of JV or the JV itself may be furnished as the work experience of the bidder.

……"

7.2 Clause 14 of the NIT, which deals with Confirmatory documents required to be uploaded by the bidder against the Eligibility Criteria in support of information / declaration furnished by him online, under sub-clause (1), states as under :-

Clause 14 - The following supportive documents of all the bidders shall be downloaded for evaluation by the Tender Inviting Authority.

Sl. No.	Eligibility Criteria	Scanned copy of documents, to be uploaded in support of information / declaration furnished online by the bidder against Eligibility Criteria as Confirmatory Document.
1.	Work Experience (Ref. Clause No.8(A) of NIT)	For work experience bidders are required to submit Work Experience (includes completed / ongoing Certificate issued by the employer against the Experience of similar work containing all the information as sought online. Bidder should also submit Work Order, BOQ and/or TDS along with the bid.
xx xx	xx xx xx xx	xx xx xx xx xx

7.3 Clause 15 of the said NIT deals with the Technical Evaluation of Tenders and states as under :-

"**<u>Clause 15 – Technical Evaluation of Tender</u> :**

A. xx xx xx xx xx

B. In case the Tender Committee finds that there is some deficiency in uploaded documents corresponding to the information furnished online or in case corresponding documents have not been uploaded by bidder(s), then the same will be specified online by Evaluator clearly indicating the omissions / shortcomings in the uploaded documents and indicating start date and end date allowing 7 days (7 x

24 hours) time for online resubmission by bidder(s). The bidder(s) will get this information on their personalized dash board under "Upload Confirmatory Document" link. Additionally, information shall also be sent by system generated e-mail and SMS, but it will be the bidder's responsibility to check the updated status / information on their personalized dash board regularly after opening of bid. No separate communication will be required in this regard. Non-receipt of e-mail and SMS will not be accepted as a reason of non-submission of documents within prescribed time. The bidder(s) will upload the scanned copy of all those specified documents in support of the information / declarations furnished by them online within the specified period of 7 days. No further clarification shall be sought from the Bidder.

C. xx xx xx xx xx xx
D. xx xx xx xx xx xx
E. xx xx xx xx xx xx
F. xx xx xx xx xx xx

G. In case of bidder(s) fails to confirm the online submitted information(s) / declaration(s) by the submitted documents as (B) above, their / his bid shall be rejected; however, if the confirmatory documents do not change eligibility status of the bidder in connection with his submitted online information(s) / declaration(s), then his / their bid will be accepted for opening of Price Bid.

H. xx xx xx xx xx xx
……"

8. The Petitioner in the present Writ Petition, in its technical bid, is shown to have submitted 10 numbers of Work Orders from Jindal Powers Ltd. and five numbers of Work Orders from D.B. Powers Ltd. along with two numbers of Work Experience Certificate (one from each of the two aforementioned companies). The aforesaid certificates submitted by the Petitioner – Company neither had any mention of Work Order Number / Agreement Number or the Executed Value of the Work for each specified experience, nor of the "Work Evaluation Period" of each experience mandatorily required under Clause 8 (A) I, II, III & VI and Clause 14(1) of the NIT dated 26.05.2020.

8.1 The Tender Committee, in accordance with the terms mentioned in the NIT, opened the bids received from various bidders pursuant to the Tender Call Notice for technical evaluation of the bids and in due course of such technical evaluation process, observed that the bid of the Petitioner – Company suffer from a number of discrepancies. On 25.06.2020 the Technical Evaluation Committee in accordance with Clause 15 (B) of the

NIT, sought online clarification from the Petitioner stating therein that apart from other discrepancies, the Work Experience Certificate submitted by the Petitioner – Company neither specifies Work Order Number nor the period of execution of each Work Orders (start date of the work and end date of the work) nor the exact value of the executed work, therein further requesting the Petitioner Company to upload documents online to that effect within a period of seven days from the date of issuance of the Notice.

8.2 The Petitioner Company, on receipt of the Notice from the Technical Evaluator, on 02.07.2020 uploaded three numbers of Work Experience Certificate (two from Jindal Powers Ltd. and one from D.B. Powers Ltd.) issued in favour of one of the constituents of the Petitioner's Joint Venture Company. The aforesaid Work Experience Certificate so uploaded also did not fulfill the requirement of Clause 8(A) and Clause 14(1) of the NIT, as the two numbers of Work Experience Certificate issued by M/s. Jindal Powers Ltd. were issued on 01.07.2020, i.e. 15 days after the last date of submission of the bid and the documents submitted along with such certificate containing details regarding the value of work executed were self-certified by the Petitioner's constituent company M/s. Pranabnaman Minerals Pvt. Ltd. (PVMPN) and not by the employer, as required by the NIT.

8.3 Further, the Work Experience Certificate issued in favour of the Petitioner Company by M/s. D.B. Powers Ltd. mentioned the quantity of work that was executed, but there was no mention of either the value of the work executed nor the Work Order Number nor the period for which the said work was undertaken in complete non-compliance of the requirements stipulated in Clause 8 (A) and Clause 14(1) of the NIT and instructions by the Technical Evaluation Committee dated 25.06.2020 seeking clarification.

8.4 From the aforesaid discussions, it is clear that the Petitioner Company lacked experience as required by the NIT and especially Clause 8 (A) and Clause 14 (1) of the NIT. He was short of Work Experience in terms of value of the work and quantity of work.

8.5 In course of hearing, assuming arguendo, the documents supplied by the Petitioner to be genuine and true, we made addition of the Work Experience Certificates given by the Petitioner and it was found that the Work Experience Certificate fall short of the required value of Rs.36,52,65,140/- within the given period. The Petitioner having failed to

satisfy the requirement of the NIT, the bid has been rightly rejected at the stage of technical evaluation.

8.6 We are of the view that, there is no defect in the decision making process in course of the technical evaluation and the Petitioner Company has been rightly debarred from participating in the financial / price bid.

9. Coming to the facts in W.P. (C) No.16516 of 2020, it is found from page – 72 of the Writ Petition, vide Annexure – 6 series, that the bid of the Petitioner for the tender in question has been rejected during technical evaluation by the duly constituted committee for the reason that D.S.C Authorization at the time of bid is not available and the Power of Attorney was executed on 26.06.2020, whereas the bid submission date was 16.06.2020.

9.1 Mr. Ashok Mohanty, learned Senior Counsel appearing for the Petitioners, relying on Clause 14 (5) of the NIT, submits that the Petitioner had, inter alia, submitted the following documents along with the bid.

(i) Memorandum of Association (page 39 of the Writ Petition)

(iii) Article of Association (page 49 of the Writ Petition)

(iv) Signatory details (page 60 of the Writ Petition)

(v) Board of Directors' Resolution dated 05.06.2020 (page 68 of the Writ Petition).

It is further submitted by Mr. Ashok Mohanty, learned Senior Counsel, that it is evident from the Articles of Association and the Signatory Details attached to it, that Petitioner No.2 – Kamalpat Dalmia is a Director of Petitioner No.1 – Company having a registered D.S.C. It is also evident from the Board of Directors' Resolution dated 05.06.2020 that, Kamalpat Dalmia (Petitioner No.2) has been authorized by Petitioner No.1 Company to sign and submit the bid in question on behalf of Petitioner No.1 Company. In that view of the matter, it is vehemently argued by Mr. Mohanty, learned Senior Counsel that the Petitioner has complied with Clause 14(5) of the NIT in so far as the requirement of **"any sort of legally acceptable document for the authority to bid on behalf of the bidder"** is concerned.

Mr. Mohanty, learned Senior Counsel for the Petitioners further draws our attention to the Central Public Procurement Portal, Govt. of India FAQ

No.11 at page 74 of the Writ Petition, wherein it has been clarified that D.S.C. is not required by the Company for submission of Tender, instead, an individual like the Director of a Company can use its D.S.C. on behalf of the Company to bid. With all the vehemence at his command, Mr. Mohanty, learned Senior Counsel for the Petitioners submits that the Board of Directors' Resolution dated 05.06.2020 authorizing Petitioner No.2 – Kamalpat Dalmia to sign and submit the bid in question on behalf of Petitioner No.1 Company is sufficient to satisfy the requirement of Clause 14 (5) of the NIT.

9.2 Mr. Rakesh Sharma, learned counsel appearing for Opposite Party Nos.1 and 2, submits that Petitioner No.2 – Kamalpat Dalmia being not the bidder himself, it was incumbent on his part to have an Authorization / Power of Attorney from Petitioner No.1 Company to use his D.S.C. for bidding on behalf of the Company. Admittedly, it is nobody's case that Kamalpat Dalmia (Petitioner No.2) was bidding for himself. It is an accepted fact that he was bidding on behalf of Petitioner No.1 Company.

It is further submitted by Mr. Sharma, learned counsel for Opposite Parties 1 and 2 that, pursuant to the clarification uploaded on 26.06.2020 by the technical evaluators, the Petitioner uploaded two documents, namely, the extract of Board of Directors' Resolution dated 05.06.2020, authorizing Petitioner No.2 to submit the bid and sign the agreement, etc. on behalf of Petitioner No.1 Company, and Power of Attorney dated 26.06.2020 authorizing Petitioner No.2 to do authorized acts required for submitting the Tender (Annexure-5 series). In the said Power of Attorney dated 26.06.2020, at point No.2 it has been specifically mentioned that, **"to get issued Digital Signature Certificate (D.S.C) in the name of the Company and to use the D.S.C. on behalf of the Company for submitting the Tender."**

Mr. Sharma, learned counsel further proceeds to submit that, on scrutiny of the above mentioned two documents, it was seen that nowhere it has been mentioned that Petitioner No.2 – Kamalpat Dalmia is authorized to use his D.S.C., specifically on behalf of the Company – Petitioner No.1. On further scrutiny it was seen that the Power of Attorney executed authorizing Petitioner No.2 to use the D.S.C. on behalf of the Company was dated 26.06.2020, whereas the last date of submission of the bid was 16.06.2020. In that view of the matter, it is argued by Mr. Sharma that on the date of submission of the bid, i.e. 16.06.2020 Petitioner No.2 was not authorized to use his D.S.C. to submit the bid on behalf of the Company – Petitioner No.1.

Mr. Sharma, learned counsel for O.Ps.1 and 2 sums up his argument by submitting that the Technical Evaluation Committee, taking into consideration the above mentioned discrepancies / short falls in the bid documents submitted by the Petitioner, rejected the technical bid of the Petitioner, as the same was not in consonance with Clause 14 (5) of the NIT. Therefore, it cannot be held that the Opposite Parties have done any illegality in rejecting the technical bid of the Petitioner and opening the price bid to Opposite Party Nos.3 to 6, which qualified technically.

Learned counsel appearing for Opposite Party No.3 supports the argument tendered by Mr. Rakesh Sharma, learned counsel for O.Ps.1 and 2.

10. The relevant Clauses of the NIT are extracted below for ready reference :-

Clause 10 of the NIT dated 26.05.2020 deals with submission of Bids, which reads thus :-

"Clause 10 – Submission of Bid :

a. In order to submit the Bid, the bidders have to get themselves registered online on the e-procurement portal (https://coalindiatenders.nic.in) with valid Digital Signature Certificate (DSC) issued from any agency authorized by Controller of Certifying Authority (CCA), Govt. of India and which can be traced up to the chain of trust to the Root Certificate of CCA. The online registration of the Bidders on the portal will be free of cost and on-time activity only. The registration should be in the name of the bidder, whereas the DSC holder may be either the bidder himself or his duly authorized person. (For JV Ref. Cl.7(ix) & (xvi).

b. xx xx xx xx xx
c. xx xx xx xx xx

d. Letter of Bid : The format of Letter of Bid (as given in the NIT at Annexure-VII) will be downloaded by the bidder and will be printed on Bidder's letter head and the scanned copy of the same will be uploaded during bid submission in cover-I. This will be the covering letter of the bidder for his submitted bid. The content of the "Letter of Bid" uploaded by the bidder must be the same as per the format downloaded from website and it should not contain any other information.

The Letter of bid will be digitally signed by DSC holder submitting bid online and it does not require any physical signature. However, if the Letter of Bid (LoB) bears the physical signature in addition to the digital signature of the DSC holder, it will be accepted without questioning the identity of person signing the Letter of Bid.

If there is any change in the contents of Letter of Bid uploaded by bidder as compared to the formant of Letter of Bid uploaded by the department with NIT document, then the bid will be rejected.

e. Confirmatory Documents : All the confirmatory documents as enlisted in the NIT at Clause No.14 in support of online information submitted by the bidder are to be uploaded in cover-I by the bidder while submitting his/her bid.

f. xx xx xx xx xx

10.1 Clause 14 of the NIT deals with Confirmatory Documents required to be uploaded by the bidder against the Eligibility Criteria in support of information / declaration furnished by him online, which reads thus :-

"Clause 14 – The following supportive documents of all the bidders shall be downloaded for evaluation by the Tender Inviting Authority.

Sl. No	**Eligibility Criteria**	**Scanned copy of documents, to be uploaded by in support of information / declaration furnished online by the bidder against Eligibility Criteria as Confirmatory Document.**
1.	xx xx xx	xx xx xx xx xx xx
2.	xx xx xx	xx xx xx xx xx xx
3.	xx xx xx	xx xx xx xx xx xx
4.	Legal Status of the bidder	Any one of the following documents : 1. Affidavit or any other document to prove proprietorship / Individual status of the bidder. 2. Partnership deed containing name of partners. 3. Memorandum and Articles of Association with certificate of incorporation containing name of bidder. 4. i) Joint Venture agreement as per ***Annexure-IV.*** ii) Power of Attorney to the Lead Partner. iii) The document(s) regarding legal status of all the individual partners of JV, as mentioned in sl.No.1 or 2 or 3 above, as applicable, and iv) Authorization to all the signatories of JV agreement by the respective partners of JV either in the form of Power of Attorney or any sort of legally acceptable document as applicable.
5.	Digital Signature Certificate (DSC)	If the bidder himself is the DSC holder bidding on-line, then no document is required. However, if the DSC holder is bidding online on behalf of the bidder, then the Power of Attorney or any sort of legally acceptable document for the authority to bid on behalf of the bidder.
xx xx	xx xx xx	xx xx xx xx xx xx

10.2 A cursory reading of Clause 10 of the NIT makes it clear that the bidders have to get themselves registered online on the e-procurement portal with valid Digital Signature Certificate (DSC) issued from any agency authorized by the Controller of Certifying Authority ('CAA' for short) and the registration of the bid should be done in the name of the bidder, whereas the DSC holder may be either the bidder himself or his duly authorized person.

10.3 It is pertinent to make a reference to Point No.11 of the FAQ of the Central Public Procurement Portal, Govt. of India, which is a part of the NIT and is enclosed with the Writ Petition vide Annexure-8. Clause 11 of the FAQ reads thus :-

> **"11. Is a company required to obtain a Digital Signature Certificate in its own name for e-tendering ?**
>
> Digital Signature Certificate (DSC) is not required by Companies but by individuals. For example the Director or the Authorized Signatory signing on behalf of the Company requires a DSC. ……"

Admittedly, pursuant to the NIT dated 26.05.2020, Petitioner No.1 Company submitted its bid online through Petitioner No.2 – Kamalpat Dalmia and said Kamalpat Dalmia was bidding on behalf of Petitioner No.1 Company.

10.4 Considering the fact that Bid was submitted online on behalf Petitioner No.1 Company by Kamalpat Dalmia (Petitioner No.2), the said Petitioner No.2 was required to submit such Bid using his own Digital Signature Certificate (DSC) with a further Power of Attorney issued in his favour or an Authorization from the Board of Directors of the Company specifically authorizing him (Petitioner No.2) to bid on behalf of Petitioner No.1 Company in the aforesaid Tender, using his on DSC.

In course of Technical Evaluation Process, the Evaluators came across such discrepancies in the bid submitted by Petitioner No.2 on behalf of Petitioner No.1 Company and sought for online clarification with regard to the same on 26.06.2020. Such clarification sought vide Annexure-4 to the Writ Petition reads thus :-

> "Uploaded affidavit dated 10.06.2020, in which authorization to use DSC on behalf of the Company is not mentioned. Kindly upload the affidavit mentioning authorization to use DSC on behalf of the Company."

> The affidavit dated 10.06.2020 is at page 62 of the Writ Petition, wherein at point No.1 the deponent Kamalpat Dalmia has stated that he is the applicant for Contract Job under the office of the General Manager (CMC, P.O.- Jagruti Bihar, Burla, Sambalpur, Odisha).

10.5 On receiving clarification notice dated 26.06.2020, the Petitioner Company uploaded online two documents to show authorization to use DSC on behalf of Petitioner No.1 Company, viz.

(i) An extract of the Resolution of the Board of Directors dated 05.06.2020 and

(ii) A Power of Attorney dated 26.06.2020, which was executed in favour of Petitioner No.2 – Kamalpat Dalmia.

On consideration of the aforesaid facts and different Clauses of the NIT, we were inclined to do joint reading of Point No.11 of the FAQ, Central Public Procurement Portal of Govt. of India and Clause 14 (5) of the NIT, as extracted supra. A joint reading of both the items clearly reveal that, when a bid is made on behalf of the Company, then the official / Director / person bidding on behalf of the Company in the bid process, shall have his own personal DSC along with an authorization from the Board of Directors of the Company or a Power of Attorney duly executed by the Company in favour of such person / Director / or officer to use his own DSC to bid on behalf of the Company.

10.6 The bid of Petitioner No.1 Company in the present case was admittedly submitted online on behalf of Petitioner No.1 Company by Petitioner No.2 – Kamalpat Dalmia, and therefore Petitioner no.2 was required to bid on behalf of Petitioner No.1 Company by using his own DSC with further authorization by a Power of Attorney duly executed by the Company to bid on behalf of Petitioner No.1 Company using his own DSC. To the contrary, in the present case, Petitioner No.2 while bidding on behalf of Petitioner No.1 Company, in the affidavit dated 10.06.2020 has testified that he is the applicant for the Tender. Neither he used his DSC to bid on behalf of Petitioner No.1 Company nor did he upload any authorization for doing so on behalf of the Company while submitting the bid documents, in clear contravention of Clause 14 (5) of the NIT.

10.7 Mr. Ashok Mohanty, learned Senior Counsel appearing for the Petitioners relies on heavily on the wordings of Clause 14 (5) of the NIT …

"…… or any sort of legally acceptable document for the authority to bid on behalf of the bidder……"

Taking a clue from the aforesaid wordings, Mr. Mohanty, learned Senior Counsel relies on the Board of Directors' Resolution dated 05.06.2020 authorizing Petitioner No.2 – Kamalpat Dalmia to sign, submit and execute and do all such acts of bids and things for Mahanadi Coalfields Ltd.

The aforesaid Board of Directors' Resolution dated 05.06.2020 is however totally silent regarding use of the DSC by Petitioner No.2 on behalf of Petitioner No.1 Company. Such a discrepancy in the document relied on by Mr. Mohanty, learned Senior Counsel takes him no where. As the document dated 05.06.2020, i.e. Board of Directors' Resolution was totally silent regarding use of his DSC by Petitioner No.2 on behalf of Petitioner No.1 Company, Petitioner No.2 had no authority to use his own DSC to submit the bid on behalf of the Company, i.e. Petitioner No.1 at the time of bid.

10.8 It is further argued by Mr. Mohanty, learned Senior Counsel that, once the Board of Directors Resolution dated 05.06.2020 (Annexure-5 series) authorizes Petitioner No.2 – Kamalpat Dalmia to act on behalf of the Company, insistence by Opposite Party Nos.1 and 2 for a separate Power of Attorney authorizing him (Petitioner No.2) to use his DSC is a non-essential condition, which could have been waived.

To such submission, our answer would be, after participating in the tender process, accepting the conditions in the NIT, raising a submission for waiver of a condition as non-essential, is not sustainable in the eye of law.

11. In fine, therefore, we are of the view that, the Technical Evaluation Committee has not done any infirmity in the Decision Making Process and has rightly rejected the bid of the Petitioners at the stage of technical evaluation. We are constrained to hold this, because the Power of Attorney authorizing Petitioner No.2 – Kamalpat Dalmia to use his DSC was subsequent to the date of Tender and the Board of Directors Resolution dated 05.06.2020 vide Annexure-5 series is silent about use of his own DSC by Petitioner No.2.

12. Accordingly, on the basis of the aforesaid discussion in paragraphs- 8, 9 and 10, both the Writ Petitions are dismissed, but without any costs.

2020 (III) ILR - CUT- 630

KUMARI SANJU PANDA, J & S.K. PANIGRAHI, J.

W.P.(CRL.) NO. 82 OF 2020

Sk. MABUD @ MAMUD @ MADUD .....Petitioner

.V.

STATE OF ODISHA & ANR. .....Opp. Parties

NATIONAL SECURITY ACT, 1980 – Section 3(2) – Detention under – It is alleged that, petitioner is a habitual offender and several cases are pending against him in different police stations – Petitioner pleads that in the order of detention, basic facts and relevant materials have not been disclosed – Petitioner further pleads that, detention order was passed on 12.02.2020 where as grounds of detention was served on 16.02.2020 – Further out of pending cases, detenu has been acquitted in few of them, this fact also has not been brought on record – There were no particulars for the detenu to make his representation & details for the same was also not provided – Legality of the order of detention challenged – Held, preventive detention is an exception to the normal procedure and is sanctioned and authorised for very limited purpose under Article 22(3) (b) with good deal of safeguards – The exercise of that power of preventive detention must be with proper circumspection and due care – In a regime of constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such power is exercised – The legal obligation in this type of case, needs to be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction and such subjective satisfaction has to be based on objective facts – If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence objective facts the satisfaction leading to an order without due and proper application of mind will render the order unsustainable – In view of the above legal position, this court has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective facts – Order of detention quashed.

Case Laws Relied on and Referred to :-

1. 2012 (I) OLR (SC) 550 : Yumman Ongbi Lembi Liema Vs. State of Manipur.
2. (1975) 3 SCC 198 : Haradhan Saha Vs. State of West Bengal.
3 (2007) 2SCC 777 : Alpesh Navinchandra Shah Vs. State of Maharashtra.
4. (2008) 3 SCC 613 : State of Maharashtra Vs. Bhaurao Punjabrao Gawande .
5 (2011) 5 SCC 244 : Rekha Vs. State of Tamil Nadu.
6. 6(2012) 2 SCC 176 : Yumman Ongbi Lembi Leima Vs. State of anipur and Ors.

7. 7(2012) 7 SCC 181 : Huidrom Konungjao Singh Vs. State of Manipur.
8. (2011) 5 SCC 244 : Rekha Vs. State of Tamil Nadu through Secretary to Govt. & Anr.

For Petitioner : M/s. Debasis Sarangi, B. S. Dasparida, S.K.Dash, S. Mohapatra, K. Mohanty and M.K. Agrawala.

For Opp. Party Nos.1 & 2 : Mr. Janmejaya Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 11.11.2020 : Date of Judgment : 16.12.2020

S.K. PANIGRAHI, J.

1. The present Criminal Writ Petition has been filed by the petitioner invoking Articles 226 and 227 of the Constitution of India challenging the order of detention dated 12.02.2020 passed by the District Magistrate, Balasore under Section 3(2) of the National Security Act, 1980.

2. Brief facts of the case are stated hereunder so as to appreciate the rival legal contentions urged on behalf of the parties:

(a) The petitioner was under judicial custody in the District Headquarters Jail Balasore in connection to P.S. Case No.319 dated 17.10.2019 held under Section 395 of IPC and Sections 25 and 27 of the Arms Act. The Superintendent of Police, Balasore in his letter No.7586/1B dated 26.12.2019 addressing the District Magistrate appealed for the detention of the petitioner under Section 3(2) of the National Security Act. He contended that the present petitioner has been indulging in antisocial activities prejudicial to public order in town, Sahadevkhunta, Sadar, Industrial PS's areas and throughout the district of Balasore and also bordering area of West Bengal since 2013. He further emphasized that the petitioner does not have any ostensible means of livelihood and only depends upon extortion, robbery and other criminal activities. Further, he contended that the people in the abovementioned regions are in a state of constant fear due to the continuous atrocious activities of this petitioner who is a dreaded criminal. The Superintendent of Police has then attached a list of 20 cases, while detailing those he has mentioned that out of 14 cognizable cases, 8 cases have been charge sheeted and the rest 6 are under investigation and will be charge sheeted soon.

(b) Acknowledging the Letter No.7586/1B, District Magistrate, Balasore ordered for detention of the petitioner on 12.02.2020 and consequently provided the grounds of detention to the petitioner on 16.02.2020. The District Magistrate has stated that there is every possibility that his release on bail will lead to the probabilities of his indulgence in more and more criminal activities. He has further stated that upon thorough perusal of materials of criminal cases registered against him, it is clear that the petitioner is a die-hard anti-social and criminal who has scanty regard for the law of the land. Hence, his detention under Section 3(2) of the NSA Act is necessary in the interest of the maintenance of public peace as well as upholding public order in the locality.

(c) The aforesaid order of detention was approved by the State Government on 20.02.2020 and subsequently based on the report of the Advisory Board, the same was confirmed on 06.04.2020 for a period of three months. Thereafter the period of detention has been extended on 06.05.2020 and 30.07.2020 pursuant to which the petitioner continues to be in detention.

3. Learned Counsel for the petitioner submits that the detaining authority while presenting the report against the detenue has not disclosed the basic facts, material particulars which led to passing an order of detention. It has further not been disclosed that what is the basis and circumstances which led the District Magistrate to come to a conclusion that the detenue is terrorizing the innocent general public. Further, he has contended that the order of detention was passed on 12.02.2020 whereas the grounds of detention was served on 16.02.2020 which indicates that the order of detention was passed without considering the materials on record. It is therefore sufficient to activise this Court into examining the legality of detention.

4. He has further contended that the Superintendent of Police and the District Magistrate have relied on stale cases as the detenue has been acquitted in quite a few of them, the same has not been brought on record. Moreover, the cases relied upon by the detaining authority are cases affecting individuals and none of them in any manner affects the tempo of life. It has also been contended that there were no particulars for the detenue to make his representation and the details for the same was also not provided. Therefore, the information being incomplete and misleading does not satisfy the requirements of law. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. The detaining authority ought to have produced contemporaneous evidence to show that the authority had applied its mind to arrive at subjective satisfaction regarding such detention.

5. Learned Counsel for the Opposite Party No.2 submits that the order of detention of the petitioner was given only after thorough consideration and judicious application of mind. He has contended that there are chances of the petitioner getting bail in Sahadevkhunta P.S. Case No.319 dated 17.10.2019 and there is a chance of resumption of the said antisocial activities after his release. Further, upon preparation of the grounds of detention, the same was issued to the detenue on 16.02.2020 which is very well within the statutory period. It is further submitted that according to Section 3(4) of the NSA Act,

the grounds of detention should be provided after 5 days and within 15 days and therefore there has been no violation of the Act. Further he has submitted that the bare reading of the application dated 26.12.2019 of the Superintendent of Police, Balasore, it is evident that the activities of the detenue has not only affected individuals but the whole community disrupting peace and public order. Hence, the present petition should be dismissed.

6. Learned Counsel for the Opposite Party No.2 submits that on the basis of the materials available on record against the petitioner showing his anti-social and criminal activities in different cases for a considerable period which are prejudicial to the interest of the public at large and as the fact remains when the normal law of the land failed to curb the anti-social activities of the petitioner, the detaining authority was compelled to take recourse under the provision contained in the NSA Act. The detention of the petitioner has been made according to the procedure established by law. It is neither illegal nor unwarranted. Hence, the present petition should be dismissed.

7. Heard Mr. Debasis Sarangi, learned counsel appearing for the petitioner and Mr. Janmejaya Katikia, learned Additional Government Advocate for Opposite Party Nos.1 and 2 and perused the case records.

8. Preventive detention is not to punish a person for something he has done but to prevent him from doing it. Therefore, since the detention order passed on the allegation of involvement of the detenu in a number of criminal cases without disclosing any material in the report of the Superintendent of Police or materials available before the Detaining Authority that there is likelihood of breach of public order, the detention order cannot be sustained. The detaining authority at the time of passing the order of detention as well as the State Government while confirming the same should take into consideration the nature of allegations and offences alleged in the grounds of detention to examine whether the same relates to 'public order' and the normal law cannot take care of such offences and that the acts of the detenu mentioned in the grounds of detention are prejudicial to maintenance of public order or they only relate to "law and order". While interpreting the provisions this Court has pointed out in a number of cases that this Court rigidly insist that preventive detention procedure should be fair and strictly

observed. The detaining authorities should exercise the privileges sparingly and "in those cases only where there is full satisfaction".

9. The Hon'ble Supreme Court in the case of ***Yumman Ongbi Lembi Liema Vs. State of Manipur***[1]**,** referring to the earlier decision of the Hon'ble Supreme Court in ***Haradhan Saha Vs. State of West Bengal***[2], held that the extraordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution where the grounds of detention do not disclose any material which was before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection with the cases in respect of which he had been arrested to support the order of detention. It is also held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed.

10. The Supreme Court in ***Alpesh Navinchandra Shah v. State of Maharashtra***[3]***; State of Maharashtra v. Bhaurao Punjabrao Gawande***[4]***;*** **and** ***Rekha v. State of Tamil Nadu***[5]*,* wherein the detention orders were set aside on the ground that the purpose for issuance of a detention order is to prevent the detenu from continuing his prejudicial activities for a period of one year, but not to punish him for something done in the remote past. Further, there would have to be a nexus between the detention order and the alleged offence in respect of which he was to be detained and in absence of a live link between the two, the detention order could not be defended.

11. The Detaining Authority did not apply its mind before passing the order of detention so as to take the present petitioner to be a dangerous person and that he has become a threat to the public order and on overall consideration of the facts and circumstances it does appear that the Detaining Authority has failed to strike a balance between the Constitutional and the legal obligation charged upon him before passing the detention order and the manner in which the power of detention has been exercised in this case. It does not appear to have been exercised rationally. In fact, the District Magistrate has relied on a list of 20 cases provided by the Superintendent of

1. 2012 (I) OLR (SC) 550, **2.** (1975) 3 SCC 198, **3.** (2007) 2SCC 777, **4** (2008) 3 SCC 613, **5** (2011) 5 SCC 244.

Police while ordering for detention. However, he has not been taken into consideration that out of the 14 cognizable cases, there are 6 cases which have not yet been charge-sheeted yet including the one in which the SP is apprehensive that the petitioner may receive bail. Moreover, the learned Counsel for the petitioner has contended that out of the 20 cases, there are a few cases where the petitioner has been acquitted, which has not been brought on record by the SP. Further, the District Magistrate has failed to establish a proper nexus between alleged offence and order of detention under the grounds of detention.

12. In ***Yumman Ongbi Lembi Leima v. State of anipur and Ors.***[6], the Hon'ble Supreme Court held that-

> *"Para 15.* …personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order."

13. The Hon'ble Supreme Court in the case of ***Huidrom Konungjao Singh Vs. State of Manipur***[7]**,** held that three cumulative and additive nature of requirements are to be satisfied to pass the order of detention; they are:

> "*Para 9.*(i) The authority was fully aware of the fact that the detenu was actually in custody;
>
> (ii) There was reliable material before the said authority on the basis of which it could have reason to believe that there was real possibility of his release on bail and being released he would probably indulge in activities, which are prejudicial to public order;
>
> (iii) Necessity to prevent him for which detention order was required."

In ***Rekha v. State of Tamil Nadu through Secretary to Govt. and Anr.***[8], where the Supreme Court quashed the order of detention, while dealing with the issue held:

> *"Para 8.* A perusal of the above statement in para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail

6. (2012) 2 SCC 176, **7.** (2012) 7 SCC 181, **8.** (2011) 5 SCC 244.

> was allegedly granted by the concerned court. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused."

14. Preventive detention is an exception to the normal procedure and is sanctioned and authorized for very limited purpose under Article 22(3)(b) with good deal of safeguards. The exercise of that power of preventive detention must be with proper circumspection and due care. In a regime of constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such power is exercised. The legal obligation in this type of case, need to be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind will render the order unsustainable. In view of the above legal position, this Court has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective facts.

15. Similarly, in the instant case, the details of the alleged bail application have not been provided in the order of detention, ground of detention or in the application of the Superintendent of Police, Balasore. Further, no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned Court. The only mention regarding bail is in the letter dated 26.12.2019 by the Superintendent of Police, Balasore wherein he had reported that it has come to his knowledge that the petitioner has arranged for his bail. However, this statement is entirely ambiguous and this Court cannot rely on the same. Considering the above submissions, we are of the view that this Court should not allow the petitioner-detenu to be kept in custody on the basis of order of detention which is illegal, bad in law hence amounts to illegal custody of the petitioner detenu.

16. In view of what is discussed hereinabove, this Writ Petition deserves to be allowed and accordingly it is allowed. Consequently, the order of detention approved by the State Government on 20.02.2020 is quashed. However, we make it clear that this will not affect the criminal cases pending against the petitioner.

2020 (III) ILR - CUT- 637

KUMARI SANJU PANDA, J & S.K. PANIGRAHI, J.

WRIT APPEAL NO.701, 700, 702 & 703 OF 2019

BABITA SATPATHY & ORS. .....Appellants

.V.

STATE OF ODISHA & ORS. .....Respondents

IN W.A NO.700 OF 2019
DIBAKAR PANDA ..... Appellant

.v.

STATE OF ODISHA & ANR. .....Respondents

IN W.A NO.702 OF 2019
RAMAKANTA NATH & ORS. .....Appellants

.v.

STATE OF ODISHA & ORS. .....Respondents

IN W.A NO.703 OF 2019
HRUSIKESH PANDA & ANR. .....Appellants

.v.

STATE OF ODISHA & ORS. .....Respondents

LETTERS PATENT APPEAL – Writ Court dismissed the writ petition on the ground of non joinder of parties – Merit of the case was not considered – Prayer of the appellants to accommodate them in available vacancies as they are qualified and they have not any grievance against the persons already appointed – Prayers of the appellants considered in the appeal – Appeal allowed directing to accommodate the appellants against the vacancies unfulfilled/existing already as they are eligible. (Para 10)

W.A. NO.701, 700, 702 & 703 OF 2019

For Appellants : M/s.B.Routray(Sr.Adv.)
S.K.Samal, S.P.Nath, S.D.Routray, B.R.Pattnaik & A.K.Das.

For Respondents : Sri D.R. Mohapatra,Standing Counsel, School & Mass Education Department
(For Respondent Nos.1 & 2)

JUDGMENT Date of Hearing: 01.12.2020 : Date of Judgment: 23.12.2020

S.K. PANIGRAHI, J.

1. In the present Writ Appeals, the appellants seek to challenge the Order dated 29.11.2019 passed by the learned Single Judge in W.P.(C) Nos.16711 of 2016, 22369 of 2015, 18904 of 2015 and 18768 of 2015 which

were dismissed for non-joinder of proper parties without going into the merits of the case.

2. Since common question of facts and law are involved in all these Writ Appeals, the same are heard together and disposed of by this common judgment.

3. The appellants seek direction from the respondents opposite parties to recast the Selection List of Sikshya Sahayaks drawn pursuant to the advertisement as per merit and engage them as Sikshya Sahayaks in all the districts and grant the consequential service benefits to them.

4. The appellants having required requisite qualification and being trained as well as OTET qualified persons, had sought engagement to the post of Sikshya Sahayak on the basis of their Online Applications on 12.09.2014. The factual conspectus of the case revolves around issue of selection of some less meritorious candidates whereas the appellants claim to be more meritorious in comparison to other candidates to be accommodated. The resolution contending guidelines of the School and Mass Education Department for appointment of Sikshya Sahayaks which allowed the appellants to apply for the said post.

5. The short grievance of the appellants herein is that they are the eligible candidates for the post of Sikshya Sahayaks and pursuant to a direction of this Court in Writ Petition (Civil) No.18720 of 2014 and some other connected matters, the Commissioner-cum-Secretary was pleased to enhance the upper age limit by three to four years for the purpose of engagement of Sikshya Sahayak. Though the present appellants were applicants in response to the advertisement published on 12.09.2014, but their candidature were rejected on the ground of their overage.

6. The School and Mass Education Department though allowed the over aged eligible candidates but the cases of the appellants were rejected only due to their overage in their 3rd preference choice district. However, during the course of Online applications, since the appellants were over aged candidates i.e. more than 35 years, the website did not accept OnLine applications from the appellants. Being aggrieved by such non-acceptance of their OnLine applications, all the appellants have approached this Court and this Court was pleased to give direction to the State Government to take a decision

on the matter of fixation of overage. Pursuant to the order passed by this Court in W.P.(C) 18542 of 2014, a High Power Committee was constituted and a meeting was held under the Chairmanship of Commissioner-cum-Secretary to Govt., S & M.E. Department for relaxation of upper age limit for engagement of Sikshya Sahayaks and by their meeting decided to enhance their overage limit from 35 years to 42 years. When such decision was taken by the High Power Committee, the first and second preference choice district selections were almost over. In that context, the appellants made their grievance before the School and Mass Education Department and the said Department directed the OPEPA to allow over aged candidates to participate in the selection process in their third preference districts which they have opted during On-line application.

7. Since the OPEPA was conducting the selection process during the first preference selection, the appellants were shown to be rejected under the heading of "Cause of Rejection" as overage and the said rejected candidates due to overage has not yet been engaged.

8. Pursuant to the letter dated 30.07.2015, the School and Mass Education Department specifically directed the OPEPA which is Nodal Agency for selection of Sikhya Sahayak, on the basis of the advertisement published in the year 2014-15 and 2016-17 to accommodate all over aged eligible candidates in the third preference choice district. It has also been directed that a separate list of over aged candidates as per their third preference choice district was available in the district Log-in and that list to be treated as authenticated document for third preference recruitment process. Further, in the said letter it has been clearly mentioned that the candidatures of over aged candidates will be considered in their third preference choice district who have submitted their applications through Online subject to positive order of the Hon'ble Court.

9. Learned Single Judge has not considered the Writ Petitions filed by the appellants on merit but dismissed it solely on the ground of non-joinder of the necessary parties. Since there are large number of candidates for the said appointment as against large number of vacancies and the appellants do not have any grievance against the candidates who have already been appointed before the decision was taken by the State Government to enhance upper age limit from 35 to 42 years, learned counsel for the appellants submitted that it is very difficult to array all the candidates as parties and serving them by post

will take long time to get the service completed which practically becomes very difficult. Hence, the issue of non-joinder of parties is not a pertinent issue. Further the appellants are not against the appointment of any candidates rather they seek appointment against the existing vacant posts.

10. The appellants' grievance is only to accommodate them on vacant seats with the enhanced upper age limit. Mr. S.K. Samal, learned counsel for the appellants submits that as per information sought under the RTI Act, there are about 7062 numbers of posts of Sikshya Sahayaks which are lying vacant after the selection of Sikhya Sahayaks pursuant to the completion of recruitment process as per advertisement published in the year 2014-15. Since sufficient number of posts are lying vacant, the appellants can easily be accommodated without disturbing any selected candidates. Therefore, the orders passed by the learned Single Judge deserve to be quashed.

11. Learned Standing Counsel for the School and Mass Education Department submits that the appellants have filed this appeal under Clause 10 of Letter Patent's Act read with Chapter VIII, Rule-2 of the Orissa High Court Rules challenging the order dated 29.11.2016 passed by the learned Single Judge in W.P.(C) Nos.16711 of 2016, 22369 of 2015, 18904 of 2015 and 18768 of 2015 which were dismissed solely on the ground of non-joinder of proper parties. It is further submitted that the appellants' allegation about less meritorious candidates have been accommodated vis-à-vis the present appellants is erroneous. He has further contended that the appellants have been given opportunity to appear in fourth preference district and they were found below the cut-off marks. Hence, they were not engaged as Sikhya Sahayaks.

12. On perusal of the materials available on record and considering the submissions of learned counsels for both sides, we set aside the orders dated 29.11.2019 passed by the learned Single Judge in W.P.(C) Nos.16711 of 2016, 22369 of 2015, 18904 of 2015 and 18768 of 2015. However, it is made clear that since there are unfulfilled vacancies of posts of Sikhya Sahayaks available against which the appellants could be accommodated, we, therefore, direct the respondents to accommodate these appellants against the said vacant posts as they are eligible for the said posts.

13. In the light of the above, we dispose of all the Writ Appeals. No order as to cost.

2020 (III) ILR - CUT- 641

S. K. MISHRA, J & MISS SAVITRI RATHO, J.

CRA NO. 47 OF 2001

DILLIP @ SAMBHU PATNAIK .....Appellant

.V.

STATE OF ORISSA .....Respondent.

(A) CRIMINAL TRIAL – Offence of murder – Appreciation of evidence – During the course of investigation, the Investigating Officer seized the blood stained pitch pieces, sample pitch piece, blood stained earth, sample earth, the wearing apparels of the deceased, blood stained cement pieces, blood stained earth, sample cement piece from the boundary wall of the Utkal Cinema Hall, Sunabeda – The weapon of offence i.e. knife has been seized on the leading to discovery by the accused under Section 27 of the Indian Evidence Act, 1872 – The wearing apparels of the accused and blood sample of the accused were collected and seized – All the seized articles have been kept in custody of the Investigating Officer after seizure – Nowhere in the forwarding report it has been mentioned that the different Material Objects sent for chemical examination were sealed separately – Effect of such lacuna – Held, if all the Material Objects were not kept separately in different sealed packets and kept together then there is danger having misleading report of chemical and serological examination – So, this circumstance cannot be relied upon by us to come to the conclusion that the prosecution has established beyond reasonable doubt that the M.O.V, the knife, recovered by the police on the discovery statement made by the accused/ appellant under Section 27 of the Indian Evidence Act, 1872, is an incriminating circumstance against the appellant. (Para 8)

(B) CRIMINAL TRIAL – Injuries on the person of the accused – Whether it implicates him as an accused? – Held, non-explanation of the injuries on the person of the accused by the prosecution should be considered as facts and circumstances against the prosecution.

(Para 9)

(C) CRIMINAL TRIAL – Presence of Human blood on the wearing apparel of the accused – Accused himself has sustained bleeding injuries – Blood grouping of deceased has not been made – Whether the presence of the blood group on the accused is a incriminating circumstance against him? – Held, No. (Para 12)

Case Laws Relied on and Referred to :-

1. 1952 (2) SC 343 : Hanumant Govind Nargundkar & Anr .Vs. State of Madhya Pradesh.
2. (1992) 5 OCR 370 : Binder Munda .Vs. State.
3. AIR 1976 SC 2263 : Lakshmi Singh & Ors. etc. .Vs. State of Bihar.
4. AIR 1997 SC 3907 : Smt. Rukma & Ors .Vs. Jala & Ors.

For Appellant : Mr. Debasis Sarangi.
For Respondent : Mr. A.K. Nanda, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 14.12.2020

S. K. MISHRA, J.

The sole appellant-Dillip @ Sambhu Patnaik has challenged his conviction and sentence to undergo imprisonment for life for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity) recorded by the learned Sessions Judge, Koraput, at Jeypore in Sessions Case No.144 of 1997, vide the judgment of conviction and order of sentence dated 05.02.2001.

02. The case of the prosecution in brief is as follows:

In this case, the occurrence took place on 15.03.1997 between 5.30 P.M. and 6.00 P.M. The accused with a view to settling scores with deceased Sushanta on account of a previous quarrel had called him and the deceased had gone in that connection to 'L' zone, Sunabeda. In pursuance of his plan, the accused was armed with a knife. In course of discussion, it is alleged that the accused took the deceased to a lonely place and stabbed him several times with the knife causing multiple injuries and instantaneous death of the deceased. It is alleged that on a previous occasion the deceased had assaulted the accused and the accused was in search of an opportunity to wreak vengeance. After the occurrence, the accused fled away from the village, but five days after the occurrence he was arrested on 20.03.1997 in village Dasamantapur. After his arrest while in custody, the accused gave a disclosure statement relating to concealment of the knife, the weapon of offence and the Investigating Officer acting upon the information furnished by the accused recovered the weapon of offence. Blood stains pertaining to the deceased were found in the knife seized by the police. Accused was found to have received injuries in his fingers cotemporaneous with the alleged occurrence. On completion of investigation, charge-sheet was submitted

against the accused. Upon commitment, the accused faced the trial for the offence alleged.

03. The accused pleaded not guilty to the charge. The defence plea is one of denial.

04. The prosecution, in support of its case, examined thirteen witnesses in all of whom P.W.5 is the brother of the deceased, who, on the date of occurrence got information about the murderous assault of his brother, verified the incident and reported about the homicidal death of the deceased to the police. P.W.12 is a friend of the deceased, who, according to the prosecution, had brought the deceased at the latter's instance to the 'L' zone in his motor cycle and had left him there. As P.W.12 returned to give the deceased a lift back after some time, he found the deceased missing and while he was waiting, he was informed that the deceased was lying near the College Square with multiple injuries. He went to the spot where he met P.W.5, the informant. The deceased was lying there dead. P.W.2 is the father of the accused, who deposed that the accused having delivered the flour after grinding wheat on the date of occurrence was found missing. P.Ws.1 and 4 are formal witnesses to the inquest over the dead body of the deceased before it was sent to Koraput Hospital for post-mortem examination. P.W.4 also witnessed the seizure of blood stained and sample earth and blood stained Chappal at the spot as per the seizure lists Exts.2 and 3 respectively. P.W.7 is the Pharmacist of Podagada Government Hospital, Podagada who on the day following the alleged occurrence had the occasion of treating the accused as an outdoor patient for cut injuries on his right little and ring fingers and entering his name in the Register of Out Patients which was seized by police as per Ext.5. The relevant entry is marked as Ext.7. P.Ws.8 and 11 are the witnesses to the seizure of the knife-M.O.V, the weapon of offence, and the wearing apparels of the accused. P.W.10 is the Medical Officer, who held the autopsy on the dead body of the deceased and found five incised injuries and two stab wounds. He confirmed his opinion that the knife M.O.V could produce the injuries found in the deceased. P.W.9 is the Assistant Surgeon, who after apprehension of the accused on 21.03.1997 examined him and noticed two skin deep cut injuries on the tips of right little and ring fingers. He proved the injury report of the accused as Ext.11 and in response to a query made by the police, he gave his affirmative opinion that the knife could produce the superficial injuries on the person of the accused. P.Ws.3 and 6 did not support the prosecution version and turned hostile. P.W.13 is the

Investigating Officer, who registered the case and made investigation and after completion of investigation submitted charge-sheet.

05. Learned Sessions Judge, Koraput, at the outset, recognized the fact that there was no direct evidence implicating the accused in the alleged crime. However, he relied upon the following circumstances to come to the conclusion that prosecution has proved its case beyond reasonable doubt. The circumstances are enumerated below:

(i) the death of the deceased Sushanta was established by the prosecution to be homicidal in nature;

(ii) the weapon of offence-M.O.V, a knife, was recovered on the disclosure statement made by the accused/ appellant under Section 27 of the Indian Evidence Act, 1872;

(iii) the blood stain determined to be belonging to human blood of 'A' group was found on the same which was the same blood group found in the wearing apparels of the deceased;

(iv) the accused did not explain the injuries he has sustained on his right little and ring fingers;

(v) small patch of blood of human origin of group 'A' found on the pant of the accused seized from him at the time of his arrest; and

(vi) the accused was absconding for five days after committing the crime.

06. Mr. Sarangi, learned counsel for the appellant argues that so far as homicidal nature of death of the deceased is concerned, the appellant does not dispute the fact or the factual findings recorded by the learned Sessions Judge, Koraput. He disputes the leading to discovery of the weapon of offence. He further disputes the reliance by the learned Sessions Judge, Koraput on the incriminating circumstance of finding of human blood of group 'A' on the weapon of offence. Mr. Sarangi, learned counsel for the appellant further argues that injuries found on the person of the accused has to be explained by the prosecution. Therefore, he assailed the presumption drawn by the learned Sessions Judge, Koraput against the accused for his non-explanation on the injuries that were found on the right little and ring fingers of the appellant and termed it as a circumstance, not explained by the prosecution, will not favour the prosecution, rather, it will favour the accused.

Finally, learned counsel for the appellant argues that finding of a small patch of blood on the pant of the accused which is determined to be human origin of group 'A' is of no consequence, as it is the case of the prosecution that the accused has sustained injuries on right little and ring fingers and finding of blood in the wearing apparels is natural. In a situation where the blood group of the accused has not been determined by the prosecution, conclusively, the finding of a small patch of blood on the pant of the accused, admittedly, when he had an injury on his right little and ring finger will not in any manner help the prosecution. Therefore, learned counsel for the appellant argues to set aside the conviction and acquit the appellant of the offence in which he has been convicted.

07. Mr. A.K. Nanda, learned Additional Government Advocate argues that findings recorded by the learned Sessions Judge, Koraput are supported by materials available on record. Therefore, he argues that the appeal should be dismissed.

08. So far as homicidal death of the deceased is concerned, there appears to be no doubt. Hence, we are not inclined to disturb such findings of the learned trial judge. However, the most import aspect to be considered by this Court at present is whether the prosecution has established its own case that it is the accused/ appellant only who has done the deceased to death and no other person. In this connection, we take note of the reported judgment passed in the case of **Hanumant Govind Nargundkar and another -vrs.- State of Madhya Pradesh**: reported in 1952 (2) SC 343, wherein the Hon'ble Supreme Court has held as follows:

> "xx xx xx xx xx In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson to the jury in Reg. v. Hodge, (1838) 2 Lewin 227) where he said :
>
> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."
>
> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the

> first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. Xx xx xx xx xx xx "

08.1. So far as the discovery of the weapon of offence M.O.V and finding of blood of human origin of group 'A' are concerned, it is seen from the evidence of P.W.13, the Investigating Officer who happens to be the Officer-In-Charge of Sunabeda Police Station that after seizure of the same, he sent the knife to the Doctor of Sunabeda Hospital to opine whether the injury can be possible by M.O.V. This was done on 20.03.1997. Then again on 22.03.1997 he sent the M.O.V to the Doctor who had conducted post-mortem examination with a query to give his opinion whether the injuries on the deceased can be possible by it.

08.2. On 27.03.1997 on his prayer, learned S.D.J.M., Koraput sent the seized articles including M.Os.I to V to S.F.S.L., Bhubaneswar for chemical examination. Ext.22 is the office copy of the forwarding letter of the learned S.D.J.M., Koraput.

08.3. Examination of the forwarding letter reveals that during the course of investigation, the Investigating Officer seized the blood stained pitch pieces, sample pitch piece, blood stained earth, sample earth, the wearing apparels of the deceased, blood stained cement pieces, blood stained earth, sample cement piece from the boundary wall of the Utkal Cinema Hall, Sunabeda. The weapon of offence i.e. knife has been seized on the leading to discovery by the accused under Section 27 of the Indian Evidence Act, 1872. The wearing apparels of the accused and blood sample of the accused were collected and seized. All the seized articles have been kept in custody of the Investigating Officer after seizure. Nowhere in the forwarding report Ext.22 it has been mentioned that the different Material Objects sent for chemical examination were sealed separately. In this connection, we rely upon the observations made by the Division Bench of this Court in the case of **Binder Munda –vrs.- State**, reported in (1992) 5 OCR 370 and find it apposite to quote the paragraph 7 of the judgment as follows:

> "The next item of evidence relied upon by the learned trial Judge is matching of blood group in the wearing apparel of the appellant, namely, Dhoti, M.O. II and the wearing apparel of the deceased like Lungi, underwear and banian, M.Os. Ill to V. Apart from the fact that matching of the blood group by itself cannot be a conclusive proof to fasten the appellant with culpability, it would be noticed, as contended on behalf of the appellant, relying on two Bench decisions of this Court in the case of Nimai Murmu v. The State, 59 (1985) CLT 488 and in the case of Lakshmi Jani v. State 60 (1986) CLT 346 that the I. O. did not keep the individual material objects in sealed packets while sending these items for chemical examination. No doubt the forwarding letter Ext. 14 would go to show that the entire parcel containing the items was sealed, but there is nothing to show that the individual seven items contained inside the parcel was each contained in a separate packet and was sealed. It is held in 60 (1985) CLT 346 (supra) as follows :
>
> ".....It is necessary and desirable that the police officer recovering articles with suspected stains of blood should immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the articles were sent to the Chemical Examiner for analysis. If such precautions are not taken, the Court may not place the same reliance on the discovery of blood stains, on the seized articles as it would have done if necessary precautions had been taken."
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> In both the decisions aforecited such infirmity is being noticed and the conviction of the appellant was set aside."

Thus, a plain reading of this judgment relied upon by the learned counsel for the appellant leads us to come to the conclusion that if all the Material Objects were not kept separately in different sealed packets and kept together then there is danger having misleading report of chemical and serological examination. So, this circumstance cannot be relied upon by us to come to the conclusion that the prosecution has established beyond reasonable doubt that the M.O.V, the knife, recovered by the police on the discovery statement made by the accused/ appellant under Section 27 of the Indian Evidence Act, 1872, is an incriminating circumstance against the appellant.

09. As regards the presumption drawn by the learned Sessions Judge, Koraput regarding the injuries found on the little and ring fingers of the right hand of the accused, we are of the opinion that the arguments advanced by the learned counsel for the appellant require serious consideration. Learned Sessions Judge, Koraput at page 9 containing the contents of paragraph 8 of the impugned judgment has given a specific finding. We consider it apposite to quote below:

> "xx xx xx The presence of injuries on the person of the accused is a circumstance against him and devoid of explanation is an admissible piece of evidence against

> him. In this connection, reliance is placed on a decision of the Supreme Court in Laxmi Singh & others v. State of Bihar reported in A.I.R. 1976 SC. 2263. The same is the view in the decision in Smt. Rukma and others v. Jala and others reported in A.I.R. 1997 S.C. 3907 wherein it is held that presence of bleeding injuries with the accused is a circumstance implicating him in the alleged occurrence. The nature and location of injuries only further the prosecution case that the accused accidentally received such injuries while dealing stab-blows with the knife on the deceased. The presence of such injuries serve as a mute testimony of the complicity of the accused in the murder of the deceased in the manner it was caused. xx xx xx."

10. To examine the acceptability of the contentions made by the learned counsel for the appellant, we have carefully read the judgment of the Hon'ble Supreme Court passed in the case of **Lakshmi Singh and others etc. –vrs.- State of Bihar**: reported in AIR 1976 SC 2263. We have examined the judgment rendered by the Hon'ble Supreme Court in the aforesaid case and do not find any observation of the Hon'ble Supreme Court that presence of bleeding injuries on the person of the accused is a circumstance implicating him in the alleged occurrence. Rather, on the contrary, the Hon'ble Supreme Court has held in the said case that non-explanation of the injuries on the person of the accused by the prosecution should be considered as facts and circumstances against the prosecution. At paragraph 11 of the said judgment, S. Murtaza Fazl Ali, J, as His Lordship was then, has very pithily summarized the law governing the field. It is appropriate to quote the same. It reads as follow:

> "P.W. 8 Dr. S. P. Jaiswal who had examined Brahmdeo deceased and had conducted the postmortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the Court, on April 22, 1966 and found the following injuries on his person:
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> "1. Bruise 3" x 1/2" on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.
>
> 2. Incised wound 1" x 2 m.m. x skin subcutaneous deep on the lateral part of the left upper arm, near the shoulder joint.
>
> 3. Punctured wound 1/2" x 2 m.m., x 4 m.m. on the lateral side of the left thigh about 5 inches below the hip joint."
>
> According to the Doctor, injury No. 1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been

suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eye-witnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Rai v. State of Bihar (1968) 3 SCR 525 = (AIR 1968 SC 1281) tried to brush it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries is wholly irrelevant to the issue, particularly when the very Doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasrath Singh also. In the case referred to above, this Court clearly observed as follows:

"The trial Court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W. 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabilised. Under these circumstances the prosecution had a duty to explain those injuries.... In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue: and (2) that the injuries probabilise the plea taken by the appellants. The High Court in the present case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In Puran Singh v. The State of Punjab, Criminal Appeal No. 266 of 1971 decided on April 25, 1975 = (reported in AIR 1975 SC 1674) which was also a murder case, this Court, while following an earlier case, observed as follows:

"In State of Gujarat v. Bai Fatima Criminal Appeal No 67 of 1971 decided on March 19, 1975= (reported in AIR 1975 SC 1478) one of us (Untwalia, J.), speaking for the Court, observed as follows:

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all."

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case. It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused relying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. Xx xx xx xx. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima Criminal Appeal No. 67 of 1971 decided on March 19, 1975 = (reported in AIR 1975 SC 1478) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

11. A careful examination of the reported judgment passed in the case of **Smt. Rukma and others –vrs.- Jala and others**: AIR 1997 SC 3907 also shows that there is no observation by the Hon'ble Supreme Court that the presence of bleeding injuries on the person of the accused is a circumstance implicating him with the alleged occurrence. So, this circumstance of finding injuries on the little and ring fingers of the right hand of the accused is not a circumstance which can be accepted as an incriminating one against the accused/ appellant.

12. The next circumstance is the finding of a small patch of blood of human origin of group 'A' on the pant of the accused. It is not disputed at this stage that the blood group of the accused/ appellant has not been determined in this case. Coupled with the fact that the prosecution case is that the accused has sustained injuries on his right little and ring fingers, in the absence of determination of blood group of the convict/ appellant belongs to a group other then group 'A', such finding of small patch of blood human origin of group 'A' on his pant will not be an incriminating circumstance against the accused. So, this circumstance fails in this case.

13. The last circumstance taken into consideration by the learned Sessions Judge, Koraput is the alleged absconding by the accused/appellant after commission of the crime. In this connection, the prosecution heavily relied upon the evidence of P.W.2 who happens to be the father of the accused/appellant. He stated in his examination-in-chief that on 15.03.1997 the police came to his quarters in search of his son. On that day, the accused had gone for grinding wheat at about 5.30 P.M. After keeping the Atta in the house as usual he left the house. Two days thereafter, he got information from the police that his son returned. His son did not return to the house till the information he received from the police. This fact cannot be taken into consideration as an incriminating circumstance of abscondance of the accused/ appellant after commission of crime. We have carefully examined the evidence of P.W.13, the Investigating Officer in this case. He has not stated in his examination-in-chief while being examined before the learned Sessions Judge on oath that the appellant was absconding. There is absolutely no material on record to show that the appellant was absconding from the police immediately after the occurrence.

14. Thus, on a conspectus of the materials available on record, we are of the opinion that the prosecution, in this case, has not established all the

circumstances which have been relied upon by the learned Sessions Judge, Koraput to record the conviction against the appellant. We are also of the opinion that chain of circumstances is not complete, unerringly pointing towards the guilt of the accused. Thus, keeping in view the aforesaid conclusion, we are of the opinion that the conviction of the appellant under Section 302 of the Penal Code recorded by the learned Sessions Judge, Koraput is erroneous and is liable to be set aside.

15. Accordingly, we allow the appeal and set aside the impugned judgment convicting and sentencing the appellant under Section 302 of the Penal Code passed by the learned Sessions Judge, Koraput, at Jeypore in Sessions Case No.144 of 1997. The appellant is acquitted of the said charge.

Since the appellant, namely, Dillip @ Sambhu Patnaik, is on bail, the bail bond be cancelled in the aforesaid case.

The L.C.R. be returned back forthwith.

As restrictions are continuing due to COVID-19 pandemic, learned counsel for the parties may utilize the soft copy of this order available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

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2020 (III) ILR - CUT- 652

S. K. MISHRA, J & MISS SAVITRI RATHO, J.

JCRLA NO. 73 OF 2006

SHYAM SUNDAR JENA .....Appellant

.V.

STATE OF ORISSA .....Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 32 – Dying declaration – Reliability – Factors to be considered – Held, (I) Whether the dying declaration is true and voluntary (ii) Whether it has been made as result of tutoring, prompting or imagination and (iii) Whether the

deceased had the opportunity to observe and identify the assailants and was in a fit state to give the declaration. (Para 12)

(B) CONSTITUTION OF INDIA, 1950 – Arts. 72 and 161 read with Section 432 of Cr.P.C – Power to grant of remission/commutation of sentences – Right to claim or apply due to delay in disposal of appeal – Held, the right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation – All that he can claim is a right that his case be considered – Ultimate decision whether remissions be granted or not is entirely left to the discretion of the authorities concerned, which discretion ought to be exercised in a manner known to law and courts do not have jurisdiction to pass an order for a remission of imprisonment of life and any other kind of sentence – The only right of the convict i.e. recognized is a right to apply to the competent authority and have his case considered in a fair and reasonable manner. (Para 23)

Case Laws Relied on and Referred to :-

1. 85 (1998) C.L.T. 105 (S.C.) : State of Orissa Vs. Parsuram Naik.
2. (1992) 2 SCC 474 : PANIBEN (SMT) Vs. State of Gujurat.
3. (2012)12 SCC 120 : Surinder Kumar vs. State of Punjab.
4. (2016) 7 SCC 1 : Union of India Vs. V.Sriharan Alias Murugan & Ors.
5. [1958] S.C.R. 552 : AIR 1958 SC 22 : Khusal Rao VS. The State of Bombay.
6. (2008) 13 SCC 767 : Swamy Sraddananda (2) Vs. State of Karnataka.
7. (2020) 79 OCR 787 : Managobinda Mohapatra Vs. State of Odisha.
8. (2020) 80 OCR 89 : Nitya @ Nityananda Behera Vs. State of Odisha.

For Appellant : M/s. Ramani Kanta Pattnaik, B.C.Parija & R.R.Rout.

For Respondent : Mr. Subir Kumar Pallit, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 16.10.2020

S.K.MISHRA, J.

In this appeal, the appellant-convict, Shyam Sundar Jena, has assailed his conviction under Section 302 of the Indian Penal Code, 1860(hereinafter referred to as the "Penal Code" for brevity) and sentence of imprisonment for life and to pay a fine of Rs.1000/- (rupees one thousand), in default to pay the fine, to undergo rigorous imprisonment for one month, passed by learned Addl. Sessions Judge, Jajpur in S.T. Case No.660/2003 (arising out G.R. Case No.370/2003 of the court of learned S.D.J.M., Jajpur corresponding to Binjharpur P.S. Case No.50/2003).

2. Shorn of unnecessary details, the prosecution case in brief is that the deceased-Urmila had married the appellant-accused sometime in the year 1994. At the time of marriage, a sum of Rs.20,000/-, gold chain, ring etc., were given as per the demand made from the side of the appellant. After the marriage, the appellant further demanded a sum of Rs.10,000/- and he used to assault Urmila and force her to bring the said amount as dowry. The matter was settled on number of occasions by the village gentries. It is alleged that on 7.7.2003 night the appellant forcibly opened the door of the room where Urmila had slept with her son. The appellant poured kerosene and set her on fire with a match stick. Thereafter Urmila screamed and her brother-in-law came. He abused and slapped the appellant. Urmila had sustained extensive burn injuries and implicated the appellant in the said manner before others who arrived at the spot. She was shifted to District Headquarters Hospital, Jajpur in a trekker. In the same night one Lalu Jena @ Babaji came and informed Ghanashyam(brother of Urmila) about the shifting of Urmila to the said Hospital. Thereafter after advise of the Doctor, Urmila was shifted to S.C.B. Medical College and Hospital, Cuttack.

3. On 10.4.2003 Ghanashyam submitted F.I.R. before the Officer-in-charge, Binjharpur Police Station. In pursuance of the F.I.R. lodged, one Basanta Kumar Jena, Officer-in-charge of Binjharpur P.S. rushed to S.C.B. Medical College and Hospital, Cuttack and found Urmila to have sustained extensive burn injuries on her body. He took steps for recording the dying declaration of Urmila and Urmila expired on 13.4.2003.

4. During course of investigation, the Investigating Officer issued requisition for medical examination of the appellant and his son. He seized the wearing apparels of the deceased Urmila and a pillow. Sarat Kumar Nathasharma, S.I. of Police, Bijnjharpur P.S. (another Investigating Officer) took step for examination of those articles by the Director, State Forensic Science Laboratory, Rasulgarh. After completion of investigation, the Investigation Officer submitted charge sheet against the appellant.

5. In order to prove its case, the prosecution has examined 26 witnesses. P.W.1, Ghanashyam Jena, is the informant. P.W.2- Surendra, P.W.5- Kashi, P.W.12-Bijay, P.W.15-Narayan, P.W.16-Lalu, P.W.23-Baishnab P.W.19-Dhiren and P.W.20-Manoj are post occurrence witnesses. P.W.6-Pramila (sister of Urmila), P.W.9-Shyasundar (brother of Urmila), P.W.10-Dukhini(mother of Urmila) and P.W.11-Sanjib(another brother of Urmila)

were examined to establish about the prosecution case. P.W.17-Pagal was examined to establish that he gave a sum of Rs.10,000/- and a gold chain as part of dowry on the request of P.W.1's father. P.W.-25-Dr. Pramod Kumar Mallik, Asst. Professor of Surgery, S.C.B. Medical College and Hospital, Cuttack, gave the certificate that Urmila was in a fit state of mind and P.W.16-Nigamananda Panda, the then Executive Magistrate posted at Cuttack Sadar, recorded the dying declaration of Urmila in presence of P.W.7-Prasanta and P.W.8-Pitambar. P.W.18-Dr.Niranjan Pati, O & G Specialist, Binjharpur P.H.C. examined the appellant and his son, P.W.24-Dr. Braja Kishore Das, Lecturer, F.M.T. Department of S.C.B. Medical College and Hospital, Cuttack conducted post mortem examination on the dead body of Urmila. P.W.3-Kusa, P.W.4-Kalandi, P.W.13-Golakhs and P.W.7-Sudhir are seizure witnesses. P.W.21-Sarat Kumar Nathsharma and P.W.22-Basant Kumar Jena are the Investigating Officers.

6. Relying on the evidence led in this case, the learned Addl. Sessions Judge came to the following findings:-

(i) The death of the deceased was homicidal in nature.

(ii) The death is caused by extensive burn injuries.

(iii) The deceased was married to the appellant. This fact was not disputed by the appellant in his statement recorded under Section 313 of the Criminal Procedure Code, 1973 (hereinafter referred to as the "Cr.P.C." for brevity)

(iv) Relying upon the evidence of P.Ws.1, 6,7,25 and 26 together with the evidence of P.W.22-the I.O., the learned Addl. Sessions Judge has come to the conclusion that there is no eye witness to the occurrence and the prosecution has solely relied upon the dying declaration of the deceased-Urmila, which has been established beyond all reasonable doubt.

Hence he proceeded to convict the appellant as aforesaid.

7. Mr. Ramani Kanta Pattnaik, learned counsel appearing for the appellant, submits that the appellant does not dispute that the death of the deceased is homicidal in nature or the fact he had married to the deceased. Mr. Pattnaik, further submitted that the appellant disputes the veracity of the dying declaration i.e. Ext.4 recorded by the Executive Magistrate, P.W.26. As per the learned counsel for the appellant, the dying declaration cannot be accepted as the F.I.R. in this case, which has been lodged by P.W.1, implicates six persons including the appellant. But in the dying declaration

no such implication has been made out against five other persons, who happens to be the relations of the appellant. It is also submitted by the learned counsel for the appellant that in the F.I.R., P.W.1 has categorically mentioned that after some days of her admission to the Hospital, the condition of the deceased improved and she stated the name of six persons whereas in the dying declaration made before the Executive Magistrate she has named only one person, i.e. the appellant, to be the perpetrator of the crime. It is also argued that the dying declaration has not been recorded by the Executive Magistrate in question answer form. Hence, it should not be accepted as gospel truth. Additionally, it is argued that the doctor, who has certified about the mental condition of the deceased to give a statement before the Magistrate, i.e. P.W.25, has stated that he has not examined the deceased before declaring her to be in a proper state of mind to give any statement before the Magistrate. Laying emphasis is on the statement of P.W.25, the doctor-P.K.Mallik, in paragraph-2 of his examination-in-chief that after recording of the dying declaration he has made an endorsement to that effect in the dying declaration. Learned counsel for the appellant submits that it runs contrary to the evidence of P.W.26-Nigamananda Panda, the Executive Magistrate, in the sense that Dr. P.K.Mallik stated before him that the deceased-Urmila was mentally and physically fit to give the dying declaration prior to the recording of the dying declaration.

8. Learned counsel for the appellant also argued that as there is no independent collaboration of the dying declaration, it cannot be the sole basis of conviction. Therefore the learned counsel argued that this is a fit case where the dying declaration should be rejected by the appellate court and the appellant be set at liberty holding that the prosecution has not proved its case beyond all reasonable doubt.

Alternatively, it is argued that there is an inordinate delay in disposal of the appeal. After 17 years and 6 months from the date of his arrest the appeal is being taken up for hearing. So, this is a fit case where sentence of imprisonment of life should be remitted to the period already undergone. This is more so because there is no motive for committing the murder of the deceased and only due to drunkenness, the appellant has committed the crime. Learned counsel for the appellant has relied upon the reported case of ***State of Orissa Vs. Parsuram Naik***; 85 (1998) C.L.T. 105 (S.C.). However, the judgment of the Hon'ble Supreme Court in the case of ***State of Orissa Vs. Parsuram Naik*** (supra) is distinguishable in the sense that in the reported

case the alleged oral dying declaration made before the mother of the deceased and the High Court did not find the same to be credible. So that is not applicable to this case.

9. Mr. Subir Kumar Pallit, learned Addl. Government Advocate, on the other hand, submits that if the dying declaration is accepted to be true and voluntary, conviction can be upheld on the basis of the uncorroborated testimony and uncorroborated dying declaration of the deceased. He relies upon the case of ***PANIBEN (SMT) VS. STATE OF GUJURAT***; (1992) 2 SCC 474, and submits that there are three safeguards and ten principles that have to be kept in mind and on the basis of the same conviction can be made. He also relied upon the reported case of ***SURINDER KUMAR VS. STATE OF PUNJAB***; (2012)12 SCC 120, and argued that the Hon'ble Supreme Court has rejected an objection terming the same to be a technical objection regarding the non-availability of the certificate and endorsement from the Doctor regarding the mental fitness of the deceased. It is held that it is a mere rule of prudence and not the ultimate test as to whether or not the dying declaration was truthful or voluntary. It was also argued that no format has been prescribed for recording a dying declaration. Therefore, it is not obligatory that the dying declaration should be recorded in a question-answer form.

As regarding the alternative submission of remission of the sentence to be already a period undergone from life imprisonment, learned Addl. Government Advocate submits that the remission of sentence is in the exclusive jurisdiction of the executive and the Court should not in such a situation interfere with the same. He also relies upon the reported case of ***UNION OF INDIA VS. V.SRIHARAN ALIAS MURUGAN AND OTHERS***; (2016) 7 SCC 1, which is a Constitution Bench judgment regarding the scope of the power of remission of the State.

10. Keeping in view the aforesaid submissions, let us examine whether the judgment of conviction recorded by the learned Addl. Sessions Judge only on the basis of the dying declaration stands scrutiny or not. At the outset, we take note of the reported case of ***KHUSAL RAO VS. THE STATE OF BOMBAY***; [1958] S.C.R. 552; AIR 1958 SC 22; which is quoted herein below:-

> "On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we

have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, (*Guruswami Tevar, I.L.R. (1940) MAD 158*), (*1*) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (*2*) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (*3*) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (*4*) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (*5*) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (*6*) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

11. Thus, it is clear that dying declaration can be accepted as the sole material available recording a conviction of the appellant. In the case of ***PANIBEN (SMT) VS. STATE OF GUJURAT*** (supra), the Hon'ble Supreme Court has held as follows:

> "Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:
>
> (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of M.P; 1976 (3) SCC 104).
>
> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of M. P. v. Ram Sagar Yadav, Ramavati Devi v. State of Bihar; 1985 (1) SCC 552).
>
> (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Ram Chandra Reddy v. Public Prosecutor; 1976 AIR SC 1994).
>
> (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. Sate of Madhya Pradesh; 1974 (4)SCC-264)
>
> (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P.; 1981 (Supp)SCC 25)
>
> (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.; 1981 (2) SCC 654)
>
> (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu; 1980 (Supp) SCC - 455).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar; 1980(Supp) SCC 769)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State of M.P.AIR 1988 SC 912).

(x)) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. V. Madan Mohan; 1989 (3) SCC 390)."

In the later judgment of ***SURINDER KUMAR VS. STATE OF PUNJAB*** (supra), the ratio decided by the Hon'ble Supreme Court, in ***PANIBEN (SMT) VS. STATE OF GUJURAT*** (supra), has been applied and the Supreme Court upheld the conviction of the appellant solely on the basis of dying declaration without any corroboration.

12. On the basis of the aforesaid settled principles of law, while assessing the evidence regarding the reliability of the dying declaration, the Court has to judge;

(i) whether the dying declaration is true and voluntary,

(ii) whether it has been made as a result of tutoring, prompting or imagination, and

(iii) whether the deceased had the opportunity to observe and identify the assailants and was in a fit state to give the declaration.

13. In this case, the evidence of P.W.26-Nigamananda Panda, the Executive Magistrate, is of much importance. He has categorically stated on oath that he proceeded to the S.C.B. Medical College and Hospital on being directed by the Collector, Cuttack. He consulted Dr. P.K.Mallik-P.W.25, who informed the Magistrate that the deceased-Urmila is mentally and physically fit to give dying declaration. Thereafter the Executive Magistrate put questions to the deceased about her name, her father's name, her native village, the marital village, her age and as to when her marriage was performed. The Magistrate further stated that she gave rational answers to the questions. Therefore, he satisfied that the deceased was in fit state of mind. Thereafter, the Magistrate started questioning the deceased about the

occurrence as to how she got the burn injuries and then recorded verbatism, the answer given by the deceased in his own hand. He read over the contents of the dying declaration recorded by him and had questioned the deceased if it was correctly written to which she had replied in affirmative. She was not in a position to attain signature on the statement and her left hand palm was burnt. So he took the right hand thumb impression of the deceased on the statement, i.e. Ext.4. Though cross examined at length, in our opinion, no major contradiction has been pointed out by the defence. Though, it appears that there are some difference between the evidence of P.Ws.25 and 26 as to when the opinion of the Doctor was given, it is a very hyper technical argument, which cannot be given much weightage.

14. The learned counsel's submission that the Doctor-P.W.25 has not examined the deceased medically to come to a conclusion that she is mentally and physically fit to give a statement before the Magistrate. However, in cross examination, he has denied the suggestion that the deceased was not in fit state of mind to give dying declaration, but he has admitted that he has not mentioned what type of examination, he had undertaken to satisfy himself about the mental and physically condition of the victim. Only a suggestion has been given that she was not mentally and physically fit to give a declaration without stipulating exactly what is the factual aspects of the case which lead to such a conclusion.

15. The submissions of the learned counsel for the appellant that the dying declaration is not in question answer form and hence it is not properly recorded are also of no value. The ratio laid down by the Hon'ble Supreme Court that there is no format prescribed for recording of dying declaration and it depends on facts of each case whether the dying declaration has been properly recorded or not and whether it can be relied upon as the sole basis for conviction. We are of the opinion that the evidence of P.Ws.6,7,22,25 and 26 read together lives no doubt in the mind of the Court that the dying declaration is true and voluntary and these five witnesses have not been cross examined to show that they have faulted while recording the declaration by P.W.26 or that these witnesses are not reliable. P.W.26, the Executive Magistrate recorded the dying declaration of the deceased on 10.4.2003 on the requisition made by P.W.22, the I.O., on being certified regarding the mental and physical fitness of the deceased-declarant by P.W.25 Dr. P.K.Mallik in presence of P.Ws.6 and 7, namely Pramila Jena and Prasant Kumar Parida, who are also signatory to the dying declaration. So all fitness

of things, we do not think this is a case where the dying declaration should be viewed its suspicious and conviction should be turned into a judgment of acquittal.

16. Moreover, this dying declaration has been relied upon by the learned Addl. Sessions Judge, who had the opportunity of observing the demeanor of the witnesses he recorded the evidence of those witnesses. His subjective findings of reliability on P.Ws.6,7,22,25 and 26 should not be lightly brushed aside by the appellate court.

17. The learned counsel for the appellant submitted that P.W.1 is the informant in this case. He has stated in the F.I.R. that on 09.4.2003 when the condition of her sister became better he could learn from her that the above mentioned accused (in the FIR) has tortured her both physically and mentally and then put kerosene on her body and set her on fire. In the F.I.R. he referred the names of six accused persons including the present appellant. He has admitted in the cross examination that he has mentioned the name of the appellant along with five others of his family members, but he denied the suggestion that he has done it deliberately to harass the accused persons.

18. In our considered opinion this will not adversely effect the probative value of the dying declaration as admittedly P.W.1 was not present at time of recording of the dying declaration. Secondly, he had talked to the deceased on 10th and from whatever impression he has got he lodged the F.I.R. So it cannot be taken as a major lacuna in the prosecution evidence to throw out the dying declaration, which has been recorded by an Executive Magistrate, with a medical certificate regarding the mental and physical fitness of the declarant and which has been accepted as good evidence of the murder of the deceased by the learned Addl. Sessions Judge. In that view of the matter, we are not inclined to allow the appeal.

19. The alternative submission that the appellant is in custody for more than 17 years and six months and, therefore, the sentence should be remitted to the period undergone. In the case of ***UNION OF INDIA VS. V.SRIHARAN ALIAS MURUGAN AND OTHERS*** (supra), the Hon'ble Supreme Court has held that the sentence of imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim

remission etc. as provided under Articles 72 and 161 of the Constitution of India to be exercised by the President and the Governor of the State and also as provided under Section 432 of the Cr.P.C.

20. As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant rules based on his/her good behaviour or such other stipulations prescribed therein. The other remission is the grant of it by the appropriate Government in exercise of its power under Section 432 of the Cr.P.C. Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432 Cr.P.C., then and then only giving credit to the earned remission can take place and not otherwise. Similarly in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid in ***Swamy Sraddananda (2) Vs. State of Karnataka***; (2008) 13 SCC 767. The Hon'ble Supreme Court has further held that convict undergoing the life imprisonment can always apply to the authority concerned for obtaining remission either under Articles 72 or 161 of the Constitution or under Section 432 of the Cr.P.C. and the authority would be obliged to consider the same reasonably subject to the principles laid down in the case of ***Swamy Sraddananda (2)*** (supra). The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation. All that he can claim is a right that his case be considered. Ultimate decision whether remissions be granted or not is entirely left to the discretion of the authorities concerned, which discretion ought to be exercised in a manner known to law. The only right of the convict i.e. recognized is a right to apply to the competent authority and have his case considered in a fair and reasonable manner.

21. We examined the notification issued by the State Government in this regard. The Government of Odisha in Law Department issued a notification bearing No.4817/L./IVJ.7/08(pt) Dt.5.5.10 regarding resolution of reconstituting the Board to review of sentence awarded to a prisoner and to recommend his premature release. The State Sentence Review Board has been constituted which is to meet at least once in a quarter at Bhubaneswar. The eligibility for premature release is quoted here in below:

> "Every convicted prisoner whether male or female undergoing sentence of life imprisonment and covered by the provisions of Section 433A Cr.P.C. shall be eligible to be considered for premature release from the prison immediately after serving out the sentence of 14 years of actual imprisonment i.e. without the remissions.
>
> It is, therefore, clarified that completion of 14 years in prison by itself would not entitle a convict to automatic release from the prison and the State Sentence Review Board shall have the discretion to release a convict at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant factors like;
>
> (a) Whether the convict has lost his potential for committing crime considering his overall conduct in jail during the 14 years incarceration;
>
> (b) The possibility of reclaiming the convict as a useful member of the society; and
>
> (c) Socio-economic condition of the convicts family.
>
> Section 433A was enacted to deny premature release before completing 14 years of actual incarceration to such convicts as stand convicted of a capital offence.xxx"

22. However, certain categories are mentioned in the said notification by way of the exceptions to the 14 years rule, in such cases, their cases shall be considered only after 20 years including remission. The period of incarceration inclusive of remission even in such cases should not exceed 25 years. These cases include cases of convicts imprisoned for life for murder with rape, murder with dacoity, murder involving an offence under the Protection of Civil Rights Act, murder of a child below 14 years of age, multiple murder, cases of gangsters, contract killers, smugglers and convicts whose sentence has been commuted to life imprisonment.

23. Thus, we are of the opinion that though the Courts do not have jurisdiction to pass an order for a remission of imprisonment of life to any other kind of sentence, but it is open for appellant to make an application to the proper authority in the State of Odisha, the Principal Secretary, Department of Home, Government of Odisha. So, we give liberty to the appellant to make an application to that effect to the concerned authority for remission of his sentence to the period already undergone. In this connection, the correctional authorities, more particularly the Prison Welfare Officer, shall render effective service to the appellant to make a proper representation before the proper authority designated by the State of Odisha. We also hope and trust that if any such application is made by the appellant, the authority

shall take a decision as early as possible preferably within a period of sixty days of the receipt of the application regarding remission in terms of the principles laid down by the Hon'ble Supreme Court in the case of ***Swamy Sraddananda (2)*** (supra) and in the case of ***UNION OF INDIA VS. V.SRIHARAN ALIAS MURUGAN AND OTHERS*** (supra) and the notification issued by the State Government.

24. As regarding the delay in disposal of the appeal is concerned, we are constraint to observe that because of things or matters not in the hands of the judiciary, the appeals are being taken up at a belated stage for which we consider all the stake holders including the judiciary responsible for the same. But at the same time we do not say that judiciary is alone responsible for being delay in disposal of the cases. We also rely upon the observations made by brother Hon'ble Shri Justice Sangam Kumar Sahoo in the case of ***Managobinda Mohapatra Vs. State of Odisha***; (2020) 79 OCR 787 (Para-1) and in the case of ***Nitya @ Nityananda Behera Vs. State of Odisha;*** (2020) 80 OCR 89 (para-15).

25. With such observation, the JCRLA is dismissed.

26. However, we hope and trust that appropriate measures should be taken by the State of Odisha and the High Court of Orissa for expeditious disposal of the Criminal Appeals in which the appellants are still in custody.

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2020 (III) ILR - CUT- 665

S. K. MISHRA, J & B. P. ROUTRAY, J.

CRA NO. 247 OF 1999

(1) MANGULI ROUT &
(2) KHAGI @ EKADASI ROUT ……..Appellants

.V.

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Defective investigation – Whether it is a ground for acquittal? – Held, defect in the investigation by itself cannot be a ground for acquittal – Reasons explained.

Investigation is not the solitary area for judicial scrutiny in a criminal trial. Where there has been negligence on investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses carefully to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the objects of finding out the truth. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. There may be highly defective investigation in a case, however it is to be examined as to whether there is any lapse by the I.O and whether due to such lapse any benefit should be given to the accused. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 3035 : State of Rajasthan Vs. Kishore.
2. AIR 1999 SC 3717 : Leela Ram (D) Through Duli Chand Vs. State of Haryana & Anr.
3. (1999) 8 SCC 715 : State of Karnataka Vs. K. Yarappa Reddy.
4. (2016) 4 SCC 583 : Gulzari Lal Vs. State of Haryana.
5. (1974) 3 SCC 626 : Chandrakant Luxman Vs. State of Maharashtra.
6. (2002) 3 SCC 57 : Allarakha K. Mansuri Vs. State of Gujarat.

For Appellants : Mr. D. Panda
For Respondent : Mr. J. Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 21.12.2020 : Date of Judgment: 23.12.2020

B.P.ROUTRAY, J.

Both the appellants have been convicted for commission of offence under Section 302 of IPC and sentenced to undergo imprisonment for life by the learned 1st Addl. Sessions Judge, Cuttack in S.T. Case No. 221 of 1995, which is challenged before us in the present appeal.

2. The brief facts of the prosecution case are that, appellant No.1, Manguli Rout and appellant No.2 Khagi @ Ekdasi Rout are two brothers. The deceased, namely, Subash and the informant, Jadunath (P.W.5) while going in a bicycle on 28.6.1994 at about 2.00 P.M. in the village road passing in front of the house of accused persons, they were assaulted by the appellants along with third accused namely, Jhari @ Jharana, the wife of appellant Manguli. It is alleged that Manguli came out suddenly, caught hold the handle of the bicycle and dragged the deceased, who was sitting on the back career of the bicycle. As the deceased fell down, accused Ekadasi being

armed with kati came out from the house and started giving blows to the legs of the deceased with that Kati and at that time the accused Manguli also dealt axe blows on the deceased being supplied the axe by the 3rd accused, Jharana. In the meantime, hearing the shout, the informant and some co-villagers namely, Anadi (P.W.4), Brahmani (P.W.2), Bisweswar and others reached at the spot. The deceased being sustained with severe bleeding injuries was shifted to Maniabandha P.H.C. and then was shifted to S.C.B. Medical College and Hospital, Cuttack on the same day where he died in that night. As such, an U.D. Case was registered at Mangalabag Police Station in connection with the death of the deceased and inquest was held by Mangalabag Police in that U.D. Case. In the meantime, F.I.R. was also registered on 28.6.1994 at 3.15 P.M. in Badamba Police Station on the written report presented by P.W.5, Jadunath.

3. The appellants pleaded 'not guilty' and denied their involvement in the occurrence.

4. Learned trial court, on the evidence of seven prosecution witnesses and seven documents marked as exhibits on behalf of the prosecution, convicted the present appellants for the aforesaid offence of murder while acquitting the 3rd accused, Jhari@Jharana.

5. It is argued by Mr. Panda, learned counsel on behalf of the appellants, inter alia, that there is material discrepancy in the evidence of P.W.5 in view of the statement of P.W.7 (I.O.) that he presented the F.I.R. before him at 2.30 P.M. in the village and that, he has not stated anything about the blows given on the chest and leg by Manguli. Besides, there is omission of confrontation of material evidence to the appellants in their examination under Section 313 of Cr.P.C.

6. On the other hand, Mr. Katikia, learned A.G.A, supporting the conviction of the appellants, has submitted that in view of clinching account of narration of occurrence by the informant and other eyewitnesses viz., P.Ws. 2, 4 & 5, the appellants have been clearly implicated as the assailants of the murder of the deceased and, as such, their conviction by the learned trial court is justified. It is further submitted by him that the learned court below has wrongly disbelieved the evidence of P.W.6, who ought to have been believed in view of his clear endorsement made in the inquest report (Ext.5) at column No.9.

7. On the backdrop of the submissions advanced at the Bar, we carefully perused the impugned judgment as well as the lower court record. As seen from the trial court judgment, much reliance has been placed on the direct ocular evidence of P.W.5 to conclude the guilt on the appellants.

8. A thorough perusal of the evidence of prosecution witnesses reveals that P.W.5 is the eyewitness to the whole occurrence while P.Ws.2, 4 and 6 are stated to be the eyewitnesses to the occurrence in part, who reached at the spot hearing the shout of P.W.5. However, the learned court below disbelieved the evidence of P.W.6. Basing on such statements of P.Ws. 5, 2 and 4 of eye-witnessing the occurrence, the learned trial Judge convicted these two appellants.

9. Now to examine the evidence of P.W.5, it is seen that he has stated very specifically naming both the appellants as to their role of giving blows on the deceased to inflict grievous bleeding injuries. He has stated at para-3 of his evidence that since Subash fell down on the ground, Ekadasi-appellant No.2 started giving kati blows to his left leg and despite of his request not to assault the deceased, he continued to assault by means of a kati. Further, Manguli, appellant no.1, being handed over an axe by Jharana, dealt axe blows on the person of the deceased on his chest, legs and neck. It is here argued on behalf of the appellants that Jharana being acquitted of the offence and in absence of production or seizure of the axe before the court below, the role attributed to the appellant-1, Manguli in causing the blows on the deceased should be discarded. But in our view, the learned counsel for the appellants is not correct in his submission to discard the evidence of P.W.5 on this aspect. It is true that Jharana has not been found guilty of the offence, but her acquittal does not take away the presence of axe as a weapon of offence used by the appellant no.1 to cause assault on the deceased. The evidence of P.W.5 regarding specific overt act of Jharana in giving the axe has been disbelieved by the trial court as the same was not supported by the evidence of P.Ws.2 & 4. Of course the axe was not seized in course of investigation which is a lacuna on the part of the Investigating Officer. But such non-seizure and non-production of the axe as one of the weapons of offence has a little impact on prosecution case in view of the clear and clinching evidence of eyewitnesses so also the corroborative medical evidence depicting nature of injuries.

10. Hon'ble Supreme Court in Criminal Appeals No. 1790-1791 of 2019 (decided on 28.11.2019, Jai Prakash vs. State of Utter Pradesh and others), have observed at Para 22 that, "there are also several lapses in the investigation of the case like non-recovery of "empties" fired from the guns on the deceased, non-recovery of fire arms used by the respondents accused etc. It is well-settled that any omission on the part of the Investigation Officer cannot go against the prosecution case. If the Investigating Officer has deliberately omitted to do what he ought to have done in the interest of justice, it means that such acts or omissions of Investigating Officer should not be taken in favour of the accused. ……..XX…….As pointed out earlier, any act of commission/omission of the Investigating Officer cannot go to the advantage of the accused. ……XX ……..…"

11. The submissions on behalf of the appellants that, the evidence of P.Ws.2 and 4 of eye-witnessing the occurrence is unreliable, is not found convincing to us, because, perusal of their evidences are found corroborative to the statement of P.W.5 deposed in the Court about narration of their presence at a short distance from the spot of occurrence. Further, P.W.2 is the mother of P.W.4 and she has confirmed in her cross examination that she was at a distance of 20 cubits from the spot being present in her Bari towards front side of the house of the appellant. What is pointed out by the learned counsel for the appellants to the effect that blows given by means of axe and kati respectively by both the appellants was an omission on the part of P.W.2, is not found correct in view of the explanation given by the I.O. (P.W.-7) at paragraph 6 of his cross examination which is to the extent that said P.W.2, though had not stated that axe and kati were used as weapons by Manguli and Ekadasi, but she had stated that "Manguli O Ekadasi Subashaku Hanibare Lagichhanti". Similarly, the omissions pointed out on behalf of the appellants, on the part of P.W.4 are not acceptable being confronted with the I.O. (P.W.7). The submission on behalf of the appellants that, there is also omission on the part of P.W.5 on material aspect, is also not found to be correct. It is pointed that the P.W.5 has not specifically stated before P.W.7 that cut blows was given by the appellant Manguli to the chest and the leg, but analysis of statements made by P.W.5 in his evidence and the statement given by P.W.7 at para-7 of his cross-examination by way of confrontation, it reveals that P.W.5 stated before P.W.7 that appellant Manguli gave cut blows to the deceased though had not specifically stated that the blows were given on the chest and neck.

12. Thus, upon scrutiny of the entire evidences brought on record by prosecution, the same reveals a clear, cogent and corroborative narration of the occurrence by the eye-witnesses and the nature of injuries inflicted are also seen supporting their statement. As such we do not find any infirmity in the order of conviction rendered by the trial court against the appellants. Accordingly, the sentence of Life Imprisonment as imposed by the learned trial court is confirmed.

13. In the result, the appeal is dismissed being devoid of any merit, in view of the discussions made above.

S.K.MISHRA, J.

(**Concurring**) Having carefully examined the judgment rendered by my Learned Brother, I concur with the conclusion reached by my learned Brother that the appeal should be dismissed. I would, however, like to rely on some judgments of the Hon'ble Supreme Court to support the concurrence.

14. In this case, prosecution case has been criticized and the judgment of conviction and order of sentence has been impugned on the ground that one of the weapon of offences i.e. Axe used by Manguli was not seized by the investigating agency during the course of investigation. In the case of ***State of Rajasthan –vrs.- Kishore: reported in AIR 1996 SC 3035***, the Hon'ble Supreme Court has held that irregularity or illegality by the investigating agency during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account. This ratio was also quoted with approval later on in the case of ***Leela Ram (D) Through Duli Chand -Vrs.- State of Haryana And Anr. : reported in AIR 1999 SC 3717***, wherein the Hon'ble Supreme Court held that it is now a well settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case.

14.1. The Hon'ble Supreme Court in the case of ***State of Karnataka -Vrs.- K. Yarappa Reddy (1999) 8 SCC 715***, considered that in case of genuineness of the Station House Diary or spuriousness of the same, if the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the Investigating Officer in conducting

investigation or in preparing the records so unscrupulously. It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious, the rest of evidence must be scrutinized independently of the impact of it. Otherwise criminal trial will plummet to that level of the investigating officers ruling the roost. The Court must have predominance and preeminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made the casually for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case.

14.2. In the case of ***Gulzari Lal -Vrs.- State of Haryana: reported in (2016) 4 SCC 583,*** the Hon'ble Supreme Court has held that "the question raised by the appellant on the issue that no blood stained earth was recovered from the place of crime is not relevant". In the said judgment the Hon'ble Supreme Court further clarified that on this count, the High Court has also noted the laxity on the part of the police and rightfully concluded that the conviction was valid in light of the statements made by the deceased and the witnesses.

14.3. In the case of Dhanaj Singh @ Shera and Others -Vrs.- State of Punjab: reported in AIR 2004 SC 1920, the Hon'ble Supreme Court held that "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective".

14.4. In the case of ***C. Muniapan and Others –Vrs.- State of Tamil Nadu: reported in 2010 (9) SCC 567***, it has also been discussed by the Hon'ble Supreme Court that "there may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or

negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation".

15. Defect in the investigation by itself cannot be a ground for acquittal. Investigation is not the solitary area for judicial scrutiny in a criminal trial. Where there has been negligence on the part of the investigating agency or omissions, etc, which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses carefully to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the objects of finding out the truth. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the Investigating Officer and whether due to such lapse any benefit should be given to the accused. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. In this context, judgments passed by the Hon'ble Supreme Court in the cases of ***Chandrakant Luxman -vrs.- State of Maharashtra: reported in (1974) 3 SCC 626, K. Yarappa Reddy (supra), Allarakha K. Mansuri –vrs.- State of Gujarat: reported in (2002) 3 SCC 57 and C. Muniapan and Others (supra),*** are relied upon.

16. In that view of the matter, determination of guilt is an absolute domain of the court having jurisdiction to try the criminal cases. In view of the settled position of law relating to faulty investigation, we are of the opinion that, in view of the clear, cogent and unimpeachable nature of evidence in the shape of narration of eye witnesses, the machinations demonstrated by the investigating officer in conducting the investigation would not result in acquittal of the appellant. I, therefore, concur with the judgment rendered by my learned Brother.

2020 (III) ILR - CUT- 673

D. DASH, J.

S.A. NO.174 OF 1991

PRATAP CHANDRA MOHAPATRA & ANR. .....Appellants

.V.

RADHAKANTA .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Second appeal – Suit for eviction on the basis of tenancy agreement – Suit decreed, confirmed in first appeal – Defendant denied the title of the plaintiff and claimed that he has been in occupation of the suit land for 25 years prior to the filing of the suit and has prescribed title by way of adverse possession – Further plea was that there has been non-compliance of the provisions of 106 of the T.P. Act which stands as the bar for entertainment of the suit – Plea examined – The court held as hereunder-:

The courts below having examined the evidence both oral and documentary as also relying upon the report of the Civil Court Commissioner and his evidence as P.W/.3 have come to a definite conclusion that the plaintiff-Matha is the owner of the suit land which stands recorded in their name in the records prepared in the settlement both under sabik and current. The lower appellate court on detail analysis of the evidence and independent examination of the same at its level has found no such reason to interfere with the same. The courts below have been very categorical in saying that the plaintiff is having the title over the suit land. The claim of the defendants as to acquisition of title by adverse possession runs fundamentally in opposition to the settled position of law. First of all, when they deny the title of the plaintiff, the claim of acquisition of title by adverse possession lacks foundation as there is no facet as to the knowledge that against whose interest they are so possessing in an adverse manner. Secondly, when it is their case that they are in possession of portion of Government land even it is accepted for a moment they have possessed land continuously and uninterruptedly for more than required period, that does not suffice the purpose as the most important ingredient as to denial of the title of the true owner remains wanting and the possession under such instance is merely precarious. In view of the above discussion and reasons, this Court is unable to arrive at a position to provide the answer to the substantial question of law favouring annulment of the judgments and decrees as passed by the courts below in decreeing the suit. (Para 12)

For Appellants : Mr. Bijon Roy, Mr. B.K. Bal & Mr. B. Choudhury.

For Respondent : Mr. M. Patra, Mr. D. Patra, Mr. B. Bramhachari & Mr. D. Deo.

JUDGMENT Date of Judgment: 27.11.2020

D.DASH, J.

The appellants by filing this appeal under section 100 of the Code of Civil Procedure (for short, 'the Code') seeks to assail the judgment and decree passed by the learned Sub-Ordinate Judge, Nayagarh (as then was) in Title Appeal No. 10 of 1989. By the same judgment and decree passed by the learned Munsif, Nayagarh (at it was then) in Title Suit No. 63 of 1985 have confirmed.

The appellants were the defendants in the suit before the trial court and they had questioned the judgment and decree passed by the trial court by carrying an appeal under section 96 of the Code; wherein they have been unsuccessful.

2. For the purpose of convenience and clarity; the parties hereinafter have been referred to in the same rank as assigned to them in the original suit, namely, the appellant no. 1 as the defendant no.1 whereas the appellant no.2 as the defendant no.2 and the respondent as the plaintiff.

3. The plaintiff's suit is for eviction of the defendants from the suit land and for vacant delivery of possession of the same by removal of the cabin standing therein with further relief of permanent injunction.

The plaintiff which is a Hindu Religious Matha has its immovable property in mouza Itamati under Nayagarh Police Station in the District of Nayagarh, Odisha. The subject matter of the suit is a small portion of land of 8 ft. length and width of 8ft.7inch, under khata No. 345, hal plot no. 1703 corresponding to sabik plot no. 1693 & 1700; better described in Schedule of the plaint with this sketch map thereunder. The Matha being the recorded owner of the suit land represented by its Marfatdar has stated that defendant no.1 in the year, 1979 was granted permission by the Matha for putting up a temporary wooden cabin on said small patch of land and go on paying a sum of Rs.8.35 paisa towards monthly rent. An agreement to that effect is said to have been executed. It had been stipulated therein that the moment, the defendant no.1 would default in paying the rent, he would be evicted forthwith. Two and half years before the suit, the defendant no. 1 all of a sudden stopped paying rent. He then being asked to remove the cabin and leave the land vacant for its user by the Matha, he did not listen to the same.

When the matter stood thus, on 14.01.1985, the care taker of the plaintiff having gone for an inspection, to his utter surprise found the defendant no.2 to be doing the tailoring work in the cabin. On being asked, he told that defendant no.1 had inducted him as tenant in that cabin and therefore he is now in occupation of the same running the tailoring shop. The defendant no.1 then being approached for such unauthorized action on his part in putting defendant no.2 in occupation of the cabin instead of giving the delivery of possession of land by removing the cabin to the plaintiff; he behaved indifferently. So, the plaintiff being desirous of putting the permanent structure over the land in question as also nearby lands and a gate at the entry point to the Matha then needed the said land. Therefore the plaintiff filed the suit.

4. The defendants filing the written statement together have denied the title of the plaintiff in respect of the suit land. They claim that defendant no.1 has been in occupation of that small patch of land i.e. the suit land for 25 years prior to the filing of the suit. Therefore, it is claimed that defendant no.1 has prescribed title over the suit land by way of adverse possession. Arrangements pleaded by the plaintiff as regards the permission being granted to the defendant no.1 to put up temporary cabin and run the same on payment of rent month to month as agreed has been stoutly denied. It is stated that no such tenancy was created between the Matha and defendant no.1 and there was never any such agreement with the defendant no.1 as pleaded by the plaintiff. The defendants further asserted that under the circumstance there was never any occasion for the the plaintiff to ask them to vacate the suit land, as the land in question did never belong to the plaintiff. They claim that the cabin is standing on a portion of Government land and since the plaintiff has their land adjoining the Government land with an intent to grab the said suit land belonging to the Government, such cooked up story has been placed with regard to execution of agreement; tenancy, payment of monthly rent etc. has been projected.

However, again it has been pleaded that on many occasions, the plaintiff through its care taker although told defendant no.1 that they are the owner of the suit land, the defendant no.1's reply has remained that let there be a measurement of the land by a Government Amin for the purpose of ascertaining the same. Lastly a plea has also been taken that the suit is not entertainable and maintainable for non-compliance of the provision of 106 of Transfer of Property Act (in short, "the T.P. Act"), which mandates service of

15 days clear notice upon the monthly tenant (lessee) prior to the suit in terms thereof. With all these above, the defendants prayed to non-suit the plaintiff.

5. The trial court keeping in view the rival pleadings framed five issues. First of all going to answer issue no.1 & 2 as to whether the suit land belongs to the plaintiff or is a piece of Government land and next concerning the nature of occupation of the suit land by the defendants, has answered in definite terms that the cabin stands on the land belonging the Matha and not over a portion of Government land and then it has been said that the occupation of the defendants is unauthorized.

Proceeding to answer issue no.2 as to non-compliance of the provisions of 106 of the T.P. Act standing as the bar for entertainment of the suit with the relief as claimed; the objection as to the maintainability of the suit as raised by the defendants has been repelled. It has then proceeded to examine as to whether the defendants have perfected title over the suit land by virtue of their long possession as claimed. Said answer has also been rendered against the defendants.

Having recorded the above findings, the defendants have been directed to vacate the possession of the suit land by removing the cabin within a period of one month or to face further legal process for recovery of possession.

6. The defendants being dissatisfied by all the findings recorded by the trial court having carried the first appeal have not been able to succeed. The appeal has been dismissed by affirming all the findings rendered by the trial court. Hence, the present second appeal.

7. This appeal has been admitted on the substantial question of law as mentioned in para-8 of the grounds in the memorandum of appeal, which is reproduced hereunder:-

> "For that when P.W.1 has categorically deposed that the plaintiff had served under section 106 of the T.P. Act, learned courts below have grossly erred in law in holding that the defendants having denied the plaintiff's title are not entitled to the relief under section 106 of the T.P. Act. (The word relief since does not appear to be proper, this Court feels it to read it as "Protection")."

8. I have heard learned counsel for the appellants at length. None appears on behalf of the respondent despite several opportunities.

The judgments containing the findings recorded by the courts below have been carefully read in the backdrop of the pleadings and the evidence both oral and documentary let in by the parties.

9. Learned counsel for the appellants vehemently submitted that when the plaintiffs' suit is based on tenancy created between the plaintiff-Matha and the defendant no. 1 in the year 1979 and agreement to that effect executed by the defendant no.1 with condition as to payment of monthly rent of Rs.8.35 paisa regularly, it ought to have been held that the suit is not maintainable as admittedly prior to the institution of the suit, there was no notice to the defendants as mandatorily required under section 106 of the T.P. Act and in terms of said provision.

10. Admittedly the plaintiff had filed the present suit for eviction based on tenancy. The defendant vehemently denied the existence of tenancy and the relationship as landlord (lesser) and tenant (lessee) between them. On the other hand, they have come forward with the specific case that the land over which the cabin stands and is in their occupation is not at all owned by the Matha, which has no right, title and interest over the same and they were/are never ever in possession of the land owned by plaintiff-Matha. It is their categorical pleading that the cabin is situated over a portion of Government land. So, the defendants challenged the locus-standi of the plaintiff-Matha to recover the possession of the suit land from them, seeking the removal of the cabin not only banking upon the pleaded relationship as lesser and lessee but also for lack of their title/ownership there over. Had they not denied the so-called relationship of lesser and lessee, then for that they would have been estopped to deny the title/ownership of the plaintiff-Matha over the suit land in view of the provision of section 116 of the Evidence Act.

In such peculiar fact situation, although the suit being for eviction based on tenancy; its success depends upon the proof of that relationship or plaintiff's title/ownership over the suit land. The defendants would be taken to be placed in the position of trespassers in the event; the plaintiff fails to establish the relationship as well as their title/ownership over the land in suit. It has to be borne in mind that here the defendants have also pleaded that they are in possession of the land for 25 years next before the institution of the suit. Although, they have denied the title of the plaintiff in respect of the suit land and asserted that the ownership rests with the State, yet they have alternatively projected a case that in the event, the plaintiff is found to be

having the antecedent title it has stood extinguished by virtue of adverse possession and as such has come to rest with the defendant no.1. The stand in the written statement that the suit is liable to be dismissed for non-compliance of the provision of section 106 of the T.P. Act wholly run contrary to the core facts pleaded as also the alternative case as projected by the defendants and rather, it is fundamentally opposed in law to those two stands. Therefore, when the fate of the suit rests on a finding as to the title of the plaintiff; as per the settled principle of law in a suit for eviction, the same can be well gone into and decided so as either to grant or refuse the relief to the plaintiff. Having taken a clear stand that there was no tenancy between the plaintiff and the defendant no.1 at any given point of time and that plaintiff is not having the title/ownership nor possession of the suit land, there arises no occasion for the defendants to put up the stand in thwarting the suit by posing non-compliance of the provision of section 106 of the T.P. Act as the legal hurdle.

11. In a suit for eviction on the failure of the plaintiff even to establish the relationship of the landlord and tenant by required proof of the said fact, the plaintiff can well succeed to proving the title over the subject matter and the adversary having no title if is in unauthorized possession, the Court in seisin of the case can pass the decree for eviction of those unauthorized possessors.

In the given case, this defendant no.1 examined as D.W.1 had clearly stated in his evidence that the plaintiff has no title over the land where the cabin is installed. He has been very straightforward in saying that if it is ascertained that he is in occupation of plaintiff's land, he would leave the same which again cuts the stand of acquisition of title by adverse possession at its throat.

12. The courts below having examined the evidence both oral and documentary as also relying upon the report of the Civil Court Commissioner and his evidence as P.W/.3 have come to a definite conclusion that the plaintiff-Matha is the owner of the suit land which stands recorded in their name in the records prepared in the settlement both under sabik and current.

The lower appellate court on detail analysis of the evidence and independent examination of the same at its level has found no such reason to interfere with the same. The courts below have been very categorical in

saying that the plaintiff is having the title over the suit land. The claim of the defendants as to acquisition of title by adverse possession runs fundamentally in opposition to the settled position of law. First of all, when they deny the title of the plaintiff, the claim of acquisition of title by adverse possession lacks foundation as there is no facet as to the knowledge that against whose interest they are so possessing in an adverse manner. Secondly, when it is their case that they are in possession of portion of Government land even it is accepted for a moment they have possessed land continuously and uninterruptedly for more than required period, that does not suffice the purpose as the most important ingredient as to denial of the title of the true owner remains wanting and the possession under such instance is merely precarious.

13. In view of the above discussion and reasons, this Court is unable to arrive at a position to provide the answer to the substantial question of law favouring annulment of the judgments and decrees as passed by the courts below in decreeing the suit.

14. Resultantly, the appeal stands dismissed and in the facts and circumstances, without cost throughout.

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2020 (III) ILR - CUT- 679

BISWANATH RATH, J.

O.J.C. NO. 5712 OF 2000

BADRI PASWAN ……...Petitioner

.V.

DIRECTOR GENERAL, CENTRAL INDUSTRIAL SECURITY FORCE & ORS. ……Opp. parties

SERVICE LAW – Disciplinary proceeding – Allegation of taking money by an employee for providing employment – Charge sheet – Enquiry – Charges proved – Confirmed in appeal and revision – No allegation of the violation of the principles of natural justice – Scope of interference by the court in exercise of power under Article 226 of the Constitution of India – Held, the scope is very limited.

"This Court here taking into consideration the decision of the Hon'ble apex Court in AIR 1967 (SC) 295 finds, it is for the settled position of law, scope for interference of the High Court in the Disciplinary Proceeding arises only in the event action of the authority is perverse or in such manner that no reasonable body or person, properly informed could come to or has been arrived at the action of misdirecting itself by adopting a wrong approach or has been enforced by irrelevant or extraneous aterials, which is not the case here. Similarly taking into account the decisions vide (1994) 6 SCC 651, it appears, by the above decisions it is clarified that there is limitation on the Courts to interfere in the departmental actions in exercise of power under Article 226. By the decision vide (1983) 4 SCC 392 the Hon'ble apex Court has already decided the parameters of exercising of powers by the Courts in the matter of power of judicial review of administration and executive action or decisions. Taking into account all the aforesaid judgments, this Court finds, the decisions cited hereinabove support the stand of the opposite parties and do not help the request of petitioner in the matter of interference with the impugned orders involving departmental proceeding" *(Para 9)*

Case Laws Relied on and Referred to :-

1. 1966 Supp SCR 311 : AIR 1967 SC 295 : (1966) 36 Comp Cas 639
Barium Chemicals Ltd. Vs. Company Law Board.
2. 4 SCC 392 : 1983 SCC (Tax) 336 : C.I.T Vs. Mahindra and Mahindra Ltd., (1983)
3. (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.

For Petitioner : M/s. B. Routray, (Sr. Adv.)
D.K. Mohapatra, B.B. Routray.

For Opp. Parties : Mr. Himanshu Sekhar Panda.

JUDGMENT Date of Hearing : 5.11.2020 : Date of Judgment : 13.11.2020

BISWANATH RATH, J.

By filing this Writ Petition the petitioner has sought for a direction to opposite parties to reinstate the petitioner in service with effect from 4.10.1999 with all consequential service benefits including regularization of his service thereby quashing the impugned order passed by the Disciplinary Authority vide Annexure-4, the order of the appellate authority vide Annexure-5 and the order of the revisional authority vide Annexure-6 and by way of Writ of Mandamus also allowing the petitioner to retain the official residence till final disposal of the Writ Petition.

2. Short background involved in this case is that petitioner was appointed as a Constable in the Central Industrial Security

Force (in short hereinafter be called as 'C.I.S.F) Unit, H.W.P. Talcher. While continuing in service in the Office of the Commandant, C.I.S.F. Unit, NALCO an allegation was made against the petitioner before the Commandant, C.I.S.F. for recovery of the money from the petitioner being paid by one Ramdev Rai (Sr.Technical/ Mechanical Deptt.), Fertilizer Corporation of India, Talcher Unit to the petitioner for arranging absorption of his son in the Railways. Dependant on the allegation made by Ramdev Rai a notice was issued to the petitioner by the Commandant to show cause on the allegation of taking money to absorb the son of Ramdev Rai in the Railways. Filing his response on 5.04.1999 petitioner denied all the allegations made by Ramdev Rai against him. Being not satisfied on denial by the petitioner, an inquiry was directed to be conducted against the petitioner on the basis of the allegation made by Ramdev Rai and accordingly, upon initiation of a departmental proceeding various charges were frame disappearing at Annexure-2 against the petitioner. On receipt of the memorandum of charge vide Annexure-2, petitioner by letter dated 5.04.1999 submitted his written statement of defence as appearing at Annexure-2-A denying all the charges levelled against him and categorically averred therein that he is neither the relative of Ex- Minister of Railways nor has told at any point of time that he has any relationship with Sri Paswan and as such he will be managing an employment in the Railways by utilizing his such connection.

3. After the written statement of defence being filed and on appointment of the Enquiry Officer, inquiry proceeding was taken up. Inquiry proceeding being concluded the Enquiry Officer submitted his final report indicating therein establishment of all the charges against the petitioner. On being asked to submit his response to the inquiry report along with communication of the inquiry report petitioner submitted his response vide Annexure-3-A. Taking into account the observation made in the inquiry report as well as response of the petitioner, the Disciplinary Authority was pleased to pass the final order directing dismissal of the petitioner from service as appearing at Annexure-4. An appeal being filed the appellate authority by its order vide Annexure-5 dismissed the appeal on concurrence with the order of the Disciplinary Authority. Revision being filed, the Revisional Authority by its order videAnnexure-6 while dismissing the revision also concurred with the order of the Disciplinary Authority as well as the Appellate Authority.

4. Learned counsel for petitioner challenges the inquiry report vis-à-vis the report of the appellate authority and the revisional authority on the premises that in spite of categoric denial by the petitioner to the so called allegation regarding receipt of money to provide employment, the same has not at all been taken into consideration. Learned counsel for petitioner also challenged the impugned order on the premises that there has been no proper consideration of the evidence at the instance of the charge-sheeted employee and the inquiry report as well as the impugned orders are heavily based on the sole testimonial of the departmental witnesses including the complainant. Taking this Court to the recording of statement in different proceedings including the inquiry report learned counsel for petitioner submitted that petitioner had written a letter to his brother for refundofmoneyon13.07.1998 and existence of such letter cannot alone come to hold the petitioner guilty of charges. Taking this Court to the other plea taken in the Writ Petition through paragraphs 7, 8, 9, 10, 11, 13 (b) and the plea taken in the rejoinder affidavit learned counsel for petitioner attempted to justify his claim on the illegality of the impugned orders and thereby requested for interference of this Court in the impugned orders.

5. Learned Central Government Counsel appearing on behalf of opposite parties, on the other hand, taking support of the discussions in the inquiry report as well as the order of the Disciplinary Authority attempted to justify the orders passed by the Appellate Authority as well as the Revisional Authority on the premises of cardinal principle of law on limited scope for High Courts for exercise of power under Article 226 of the Constitution of India.

Learned Central Government Counsel for the opposite parties further contended that for there being no allegation of violation of natural justice or observation and findings of the authority being perverse to the materials available on record, there is absolutely no scope for this Court to interfere in the impugned orders and as such a request is made for dismissal of the Writ Petition.

6. On perusal of the inquiry report at Annexure-3 this Court finds, Department has examined three defence witnesses including the complainant. This apart, the defence has also brought into

several materials to establish the complaint involving the petitioner. Evidence of defence witnesses having gone into, this Court observes, defence could be able to satisfy the charges through oral as well as material evidence, whereas the charge-sheeted employee in spite of being given opportunity could not be able to demolish the evidence of defence. The inquiry report has the detailed discussion on the materials available on record, besides has also good reasoning before arriving at its conclusion. Further, the findings of the Enquiry Officer also remains confirmed not only by the Disciplinary Authority but also by higher authorities like the Appellate Authority as well as the Revisional Authority. Thus there is concurrent finding of fact by different authorities disentitling this Court to interfere in such matters. Besides the issue involved here also is of year 1999 and the petitioner while filing the Writ Petition in the year 2000 was already of 66 years old and must be by now 86 years old.

7. Considering the rival contentions of the parties, taking into account the plea of the petitioner, grounds taken support to his contentions in his challenge to the inquiry report, the orders of the Disciplinary Authority, the Appellate Authority as well as the Revisional Authority and also the counter plea of the opposite parties, this Court on hesitantly observes, in absence of allegation of violation of natural justice or any finding remaining contrary to the materials available on record and in absence of establishment of the allegation that there is improper consideration of evidence of the defence and ignorance of evidence of charge-sheeted employee, further for the disciplinary proceeding being completed after observance of natural justice and as a report is submitted basing on the findings of fact being confirmed by the Disciplinary Authority and again confirmed by the Appellate Authority as well as the Revisional Authority, there is absolutely no scope for this Court to interfere in such cases as this Court cannot sit as Appellate Authority in exercise of power under Article 226. For the serious charge being proved, claim of petitioner that allegation of punishment becomes harsh, has no leg to stand.

8. Taking into consideration the judgments of the Hon'ble Apex Court involving similar situation in the case of ***Barium Chemicals Ltd. v. Company Law Board, 1966 Supp SCR 311 : AIR 1967 SC 295 : (1966) 36 Comp Cas 639***, this Court finds, the Hon'ble Apex Court held as follows:

> "10. Once it is conceded that the formation of an opinion by the Board is intended to be subjective — and if the provision is constitutional which in our view it is — the question would arise: what is that about which the Board is entitled to form an opinion? The opinion must necessarily concern the existence or non-existence of facts suggesting the things mentioned in the several sub-clauses of clause (b). An examination of the section would show that clause (b) thereof confers a discretion upon the Board to appoint an Inspector to investigate the affairs of a company. The words in "the opinion of" govern the words "there are circumstances suggesting" and not the words "may do so". The words "circumstances" and "suggesting" cannot be dissociated without making it impossible for the Board to form an "opinion" at all. The formation of an opinion must, therefore, be as to whether there are circumstances suggesting the existence of one or more of the matters in sub-clauses (i) to (ii) and not about anything else. The opinion must of course not have been arrived at mala fide. To say that the opinion to be formed must be as to the necessity of making an investigation would be making a clear departure from the language in which Section 237(b) is couched. It is only after the formation of certain opinion by the Board that the stage for exercising the discretion conferred by the provision is reached. The discretion conferred to order an investigation is administrative and not judicial since its exercise one way or the other does not affect the rights of a company nor does it lead to any serious consequences as, for instance, hampering the business of the company. As has been pointed out by this Court in Raja Narayanalal Bansilal v. Maneck Phiroz Mistry [1961 1 SCR 417]. the investigation undertaken under this provision is for ascertaining facts and is thus merely exploratory. The scope for judicial review of the action of the Board must, therefore, be strictly limited. Now, if it can be shown that the Board had in fact not formed an opinion its order could be successfully challenged. This is what was said by the Federal Court in Emperor v. Shibnath Banerjee [1961 6 FCR 1 : AIR 1943 FC 75] and approved later by the Privy Council. Quite obviously there is a difference between not forming an opinion at all and forming an opinion upon grounds, which, if a court could go into that question at all, could be regarded as inapt or insufficient or irrelevant. It is not disputed that a court cannot go into the question of the aptness or sufficiency of the grounds upon which the subjective satisfaction of an authority is based. But, Mr Setalvad says, since the grounds have in fact been disclosed in the affidavit of Mr Dutt upon which his subjective satisfaction was based it is open to the court to consider whether those grounds are relevant or are irrelevant because they are extraneous to the question as to the existence or otherwise of any of the matters referred to in sub-clauses (i)to(iii).

In the case of ***C.I.T v. Mahindra and Mahindra Ltd., (1983) 4 SCC 392 : 1983 SCC (Tax) 336***, this Court finds, the Hon'ble Apex Court held as follows:

"11. By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from Barium Chemicals case [Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295 : 1966 Supp. SCR 311 : (1966) 36 Com Cas 639] on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. This Court in one of its later decisions in Shalini Soni v. Union of India [(1980) 4 SCC 544 : 1981 SCC (Cri) 38 : AIR 1981 SC 431 : (1981) 1 SCR 962] has observed thus: "It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote". Suffice it to say that the following passage appearing at pp. 285-86 in Prof. de Smith's treatise Judicial Review of Administrative Action (4th Edn.) succinctly summarises the several principles formulated by the Courts in that behalf thus:

"The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidity contained within each category."

In the case of ***Tata Cellular v. Union of India, (1994) 6 SCC 651,*** this Court finds, the Hon'ble Apex Court held as follows:

> "71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.
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> 73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.
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> 74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

9. This Court here taking into consideration the decision of the Hon'ble apex Court in ***AIR 1967 (SC) 295*** finds, it is for the settled position of law, scope for interference of the High Court in the Disciplinary Proceeding arises only in the event action of the authority is perverse or in such manner that no reasonable body or person, properly informed could come to or has been arrived at the action of misdirecting itself by adopting a wrong approach or has been enforced by irrelevant or extraneous materials, which is not the case here. Similarly taking into account the decisions vide ***(1994) 6 SCC 651***, it appears, by the above decisions it is clarified that there is limitation on the Courts to interfere in the departmental actions in exercise of power under Article 226. By the decision vide ***(1983) 4 SCC 392*** the Hon'ble apex Court has already decided the parameters of exercising of powers by the Courts in the matter of power of judicial review of administration and executive action or decisions. Taking into account all the aforesaid judgments, this Court finds, the decisions cited hereinabove support the stand of the opposite parties and do not help the request of petitioner in the matter of interference with the impugned orders involving departmental proceeding.

10. As a result, since the Writ Petition does not bear any merit, the same stands dismissed. However, there is no order as to cost.

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2020 (III) ILR - CUT- 687

S. K. SAHOO, J.

CRA NO. 207 OF 1988

PRAVAT CHANDRA MOHANTY .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRA NO. 210 OF 1988

PRATAP KUMAR CHOUDHURY .....Appellant

.V.

STATE OF ORISSA .....Respondent

(A) CRIMINAL TRIAL – Appreciation of evidence – Whether conviction can be based on the evidence of solitary witness? Held, Yes. – Reasons explained. (Paras 9 & 10)

(B) CRIMINAL TRIAL – Defective Investigation – Non examination/non-citation of some witnesses in the charge sheet – Whether it vitiates the prosecution case? – Held, if the defence felt that any material witnesses were left out from the charge sheet witnesses, even though their statements were on record or any particular witness should have been examined to throw light on certain aspects, the defence could have filed appropriate application to summon such witnesses assigning reasons for their examination. (Paras 9 & 10)

(C) CRIMINAL TRIAL – Non examination/withholding of material witnesses – Whether it is fatal to the prosecution case? – Held, law is well settled that withholding of material witnesses who could have unfolded the genesis of the incident or essential part of the prosecution case would be a factor for the court to draw adverse inference against the prosecution but where the overwhelming

evidence is already available on record and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of other witnesses may not be material. (Para 10)

(D) CRIMINAL TRIAL – Appreciation of Evidence – Whether post-mortem report (Medical evidence) negatives the ocular testimony? – Held, law is well settled that medical evidence is only an evidence of opinion and is hardly decisive. (Paras 10 & 11)

Case Laws Relied on and Referred to :-

1. (2019)7 SCC 711 : Jagdish .Vs. State of Haryana.
2. A.I.R. 1993 S.C. 1193 : Kathi Odhabhai Bhimabhai .Vs. State of Gujarat.
3. 2003)2 SCC 401 : Lallu Manjhi .Vs. State of Jharkhand.
4. (2009)7 SCC 454 : Motilal .Vs. State of Rajasthan.
5. (2012)4 SCC 722 : Govindaraju @ Govinda .Vs. State.
6. 2016(II) 218 SC : Harbeer Singh .Vs. Sheeshapal ABC.
7. 2019 (II) C.L.T. Crl. (Supp.) 402 (SC) : Guman Singh .Vs. State of Rajasthan.
8. A.I.R. 2012 S.C. 3157 : Rai Sandeep @ Deepu .Vs. State of NCT of Delhi.
9. (1994)2 SCR 265 : Arjun Marik .Vs. State of Bihar.
10. (2000)8 SCC 382 : State of W.B. .Vs. Mir Mohammad Omar and Ors.
11. (2007)15 SCC 327 : Sellappan .Vs. State of Tamil Nadu.
12. (2008)14 SCC 479 : Mahadev Prasad Kaushik .Vs. State of U.P.
13. 1993 (2) SCC 746 : Nilabati Behera (Smt.) @ Lalita Behera .Vs. State of Orissa & Ors.

For Appellant : Mr. Yasobant Das, (Sr Adv.) (in CRA No. 207 of 1988)
For Appellant : Mr. Devashis Panda, (in CRA No. 210 of 1988)
For State of Odisha : Mr. Lalatendu Samantaray, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 20.10.2020: Date of Judgment: 09.11.2020

S. K. SAHOO, J.

The appellant Pravat Chandra Mohanty (hereafter 'Pravat Mohanty') in CRA No.207 of 1988 and appellant Pratap Kumar Choudhury (hereafter 'P.K. Choudhury') in CRA No.210 of 1988 faced trial in the Court of learned Asst. Sessions Judge-cum-Additional Chief Judicial Magistrate (Special), Cuttack in Sessions Trial No. 246 of 1985 for the offences punishable under sections 304, 342, 323, 294, 201, 167, 477-A, 471 read with section 34 of the Indian Penal Code.

The learned trial Court vide impugned judgment and order dated 29.08.1988, though acquitted the appellants of the charges under sections

294, 201, 167 and 477-A read with section 34 of the Indian Penal Code, however found them guilty under sections 304 Part-II, 342, 323, 471 read with section 34 of the Indian Penal Code. The appellants Pravat Mohanty and P.K. Choudhury were sentenced to undergo rigorous imprisonment five years and eight years respectively for the offence under section 304 Part-II of the Indian Penal Code. Each of the appellants was sentenced to undergo rigorous imprisonment for three years for the offence under section 471 of the Indian Penal Code, rigorous imprisonment for three months for the offence under section 342 of the Indian Penal Code, rigorous imprisonment for one month for the offence under section 323 of the Indian Penal Code and all the sentences were directed to run concurrently.

The appeal of the appellant Pravat Mohanty was presented on 30.08.1988 which was admitted on 31.08.1988 and he was directed to be released on bail on the same day. Similarly, the appeal of appellant P.K. Choudhary was presented on 31.08.1988 which was admitted on 01.09.1988 and he was also directed to be released on bail on the same day.

2. The prosecution case, as per the first information report (Ext.1) lodged by Kusia Nayak (P.W.1) on 05.05.1985 (Sunday) at 11 a.m. before the D.S.P., City, Cuttack(S) is that the informant was staying in a rented house of one Bishnu Mohanty of Rajabagicha, Cuttack. On 02.05.1985 he had been to Nayagarh in connection with the marriage of his nephew and returned home to Cuttack in the morning hours of 04.05.1985. After arrival, he was informed by his wife Kanchan Dei (P.W.18) that there was quarrel between their Basti residents Sura and Bainshi on Friday. He went to the market and returned at about 4 p.m. when his wife told him that Pramod Naik, Benu Naik and Guna Naik were abusing her in filthy language and telling her to drive out her family members as they had no houses and no holding numbers. The informant was also told by his wife that Thana Babu of Purighat police station had called him to go to the police station. After sometime, Kasinath Naik (hereafter 'the deceased') also told the informant that the constable had come and told him in that respect. Accordingly, both the informant and the deceased decided to go to Purighat police station. In the evening hours, when both of them reached at Purighat police station, one police officer having mustache told the deceased that on the next time, he would cause fracture of the hands and legs of the son of the deceased by assaulting him as the later had filed a case against him before the Legal Aid. The deceased remained silent. The said police officer also used slang

language against the deceased and told that he belonged to Alisha Bazar, Cuttack and he would not allow the family of the deceased to stay at Cuttack and no lawyer could do anything to him. The deceased replied to the said police officer that on being assaulted, his wife and son had filed the case before the Legal Aid and he did not know anything in that respect.

It is further stated in the first information report that the said police officer having mustache gave a kick to the deceased and again used slang language and also gave two blows on the hands of the informant and also kicked him. Then said police officer having mustache further assaulted the deceased who cried aloud and in that process, he sustained bleeding injuries on his body. The informant was asked to wait in one room of the police station and the deceased was taken to the other side verandah of the police station and was assaulted. Though the informant was not able to see the assault but he could hear the cries of the deceased. Then the police officer called the informant outside and after he came out, he saw the appellant Pravat Mohanty assaulting the deceased by means of a stick and the deceased was crying aloud. The informant gave water to the deceased on being told by the police officer but the deceased was having no strength to walk and he was just crawling. The deceased came near the informant and he was having bleeding injuries on his hands and necks and the legs were swollen. The deceased was telling that he would not survive and would die. When the deceased sought permission to attend the call of nature, the police officer having mustache and appellant Pravat Mohanty further assaulted him. When the deceased again requested to attend the call of nature, with permission of the police officer, the informant took him for such purpose and after they returned, the appellant Pravat Mohanty asked the deceased as to why he was limping. The deceased was given bread to eat but when he refused, appellant Pravat Mohanty compelled him to take bread and further assaulted him on his knee. Getting indication from the constable, the informant concealed the bread and told the police officer that the deceased had already taken the bread. The said police officer brought liquor in a bottle and poured it in the mouth of the deceased as well as the informant and then sprinkled liquor over them and went outside of the police station. Sura Naik (P.W.13) who belonged to the Basti of the informant came to the police station and talked with one Mishra Babu secretly but on seeing the deceased and the informant, he went away. Then appellant Pravat Mohanty again assaulted the deceased and asked him to sit in a vehicle to go to the hospital. At that time, it was 11 to 12 O' clock in the night. The appellant Pravat Mohanty, a driver and a

constable lifted the deceased and placed him inside the vehicle and he was crying that he would not survive. When the informant expressed his eagerness to accompany the deceased to the hospital, he was told that there was no necessity to accompany the deceased even though the deceased was calling the informant to accompany him. After the deceased was taken away from the police station, one constable chained the left leg of the informant to a table of the police station and in the morning hours, the informant was untied as per the instruction of the appellant Pravat Mohanty. One sweeper was called to the police station and he was asked to clean the blood and stool of the deceased which was lying at different places inside the police station. At that time the informant came to know that the deceased had died in the hospital last night. The widow of the deceased had also come to the police station crying but she was not allowed to stay there by the Havildar. It is mentioned in the first information report that the police officer having mustache was a fair and tall person.

On receipt of such first information report, Purighat/ Lalbag P.S. Case No.273 of 1985 was registered under sections 302, 342, 323, 294, 201 read with section 34 of the Indian Penal Code on 05.05.1985 at 11 a.m. against appellant Pravat Mohanty and the other police officer of Purighat police station having mustache.

3. As per the oral communication of the order of the Director General of Police, P.W.39 Gagan Bihari Mohanty who was working as Inspector, C.I.D., C.B., Cuttack proceeded to Lalbag police station, where he found the informant Kusia Naik (P.W.1) lodging the oral report before the City, D.S.P. which led to the registration of Purighat/Lalbag P.S. Case No.273 of 1985. P.W.39 was directed by the Director General of Police to investigate this case and also to take over charge of investigation of two other connected cases i.e. Purighat/Lalbag P.S. Case No.269 of 1985 which was registered at the instance of P.W.13 Sura Naik on 03.05.1985 and Purighat/Lalbag P.S. Case No.272 of 1985 which was registered stated to be at the instance of the deceased on 04.05.1985 and the appellant P.K. Choudhury was the investigating officer of those two cases.

The appellant P.K. Choudhury was placed under orders of suspension on 05.05.1985 and appellant Pravat Mohanty was transferred. On 06.05.1985 P.W.38 Jayadeb Sarangi, S.I. of Police attached to Purighat police station took charge of investigation of Purighat/Lalbag P.S. Case No.272/1985 from

appellant P.K. Choudhury and on the death of the deceased, he intimated the learned S.D.J.M., Cuttack to convert the case to one under section 302 of the Indian Penal Code. Accordingly, as per order dated 07.05.1985, the learned S.D.J.M. added section 302 of the Indian Penal Code in Purighat/Lalbag P.S. Case No.272/1985.

During course of investigation in Purighat/Lalbag P.S. Case No.273/1985, P.W.39 examined the informant (P.W.1) and then proceeded to Purighat police station which was situated by the side of Kathajori river embankment. He noticed blood stains on the floor of the office room, verandah of Purighat police station and also in the police jeep. He sent requisition to the Director of State S.F.S.L., Rasulgarh for sending the Scientific Officers for collection of physical evidence. At about 7.00 p.m. on 05.05.1985, he examined a constable (P.W.9) and then proceeded to S.C.B. Medical College and Hospital, Cuttack along with the informant and issued requisition for his medical examination and received the report of the informant from the Medical Officer on the same day. At about 11 O' clock in the night on 05.05.1985, he seized one white dhoti having stains of blood and stool (M.O.I), one Ganji having blood stains (M.O.II), one silver 'deunria' with thread (M.O.III) and one steel ring tied in a piece of torn dhoti (M.O.VI) under seizure list Ext.11 on being produced by Havildar Brahmananda Behera (P.W.8) of Purighat police station who had accompanied the dead body to mortuary and brought those articles after post mortem examination. One khaki half pant and khaki half shirt of the informant (P.W.1) were seized under seizure list Ext.12 from which smell of liquor was coming. Those pants and shirts were given in the zima of P.W.1 as per zimanama Ext.57. On the same day at about 11.45 p.m., the station diary entry book of Purighat police station maintained from 29.04.1985 to 05.05.1985, the command certificate book of the police station, one bamboo lathi having blood stain (M.O.IV), one wooden batten (M.O.VII) were seized under seizure list Ext.13. The Scientific team arrived at Purigaht police station around midnight on 05.05.1985 and inspected the spot and collected physical evidence. P.W.39 reached at Rajabagicha in the night and visited the Basti where the deceased and the informant were staying. He examined some witnesses and on 06.05.1985, he conducted some seizures including the police jeep of Purighat police station and gave the jeep in the zima of the driver of the police station under zimanama Ext.58. He also seized the sample packet collected by the Scientific Officer under seizure list Ext.9 and received the autopsy report on 06.05.1985. Since the deceased was working as a Jamadar in Cuttack

Municipality at the time of occurrence, his admitted handwritings were seized under seizure list Ext.4 on production by the Accountant and the Head Clerk of the Cuttack Municipality Office. On 8.5.1985 P.W.39 applied before the learned C.J.M., Cuttack for permission to seize the original F.I.R. in Purighat/Lalbag P.S. Case No.272/1985 from the Court office which was stated to have been lodged by the deceased. He made certain queries in writing to the doctor (P.W.37) who had conducted post mortem examination over the dead body of the deceased and received the reply from him. He examined some more witnesses and visited the spot as per Purighat/Lalbag P.S. Case No.272/1985 which was stated to be situated in front of Rajabagicha High School. During course of further investigation, he obtained the certified copy of the order sheet in I.C.C. Case No.28 of 1985 from the Court of learned S.D.J.M., Sadar, Cuttack which was filed by the son of the deceased namely Sukanta Nayak (P.W.34) against appellant P.K. Choudhury and another police officer. P.W.39 verified the records of Purighat/Lalbag P.S. Case No.269/1985 which was lodged by P.W.13 Sura Nayak on 03.05.1985 in which neither the deceased nor the informant (P.W.1) was named as accused in the F.I.R. The viscera of the deceased collected during post mortem examination were sent to S.F.S.L., Rasulgarh for examination with the permission of C.J.M., Cuttack. P.W.39 moved the learned S.D.J.M., Sadar, Cuttack on 13.05.1985 for conducting T.I. parade in respect of the appellant P.K. Choudhury. He also seized the F.I.R. in Purighat/Lalbag P.S. Case No.272/1985 from the office of the C.S.I. under seizure list Ext.39 after obtaining permission of the learned C.J.M., Cuttack. After appellant P.K. Choudhury surrendered in the Court, test identification parade in his respect was conducted on 25.05.1985 by P.W.24, learned J.M.F.C., Cuttack in which P.W.1 identified the appellant. P.W.39 took over charge of investigation of Purighat/Lalbag P.S. Case Nos. 269/1985 and 272/1985 from S.I. Jayadev Sarangi (P.W.38) on 26.05.1985. He sent bamboo lathi (M.O.IV) and wooden batten (M.O. VII) to the doctor (P.W.37) who conducted autopsy for his opinion and received the opinion as per Ext.49. On the prayer of the I.O., the learned S.D.J.M., Sadar, Cuttack sent different exhibits to S.F.S.L., Rasulgarh for chemical examination on 01.06.1985 and the reports of chemical examination and serological examination were received and reply of the autopsy doctor on other queries were also obtained. The disputed F.I.R. in Purighat/Lalbag P.S. Case No.272/1985 and the admitted writings and signatures of the deceased were sent to handwriting expert through S.P., CID, CB, Cuttack for opinion. A casualty memo of S.C.B. Medical College and Hospital, which was issued to Mangalabag police station was also seized.

Sketch map (Ext.40) was prepared by the Amin (P.W.32) attached to the office of Tahasildar, Cuttack and handwriting expert's opinion was also received. Some of the statements of the witnesses were recorded under section 164 of Cr.P.C. by the learned S.D.J.M., Sadar, Cuttack on the prayer of the investigating officer. The investigating officer found the inquest report of the deceased as per Ext.16 was written in the handwriting of the appellant P.K. Choudhury so also the requisition for the medical examination of the deceased in Purighat/Lalbag P.S. Case No.272/1985. The seizure lists Ext.23/3 and Ext.42 in Purighat/Lalbag P.S. Case No.272/1985 prepared by the appellant P.K. Choudhury and the case diary of the said case prepared by the appellant in five sheets were also seized. The witnesses shown to have been examined by the appellant P.K. Choudhury in Purighat/Lalbag P.S. Case No. 272/1985 were re-examined by the I.O. but they did not support their alleged previous statements made before the appellant P.K. Choudhury and also denied to have been examined by him. The I.O. perused the station diary of Purighat police station and found that the arrest of the deceased or the informant in connection with Purighat/Lalbag P.S. Case No. 269/1985 was not shown in it.

On completion of investigation in Purighat/Lalbag P.S. Case No.269/1985, P.W.39 submitted charge sheet against some persons other than the informant (P.W.1).

On completion of investigation in Purighat/Lalbag P.S. Case No.272/1985, P.W.39 submitted final report (Ext.64) indicating the case to be false.

On completion of investigation in Purighat/Lalbag P.S. Case No.273/1985, he submitted charge sheet against the appellants on 22.07.1985 under sections 304/342/323/294/ 201/167/471/477-A/34 of the Indian Penal Code.

4. After observing due committal formalities, the case of the appellants was committed to the Court of learned Sessions Judge, Cuttack who transferred it to the Court of learned Asst. Sessions Judge -cum- Additional Chief Judicial Magistrate (Special), Cuttack for trial where the learned trial Court framed charges on 15.02.1986 against the appellants and since the appellants refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

5. The defence plea of the appellant Pravat Mohanty was that he was the Inspector in-charge of Purighat police station at the relevant time and since many cases were instituted against the Scheduled Caste community of Rajabagicha area, the community people were very much aggrieved on him for which they have deposed falsehood. It was further pleaded that in another case i.e. Purighat P.S. Case No.140 of 1984, the D.S.P. and P.W.39 requested him to release the seized motorcycle but he did not keep their request for which they were aggrieved and that they were in search of an opportunity to put him in trouble and accordingly, P.W.39 had arranged false evidence against him. It is the further defence plea that the deceased Kasinath along with the informant (P.W.1) came to Purighat police station in the occurrence night to lodge F.I.R. regarding assault on the deceased on the Kathajori river embankment at about 9 p.m. who had sustained bleeding injuries and on such F.I.R., Purighat/Lalbag P.S. Case No.272/1985 was registered and that deceased was not assaulted in Purighat police station.

The defence plea of the appellant P.K. Choudhury was that he was the Senior Sub-Inspector attached to Purighat Police Station at the time of occurrence. Sukanta Naik (P.W.34), who was the son of the deceased was an anti-social element and many cases were instituted against him at Purighat police station and he was taking action against P.W.34 for which P.W.34 along with others deposed against him as they wanted to demoralize the police. P.W.34 filed a complaint case against him and one P.K. Jaysingh, another S.I. of police of Purighat police station. Sura Naik (P.W.13) lodged an F.I.R. on 03.05.1985 in Purighat police station which was entrusted to him for investigation by the appellant Pravat Mohanty. It was further pleaded that P.W.39 was hostile towards him for which he arranged false evidence against him. It is the further defence plea that the deceased Kasinath had come to the police station in the night of occurrence at about 9.50 p.m. with bleeding injuries and he was not assaulted inside Purighat police station and on the basis of the F.I.R. of the deceased, Purighat/ Lalbag P.S. Case No.272/1985 was registered and the seizure made by him in that case was true. It was pleaded that in the night of occurrence, he arrested P.W.1 and the deceased and detained them in the police station.

6. In order to prove its case, the prosecution examined thirty nine witnesses.

P.W.1 Kusia Naik is the informant in the case. He is an eye witness to the assault on the deceased inside Purighat police station and he himself is an injured.

P.W.2 Khetrabasi Behera was the Senior Scientific Assistant of F.S.L., Bhubaneswar. He came to Purighat police station during the midnight on 05.05.1985 along with A.S.I. Photographer and S.I. of Finger Print on receipt of requisition from the investigating officer for inspection of the spot. He found blood stain marks on the floor of the room of the police station and collected sample. He also noticed blood stain in the police jeep bearing registration no.OSU 6632 and collected sample. He directed the photographer to take photographs of different places at the spot and the articles and kept those articles in a sealed packet and handed over to the investigating officer for sending it to the Director of S.F.S.L. for testing. He proved his report Ext.2.

P.W.3 Sudarsana Naik, who was working as a sweeper in Purighat Police Station, is a witness to the seizure of broomstick M.O.V. as per seizure list Ext.3. He was declared hostile by the prosecution.

P.W.4 Surendra Kumar Das, who was working as a Junior Assistant in Cuttack Municipality, is a witness to the seizure of some documents produced by the Office Accountant before the I.O. of the case which were seized under seizure list Ext.4. He also identified the signatures of the deceased on the Pay Cards supplied to the sweepers of the Municipality as the deceased was working as a Jamadar in Cuttack Municipality. He is also a witness to the seizure of Pay Cards vide seizure list Ext.5 and identified the signatures of the deceased in the reports Exts.6, 7 and 8.

P.W.5 Jogi Naik is a witness to the seizure of one jeep vide seizure list Ext.9 and eight packets containing blood stained cemented earth vide seizure list Ext.10.

P.W.6 Kailash Naik is a witness to the seizure of one dhoti, one banian, one silver DEUNRIA, one steel ring vide seizure list Ext.11. He is also a witness to the seizure of Khaki Pant and Khaki half-shirt of Kusia Naik (P.W.1) vide seizure list Ext.12 as well as one wooden batten (M.O. VII), one bamboo lathi (M.O. IV), some khatas and papers vide seizure list Ext.13. He is also a witness to the seizure of broomstick (M.O. V) vide seizure list Ext.3. He is also a witness to the seizure of eight paper packets containing blood stains collected from the floor vide seizure list Ext.10.

P.W.7 Malati Bewa, who is the widow of the deceased Kasinath, is a post occurrence witness and she identified the wearing apparels put on by her

husband at the time of going to the police station vide M.O.I, M.O.II, M.O.III, M.O.VI and M.O.VII. She stated about her husband and P.W.1 going to Purighat police station at about sunset time on the date of occurrence. She also came to Purighat police station along with others during the occurrence night at about 10 p.m. and heard cries of her husband 'MALO MARIGALI MARIGALI' and when they made an attempt to enter inside the police station, they were prevented by some police personnels.

P.W.8 Brahamananda Behera, who was posted as a Havildar in Purighat Police Station at the relevant point of time, did not support the prosecution case for which he was declared hostile.

P.W.9 Baidhar Mohanti was the Constable attached to Purighat Police Station at the relevant time and he stated that the deceased and P.W.1 had come to the police station and gave an application to appellant P.K. Choudhury who asked them to meet appellant Pravat Chandra Mohanty. He was also declared hostile by the custody.

P.W.10 Dr. Gourkrushna Bisal, who was posted as the Medical Officer in the Casualty of S.C.B. Medical College and Hospital, Cuttack, examined P.W.1 on 05.05.1985 on police requisition and noticed two simple injuries on the person of P.W.1 and prepared his report Ext.18.

P.W.11 Dhruba Charan Das, who was a worker in the Press, stated to have noticed two scheduled caste persons in Purighat police station in the night on 04.05.1985. He was declared hostile.

P.W.12 Maheswar Behera and P.W.13 Sura Naik also did not support the prosecution case for which they were declared hostile.

P.W.14 Dr. Kusa Kumar Jajodia was in charge of Casualty of S.C.B. Medical College and Hospital who received the deceased Kasinath dead on being produced by Havildar Brahmananda Behera of Purighat Police Station and gave casualty memo to Mangalabag police station. He proved the command certificate Ext.14.

P.W.15 Para Dei, who belonged to the Basti of the deceased and P.W.1, did not state anything regarding the occurrence.

P.W.16 Biswanath Pandit, who was a Social Worker, is a witness to the inquest report vide Ext.15.

P.W.17 Maheswar Nayak, who was a Royalty Collector of sand, stated that on the instruction of the appellant P.K. Choudhury, he put his signature on a written paper vide Ext.23.

P.W.18 Kanchana Dei is the wife of P.W.1 who stated that her husband along with deceased had been to Purighat police station on the date of occurrence but since they did not return till 9.00 p.m., she went to the police station in search of her husband and when she called her husband, the constable present in the police station abused her and threw a roller stick, for which she returned to her house. She was declared hostile by the prosecution.

P.W.19 Sundari Bewa, who is an inhabitant of the Basti of the deceased, stated that she had been to the police station on the request of the widow of the deceased to ascertain the whereabouts of the deceased and on reaching at the gate of the police station, she heard the shriek of a person from inside the police station and she was not allowed to enter inside the police station. She again went to the police station at about 10 p.m. with the widow of the deceased and others but they were not allowed to enter the police station.

P.W.20 Biswanath Naik, who is the younger brother of the deceased, stated that Havildar Behera Babu had been to their Basti in search of the deceased and P.W.1 and he had seen the deceased and P.W.1 going to the police station in the evening hours.

P.W.21 Harasa Dei, who accompanied the widow of the deceased to Purighat police station in search of the deceased, stated that they heard the cry from inside the police station but they were not allowed to enter inside.

P.W.22 Rukmani Dei also accompanied the widow of the deceased and others to Purighat police station in search of the deceased and she stated that they heard the cry of one person inside the police station but they were not allowed to enter inside.

P.W.23 Madhab Swain did not support the prosecution case for which he was declared hostile.

P.W.24 Niranjan Das was the J.M.F.C., Cuttack who conducted T.I. parade in respect of the appellant Pratap Kumar Choudhary on 25.05.1985

and informant (P.W.1) was the identifying witness and he correctly identified the appellant. He prepared the T.I. parade report Ext. 24.

P.W.25 Chakradhar Kar was J.M.F.C., Cuttack, who recorded the statements of some witnesses under section 164 of Cr.P.C. vide Exts.25, 26, 27 and 28.

P.W.26 Aramohan Singh was working as A.S.I., C.I.D., CB, Photography Bureau who visited the Purighat police station in the night of occurrence and he took photographs of blood stains lying at different places in the police station including the jeep. He also took photographs of the blood stained dhoti with stool mark, lathi and proved the positives and negatives of the photographs.

P.W.27 Mohan Kumar Prusty was the handwriting expert, who after examining the admitted handwritings of the deceased and the disputed handwritings of the deceased gave his opinion as per his report Ext.37.

P.W.28 Bijaya Kishore Mohanty was the J.M.F.C., Cuttack who recorded the statement of P.W.12 under section 164 of Cr.P.C.

P.W.29 Balunkeswar Biswal was the C.S.I. of Cuttack Sadar Court who stated about the seizure of the F.I.R. in Purighat P.S. Case No. 272/1985 vide seizure list Ext.39.

P.W.30 Purusottam Lenka, who was an attendant in the Casualty Department of S.C.B. Medical College and Hospital, Cuttack stated that he and two police people lifted the patient (the deceased) to the bed in the Casualty Department in a stretcher and the doctor examined and declared him dead.

P.W.31 Umesh Chandra Pattnaik was the Senior Clerk in the Health Office of Cuttack Municipality who produced the pay cards containing signatures of the deceased before the I.O. along with the absentee reports which were seized by the I.O. under seizure list. He also proved the signatures of the deceased in different documents.

P.W.32 Bhabagrahi Routrai was the Amin attached to the office of Tahasildar, Cuttack who visited Purighat police station and prepared the sketch map (Ext.40).

P.W.33 Bhagyadhar Bal, who is a resident of the locality adjacent to Rajabagicha High School stated not to have heard any hullah on the date of occurrence near the passage leading to Kathojori even though he was present in his house.

P.W.34 Sukanta Naik, who is the son of the deceased, is a post occurrence witness and stated about initiation of a complaint case bearing I.C.C Case No. 28 of 1985 against the appellant Pratap Kumar Choudhary and another S.I. of Police. He further stated that Ext.A is not the signature of the deceased.

P.W.35 Bulu Naik, who was working as a sweeper in S.C.B. Medical College & Hospital stated that on the instruction of the appellant P.K. Choudhury, he collected wet sand lying in front of the Casualty verandah of the hospital and kept it in a piece of paper, which was seized by appellant P.K. Choudhury in his presence.

P.W.36 Trinatha Naik, who was working as a sweeper in S.C.B. Medical College & Hospital, Cuttack stated about the collection of sample earth from Casualty Ward by P.W.35 which was seized by police under seizure list Ext.42.

P.W.37 Dr. Debendra Kumar Pattnaik was the Assistant Surgeon of F.M.T. Department of S.C.B. Medical College & Hospital, Cuttack, who conducted autopsy over the dead body of the deceased and proved his report Ext.43. He also gave his opinion on the requisitions submitted by the investigating officer.

P.W.38 Jaideb Sarangi who was working the Sub-Inspector of police attached to Purighat Police Station was the investigating officer of Purighat/Lalbag P.S. Case No.272/1985 after taking over the charge from appellant Pratap Kumar Choudhury.

P.W. 39 Gaganbehari Mohanty was the Inspector, C.I.D. , C.B., Cuttack is the investigating officer in the case.

No witness was examined on behalf of the defence.

The prosecution exhibited sixty seven documents. Ext.1 is the F.I.R., Ext.2 is the report of the Scientific Officer (P.W.2), Exts.3, 4, 9, 10, 11, 12,

13, 39, 42 and 62 are the seizure lists, Ext.5 is the pay cards, Exts.6, 7 and 8 are the absentee reports submitted by the deceased in the Municipality office, Ext.14 is the command certificate issued to P.W.8, Ext.15 is the inquest report prepared by the Executive Magistrate, Ext.16 is the inquest report prepared by the appellant Pratap Kumar Choudhary, Ext.17 is the dead body challan, Ext.18 is the report of the medical examination of P.W.1, Ext.20 is the F.I.R. lodged by P.W.13 in Purighat P.S. Case No.269 of 1985, Ext.21 is the 164 Cr.P.C. statement of P.W.13, Ext. 22 is the casualty memo issued by P.W.14 to Mangalabag Police Station, Ext. 23 is the signature of P.W.17 in a seizure list, Ext.24 is the report of Test Identification parade, Ext.19/3 and Exts.25 to 30 are the 164 Cr.P.C. statements, Exts.31 and 32 are the negative prints of photographs, Ext.33 is the forwarding letter addressed to the handwriting experts, Ext.34 is the negative prints of eleven exposures of handwriting, Ext.35 is the enlarged positive prints consisting of ten sheets of the disputed documents to be examined by the Handwriting Experts, Ext.36 is the enlarged photographs of admitted writings and signatures, Ext.37 is the report of the Handwriting Expert, Ext.38 is the statement of reasons of the Handwriting Expert, Ext.40 is the sketch map prepared by P.W.32, Ext.41 is the certified copy of the order-sheet in I.C.C. Case No. 28 of 1985, Ext.43 is the post mortem examination report, Ext. 44 is the endorsement of P.W.37 in the supplementary query by the I.O., Ext. 45 is the further opinion of P.W. 37, Ext.46 is the endorsement of the clerk of P.W.37 in the supplementary query of the I.O., Exts.47, 49 and 51 are the further opinion of P.W.37, Exts. 48 and 50 are the endorsements of P.W.37 in another supplementary query of the I.O., Ext.52 is one sheet of case diary written by the appellant Pratap Kumar Choudhary in Purighat/Lalbag P.S. Case No.269/1985, Ext. 53 is the signature of appellant Pratap Kumar Choudhary under the statement of P.W.15 in the case diary of Lalbag/Purighat P.S. Case No.269/1985, Exts.54 and 55 are the station diary entries, Ext. 56 is the medical requisition of the deceased, Exts. 57 and 58 are the zimanama, Ext.59 is the forwarding letter to S.F.S.L., Ext.60 is the Chemical Examination report, Ext.61 is the Serological Examination report, Ext.63 is the case diary maintained by appellant Pratap Kumar Choudhury in Lalbag/Purighat P.S. Case No.272/1985, Ext.64 is the final report in Purighat/Lalbag P.S. Case No.272/1985 submitted by P.W. 39, Ext.65 is the viscera report of the deceased, Ext.66 is the order copy of D.G. of police and Ext.67 is the supervision note of the Deputy Superintendent of Police.

The defence exhibited nine documents. Ext.A is the signature of the deceased in disputed F.I.R. in Lalbag/Purighat P.S. Case No.272/1985, Ext.B/1 is the statement of P.W.34, Exts.C, D, E and F are the station diary entries dated 04.05.1985 of Purighat police station, Ext.G is the certified copy of the order dated 20.01.1985 passed in G.R. Case No. 163 of 1985, Ext.H/1 is the certified copy of F.I.R. in Lalbag/Purighat P.S. Case No.49 of 1985 and Ext.J is the certified copy of the charge sheet in Lalbag/Purighat P.S. Case No.49 of 1985.

The prosecution also proved seven material objects. M.O.I is the dhoti, M.O.II is the ganji and M.O.III is the 'DEUNRIA' of the deceased respectively, M.O. IV is the bamboo lathi, M.O.V is the broom stick, M.O.VI is the steel ring of the deceased, M.O.VII is the wooden batten and M.O.VIII is the shirt of the deceased.

7. The learned trial Court after analysing the oral as well as documentary evidence on record came to hold as follows:

Paragraph no.9:

There is nothing to connect the accused persons with the alleged offence of abusing the ladies in obscene language. So, the charge under section 294/34 of the Indian Penal Code does not stand substantiated.

Paragraph no.11:

The first information report (Ext.20) in Purighat/ Lalbag P.S. Case No.269/1985 carries a vivid description of the occurrence and even the names of the witnesses are also mentioned in it including which person played what specific role during the occurrence but there is no mention of participation of the deceased and P.W.1 in it. Accordingly at the outset, it is not believable that the deceased and P.W.1 had participated in the offence alleged in Purighat/Lalbag P.S. Case No.269/1985.

Paragraph no.12:

P.W.13 Sura Naik who is the informant in Purighat/Lalbag P.S. Case No.269/1985 did not support the prosecution case and turned hostile and gave contrary evidence. He has also not explained in his evidence why he omitted to mention the names of the deceased and P.W.1 in his F.I.R. It seems that P.W.13 subsequently developed his story involving the deceased and P.W.1

to suit the defence version in the case. The deceased and P.W.1 had not taken part in the occurrence alleged by P.W.13 in his F.I.R.

Paragraph no.13:

The appellant Pratap Kumar Choudhury has shown examination of one Para Dei (P.W.15) in connection with Purighat/Lalbag P.S. Case No.269/1985 but P.W.15 herself frankly denied to have been examined in that case. Thus P.W.15 falsifies her alleged statement in the case diary of the said case.

Paragraph no.14:

The appellant Pratap Kumar Choudhury has not mentioned the time and place of arrest of the deceased and P.W.1 in the case diary of Purighat/Lalbag P.S. Case No. 269/1985 which suggests that it had not taken place and therefore, the I.O. omitted to write it. The appellant P.K. Choudhury could not explain this in his statement recorded under section 313 Cr.P.C. In view of the station diary entries of Purighat police station, the appellant P.K. Choudhury remained absent from the police station from 10.15 p.m. till midnight at 12 O' clock and he again came back at 12 O' clock but soon thereafter he left. The statement of the appellant in his accused statement that he arrested the deceased and P.W.1 in between 10 p.m. to 12 a.m., appears to be wrong. Though as per the station diary entry, appellant P.K. Choudhury remained present in Purighat police station for fifteen minutes between 10 p.m. to 10.15 p.m. but within the said period, he stated to have maintained the case diary of Purighat/Lalbag P.S. Case No. 272/1985 including examining the deceased and P.W.1 and issuing medical requisition for the examination of the deceased and left for the spot at 10.15 p.m. It is not possible to do so many things and then to arrest the deceased and P.W.1 during such short period of fifteen minutes. It becomes clear that appellant Pratap Kumar Choudhury could not explain in his accused statement when he arrested the deceased and P.W.1.

Paragraph no.16:

It becomes clear that the deceased and P.W.1 were not in fact arrested and the connected parts of case diary in Purighat/Lalbag P.S. Case No.269/1985 were fabricated to falsely show that they were arrested.

Paragraph no.19:

The distance between the house of P.W.33 and the embankment is not very short. It was, therefore not likely that P.W.33 would be able to hear the

sound of noise at the spot. So, his evidence cannot rule out the possibility of the alleged incident.

Paragraph no.20:

The occurrence as alleged in the so-called F.I.R. in Purighat/Lalbag P.S. Case No.272/1985 did not at all take place.

Paragraph no.21:

It is clear from the evidence of the P.Ws.1 and 20 that the deceased and P.W.1 had come to the police station in the evening of 04.05.1985.

Paragraph no.22:

The testimony of P.W.1 and P.W.20 being creditworthy, it is found that the deceased and P.W.1 came to the police station in the evening. In view of this fact, the occurrence alleged in Lalbag/Purighat P.S. Case No.272/1985 stands automatically ruled out.

Paragraph no.26:

The disputed signature reading 'Kasinath' in the so-called F.I.R. relating to Purighat/Lalbag P.S. Case No.272/1985 was not in the hand of the deceased.

Paragraph no.27:

The opinion of P.W.31 that Ext.A is the signature of the deceased which is contrary to the evidence of P.W.34 and expert's opinion, cannot be accepted as it seems that P.W.31 committed the mistake because he was not so well acquainted with the handwriting of the deceased.

Paragraph no.28:

The seizure list prepared by appellant P.K. Choudhury in Purighat/Lalbag P.S. Case No.272/1985 relating to seizure of a half shirt and one napkin on being produced by the deceased, appears to be a false seizure list.

Paragraph no.29:

The garments Dhoti, Ganji and Deunria and the steel ring of the deceased (M.O.I, II, III and VI) were seized under seizure list Ext.11 by

P.W.39 on being produced by P.W.8 after post mortem examination. It is not understood how a shirt and napkin were available as the clothes of the deceased, so that the appellant P.K. Choudhury could seize the same under seizure list Ext.23/3. The date put by the appellant P.K. Choudhury under his signature as 05.05.1985 in the seizure list (Ext.23/3) dated 04.05.1985 shows that this mistake occurred because the seizure list was written on a day subsequent to 04.05.1985. The explanation given by the appellant in that respect in question no.46 is not acceptable. Nothing was at all seized under Ext.23/3 and the alleged seizure was only a paper transaction.

Paragraph no.31:

The effect of evidence of P.Ws.35 and 36 is that though seizure of vomited substance has been reflected in Ext.42, it was not in fact seized. The averments in Ext.42 appear to be false and it is a fabricated document.

Paragraph no.32:

The chemical examination report (Ext.60) mentions that the sample did not contain vomited substance. Obviously it was not seized under Ext.42 and the document appears to be fabricated.

Paragraph no.33:

P.W.1 was falsely shown as a witness in the case diary of Purighat/Lalbag P.S. Case No.272/1985.

Paragraph no.34:

The alleged occurrence in Purighat/Lalbag P.S. Case No.272/1985 was not possible one as such an occurrence at such a place cannot cause the injuries found in the dead body.

Paragraph no.35:

The contention of the defence advocate that the injuries found in the dead body could have been caused by an occurrence and at the spot as alleged in Purighat/Lalbag P.S. Case No.272/1985 is not acceptable.

Paragraph no.36:

The inquest report Ext.16, prepared by the appellant P.K. Choudhury is a fabricated document in which the injuries on the deceased have been minimized to a great extent deliberately with malafide intention.

Paragraph no.37:

Ext.16 cannot suggest any conclusion other than a malafide intention to suppress the injuries.

Paragraph no.38:

The entire case i.e. Purighat/Lalbag P.S. Case No.272/1985 is false, the alleged investigation is only a paper transaction and all the connected documents i.e. so-called F.I.R., seizure lists, C.D. etc. are fabricated documents.

Paragraph no.39:

There is ample evidence to indicate who scribed the F.I.R. (Ext.1), where and how. Therefore, the contention raised from the side of the defence that the F.I.R. was not duly proved, is discarded.

Paragraph nos.42, 43:

The contention was raised by the defence that Ext.1 is not the real F.I.R., though it was treated as such. There is no reason to have suspicion against the F.I.R. lodged by P.W.1, specifically because evidence of P.W.1 in connection with it appears to be cogent.

Paragraph no.54:

Both the Sub-Inspectors P.K. Choudhury (appellant) and P.K. Jaysingh appeared in the Court on 30.04.1985 in pursuance of the summons issued to them in Complaint Case No.28/85 filed by P.W.34 which was four days before the alleged occurrence. Obviously, they must have been aggrieved not only against P.W.34 but also against his family members and against P.W.1. This indicates the motive on the part of accused P.K. Choudhury and accused Pravat Mohanty being his immediate superior, he must have also taken up his cause, thereby becoming motivated to retaliate.

Paragraph no.55:

Except P.W.1, there is no other witness to speak directly about the occurrence. The evidence of P.Ws.7, 19, 21 and 22 were adduced to provide limited corroboration to the testimony of P.W.1 but it is difficult to believe their version.

Paragraph no.56:

The evidence of the female witnesses P.Ws.7, 21 and 22 do not inspire confidence.

Paragraph no.57:

The unlawful detention of the deceased and P.W.1 inside Purighat police station in the night of occurrence stands proved.

Paragraph no.59:

P.W.1 is not an educated person and he is only a sweeper. Therefore, the evidence of P.W.1 cannot be discarded on the ground that there were some differences between his testimony and his averments in the F.I.R.

Paragraph no.60:

The report of the medical examination of P.W.1 proved by the doctor (P.W.10) supports his testimony about assault on him. This is another reason for which the evidence of P.W.1 should not be disbelieved.

Paragraph no.61:

The testimony of P.W.1 should not be viewed with suspicion on the ground that there are some discrepancies with reference to the narration made in the first information report.

Paragraph no.62:

No importance should be attached to the T.I. parade conducted by the Judicial Magistrate (P.W.24) in respect of accused P.K. Choudhury in which P.W.1 identified him, as P.W.1 knew the accused earlier, though not by name and deposed against him in Complaint Case No.28/85.

Paragraph no.63:

P.W.1 is the solitary witness to speak about the occurrence inside the police station and there is no other independent witness to corroborate his testimony. Testimony of P.W.1 is an added strength in addition to the available circumstances and factors which are by themselves sufficient to prove the alleged assault. So, there is no necessity at all to look for independent corroboration as the assault took place inside the police station.

Paragraph no.64:

The deceased was mercilessly beaten by accused P.K. Choudhury with the active connivance, consent and collaboration of accused Pravat Mohanty.

Paragraph no.66:

No adverse inference can be drawn against the prosecution for non-examination of P.K. Mishra, A.S.I. who had written the station diary entries marked as Exts.D, E, E/1, F, F/1 and 55 as his conduct appears to be dubious in making false Station Diary entries. Accused persons should have summoned him as a defence witness as his version would substantiate the defence plea.

Paragraph no.68:

The evidence of P.Ws.9, 11, 12 and 13 that the appellant Pratap Kumar Choudhury was not present in the police station during the crucial time i.e. till 9.45 p.m. cannot be relied upon in support of the defence plea. P.Ws.9, 11 and 13 appear to be liars and the evidence of P.W.12 is contrary to his statement under section 164 Cr.P.C.

Paragraph no.69:

The omission of the investigating officer to make P.W.34 Sukanta Naik as an accused in the charge sheet in Purighat/Lalbag P.S. Case No.269/1985 cannot be said to be a malafide act.

Paragraph no.71:

It is found that the deceased had not at all taken rice and vegetable curry. The presence of undigested food materials inside the stomach of the deceased cannot be believed as the deceased has taken food at about sunset time before going to the police station and he died in the night at about 3.00 a.m. and therefore, the intervening time gap was more than eight hours which was sufficient for complete digestion of food like rice and vegetables.

Paragraph no.73:

The hypothesis of suffocation/choking being not acceptable, the reasonable conclusion would be that the cause of death was due to failure of heart precipitated by long detention associated with the injuries found in the body.

Paragraph no.74:

The nexus of the death of the deceased and the act of the appellants in subjecting him to long detention throughout the night and mercilessly beating him and that the facts disclosed that the appellants knew that their acts would be likely to cause death of the deceased. Accordingly, it was held that the appellants have committed an offence punishable under section 304 Part II read with section 34 of the Indian Penal Code.

Paragraph no.78:

The accused persons fabricated case diary in Purighat/Lalbag Case No.269/1985 and also forged the so-called F.I.R., seizure lists and connected case diary including examination of witnesses, inquest etc. in Purighat/Lalbag Case No.272/1985. The accused persons used such forged documents as genuine documents, though to their knowledge those were forged. They did so falsely to explain the wrongful detention of the deceased and P.W.1 and to explain the injuries on their bodies in furtherance of their common intention. Hence, it is found that they are guilty of the offence punishable under section 471/34 Indian Penal Code.

The learned trial Court after discussing the evidence, disbelieved the charge under sections 294/34 of the Indian Penal Code in paragraph 9, charge under section 201/34 of the Indian Penal Code in paragraph 75, charge under section 167/34 of the Indian Penal Code in paragraph 76 and charge under section 477-A/34 of the Indian Penal Code in paragraph 77 of the judgment.

8. Mr. Devashis Panda, learned counsel appearing for the appellant P.K. Choudhury contended that the evidence of star witness P.W.1 is full of contradictions. He has made deliberate improvement in his evidence in comparison to what he has narrated in the F.I.R. and stated before the I.O. in his statement recorded under section 161 Cr.P.C. and therefore, no implicit reliance can be placed on it. He argued that taking into account the distance factor from the Basti of P.W.1 and the deceased to Purighat police station, had they left their Basti at a time as stated by P.W.1, it would not have taken so much of time for them to reach at the police station. None of the police officials like P.W.8 and P.W.9 present in the police station and other independent persons like P.W.11 and P.W.12 who came to the police station during the relevant time corroborated the evidence of P.W.1 regarding his presence with the deceased since evening hours as well as the assault on the deceased by any of the appellants. According to Mr. Panda, the alleged

weapon of offences i.e. M.O.IV and M.O.VII were not shown to P.W.1 during trial for identification and M.O.VII was not even produced before the Scientific Officer when he and his team visited Purighat police station on 05.05.1985 midnight nor sent to S.F.S.L., Rasulgarh for examination. The F.I.R. lodged by the deceased in Purighat/Lalbag P.S. Case No.272/1985, the station diary entries dated 04.05.1985 of Purighat police station marked as Exts.C, D, E, E/1, F, F/1 substantiate the defence plea regarding arrival of the deceased and P.W.1 in the police station around 10 p.m. and not at about 7 p.m. on 04.05.1985 as alleged by prosecution. He argued that materials on record indicate that A.S.I. of police P.K. Mishra was the diary in-charge, Sk. Firoz was the driver of the police jeep in which the deceased was taken to the hospital from the police station and constable Anand Naik was also on duty at the relevant point of time but they have not been examined during trial. According to Mr. Panda, it was the duty on the part of the investigating officer (P.W.39) to first verify as to who were on duty during the period P.W.1 and the deceased remained in Purighat police station and to examine all of them to ascertain the truthfulness of the prosecution version but the same has not been done. Though the investigating officer stated that he sent P.W.1 for medical examination on police requisition on 05.05.1985 and received the injury report on the same day but P.W.1 is silent in that respect. In the first information report, it is mentioned that a police officer having mustache assaulted the informant but strangely the informant has not named the appellant P.K. Choudhury in it even though he had deposed a month before against the said appellant in the complaint case instituted at the instance of P.W.34, the son of the deceased. The evidence on record indicates that there were other police officials working in Purighat police station at the relevant point of time who were having mustache and this creates doubt about the participation of the appellant P.K. Choudhury. He argued that no importance can be attached to the identification of appellant P.K. Choudhury in the T.I. Parade as everything has been stage managed by the investigating officer. He further contended that though the learned trial Court has commented that the appellant Pratap Kumar Choudhury had minimized the injuries sustained by the deceased at the time of preparation of inquest report (Ext.16) and gave incorrect data in it in comparison to the inquest report (Ext.15) prepared by the Executive Magistrate but no importance can be attached to Ext.15 as the concerned Executive Magistrate who prepared such report was not examined nor any of the witnesses who signed the inquest report were examined to prove their signatures on it. He emphatically contended that since Indian Evidence Act enumerates as to how a document

is to be proved and by whom and Ext.15 has not been proved in that manner, the same cannot be considered at all to discard Ext.16. The statement of the I.O. that he could not find the Executive Magistrate who prepared the inquest report is not acceptable. He further argued that P.W.39 seems to have received an oral order to investigate Purighat/Lalbag P.S. Case No.273/1985 prior to its registration and the presence of Umesh Mohapatra, City D.S.P. at the time of lodging of F.I.R. at Lalbag police station are some of the doubtful features of the case. While concluding his argument, it is submitted that two separate standards have been adopted by the learned trial Court while assessing the prosecution case vis-à-vis the defence plea and therefore, taking an overall holistic and pragmatic view, benefit of doubt should be extended in favour of the appellant P.K. Choudhury.

Mr. Yasobant Das, learned Senior Advocate appearing for the appellant Pravat Mohanty contended that P.W.1 is a agnatic relation of the deceased and he is a highly interested witness and he also deposed as a witness in the complaint case instituted by the son of the deceased against appellant P.K. Choudhury. P.W.1 is a Court bird and there is motive on his part to falsely implicate the appellant and therefore, the false implication of the appellant cannot be ruled out. Mr. Das further argued that the prosecution has to stand on its own legs and weakness of the defence or inability of the defence to prove the defence plea is not a factor to accept the prosecution case automatically. To dislodge the defence plea regarding assault on the deceased on the river embankment at about 9 p.m. on 04.05.1985, a story has been introduced by the prosecution that P.W.8 accompanied the deceased and P.W.1 to the police station which indicates that the prosecution has not come forward with clean hand to substantiate its case. The version of different witnesses including P.W.1 relating to the time of his leaving of Basti with the deceased on the date of occurrence and their arrival time at Purighat police station are discrepant in nature. He highlighted the evidence of the doctor (P.W.37) who conducted post mortem examination and contended that since the doctor stated that all the external injuries are superficial in nature and such type of injuries are by themselves not fatal and cannot precipitate death, therefore even if for the sake of argument it is conceded that there was assault on the deceased in Purighat police station but the same would not make out the case of culpable homicide as defined under section 299 of the Indian Penal Code as the doctor (P.W.37) stated that the deceased was having a diseased heart which might accelerate heart attack and sudden death. He further argued that there is nothing on record to make out a case for the

offence under section 471 of the Indian Penal Code. He further argued that it is doubtful if the F.I.R. lodged by P.W.1 was registered at 11 a.m. on 05.05.1985 rather it has been ante timed as in the inquest report and post mortem report prepared thereafter, Purighat/Lalbag P.S. case no. 273 of 1985 has not been reflected but those documents reflect Purighat/Lalbag P.S. case No. 272/1985 which was registered on the basis of the F.I.R. lodged by the deceased. According to Mr. Das, the investigating officer (P.W.39) has deliberately not investigated Purighat/Lalbag P.S. Case No. 272/1985 properly and submitted final report indicating the case to be false, otherwise truth could have been elicited. The statement of the star witness (P.W.1) stated to have been recorded on 05.05.1985 was sent to Court on 25.07.1985 which has not been explained by the prosecution. He argued that how the Scientific Officer (P.W.2) noticed blood stain on the floor of the police station during the midnight on 05.05.1985 when P.W.3, the sweeper washed and cleaned the floor in the morning hours of that day. He concluded his argument by submitting that since material witnesses have been withheld by the prosecution and the prosecution case has been disbelieved by the learned trial Court in part, it would be very risky to convict the appellant. The learned counsel for the appellant relied upon the decisions in the cases of **Jagdish -Vrs.- State of Haryana reported in (2019)7 Supreme Court Cases 711, Kathi Odhabhai Bhimabhai -Vrs.- State of Gujarat reported in A.I.R. 1993 S.C. 1193**, **Lallu Manjhi -Vrs.- State of Jharkhand reported in (2003)2 Supreme Court Cases 401**, **Motilal -Vrs.- State of Rajasthan reported in (2009)7 Supreme Court Cases 454**, **Govindaraju @ Govinda -Vrs.- State reported in (2012)4 Supreme Court Cases 722**, **Harbeer Singh -Vrs.- Sheeshapal reported in ABC 2016(II) 218 SC**, **Guman Singh -Vrs.- State of Rajasthan reported in 2019 (II) C.L.T. Crl. (Supp.) 402 (SC)** and **Rai Sandeep @ Deepu -Vrs.- State of NCT of Delhi reported in A.I.R. 2012 S.C. 3157**.

Mr. Lalatendu Samantaray, learned Addl. Govt. Advocate on the other hand supported the impugned judgment and submitted that the learned trial Court has vividly discussed the evidence on record and acquitted the appellants of some charges and even if in view of contradictions in the evidence of P.W.1 vis-à-vis his narration of events in F.I.R. and statement recorded under section 161 of Cr.P.C., he is taken as a partly reliable and partly unreliable witness, still then there are ample corroboration to the evidence of P.W.1 that when the deceased came to the police station with P.W.1 in the evening hours on the date of occurrence, he was having no

injuries but during midnight, he was taken to the hospital in a moribund condition from the police station and therefore, it is apparent that the injuries sustained by the deceased were caused during his presence at the police station. He argued that in view of the nature of contradictions in the evidence of P.W.1, his entire evidence cannot be wiped out rather the Court should adopt the well settled theory of separating grain from the chaff. He further submitted that even though the deceased and P.W.1 were not named as accused in the first information report lodged by P.W.13 Sura Nayak which gave rise to Purighat/Lalbag P.S. Case No.269/1985 but all the same they were called to the police station with an oblique motive and creating a false statement against them in the said case, they were shown to have been arrested and detained in the police station. He further argued that the deceased was assaulted mercilessly by the two appellants as the appellant P.K. Choudhury and another police officer were summoned by the Court as accused on the compliant petition filed by the son of the deceased and then realizing that the health condition of the deceased had deteriorated on account of assault and there would be hue and cry for custodial violence, documents were created immediately to show as if the deceased sustained the injuries on account of assault by some unknown persons on the river embankment and came to report for the same. If the deceased was having no injuries on his person when he came to police station as stated by some witnesses, then the question of deceased sustaining any injury on account of assault on the river embankment does not arise rather it falsifies the defence plea. If the defence plea that the deceased came to police station to report about his assault incident is not accepted, then the defence plea that P.W.8 was not sent to the Basti to call the deceased and P.W.1 gets falsified as there would be no occasion for them to come to the police station. Finally, he argued that the appeals should be dismissed.

9. It would be appropriate first to discuss briefly the background of the case which appears from the evidence on record.

P.W.20 Biswanath Nayak, the younger brother of the deceased lodged a first information report at Purighat police station against Sukanta Naik (P.W.34), the son of the deceased in connection with some landed property dispute, for which Purighat/Lalbag P.S. Case No.49 of 1985 was registered under sections 294 and 506 of the Indian Penal Code. In connection with the said case, P.W.34 was arrested by police of Purighat police station and allegedly assaulted for which P.W.34 approached the Legal Aid Board and

also instituted a complaint case vide I.C.C. Case No.28 of 1985 in the Court of learned S.D.J.M., Cuttack against the appellant P.K. Choudhury and one P.K. Jaisingh who were the Sub-Inspectors of the said police station. In the complaint case, after inquiry under section 202 of Cr.P.C. was conducted, summons were issued against the appellant P.K. Choudhury as well as P.K. Jaisingh and both of them appeared in the Court on 30.04.1985. The above aspect has not been disputed by appellant P.K. Choudhury in his accused statement though it is his case that the complaint case was filed on false accusation.

On 03.05.1985 P.W.13 Sura Naik lodged an F.I.R. (Ext.20) at Purighat police station, on the basis of which Purighat/Lalbag P.S. Case No.269/1985 was registered against P.W.34 and others but the deceased and P.W.1 were not named as accused in the said first information report. This aspect is also not disputed by both the appellants in their accused statements.

10. Now, coming to the prosecution case on the date of occurrence, it is stated that P.W.8 Brahmananda Behera who was the Havildar of Purighat police station came to the Basti of the deceased and P.W.1 for three times to call both of them to the police station and accordingly, both the deceased and P.W.1 went to the police station in the evening. Appellant Pravat Chandra Mohanty denied about this aspect whereas appellant P.K. Choudhury stated in his accused statement that since he was not present in the police station from 10 a.m. to 9.45 p.m., he could not say anything about that. In view of the stand taken by the appellants on this particular aspect, it would be important first to discuss the evidence adduced by the prosecution.

A. Whether P.W.1 and the deceased were called to Purighat police station through P.W.8 on the date of occurrence:

On this point, the relevant prosecution witnesses are P.W.1, P.W.7, P.W.8, P.W.13, P.W.18, P.W.20 and P.W.21.

In the first information report (Ext.1), it is mentioned that on the date of occurrence, after the informant (P.W.1) returned home from the market at about 4.30 p.m., he was informed by his wife (P.W.18) that he had been called to Purighat police station by Thanababu and after some time, the deceased also came and told P.W.1 to go to the police station and accordingly, both of them decided to go to the police station. There is nothing

in the first information report as to who gave information to the wife of P.W.1 in that respect.

In his evidence, P.W.1 stated that at about noon when he returned to his house, he was told by his wife that he was wanted by the police of Purighat police station and one Behera babu had come to call him and then he met the deceased who also told that they were wanted by the police of Purighat police station. Thus from the evidence of P.W.1, it appears that he was not directly informed by any police official of Purighat police station to come to Purighat police station but he was told by his wife in that respect. It is also not clear from his evidence as to who was that Behera babu to whom his wife was referring to.

P.W.18 Kanchan Dei is the wife of the informant who stated that on the date of occurrence at about noon, Havildar Behera Babu had come to their Basti to call her husband but her husband was absent for which Havildar Behera Babu returned. Again Behera Babu came to the Basti to call her husband and took her husband and the deceased to the police station. Her previous statement has been confronted by the Public Prosecutor after she was declared hostile and she admitted to have stated before the I.O. that when Havildar came to her house at about twelve noon on 04.05.1985, he told her that the appellant Pravat Babu wanted her husband to go there and that she told that her husband was absent. Except giving suggestion that Behera Babu did not call her husband and the deceased Kasinath, the defence has brought nothing in the cross-examination in that respect.

P.W.7 Malati Bewa, the widow of the deceased stated that Havildar Behera babu of Purighat police station came to call the deceased at about 11.30 a.m. on the date of occurrence but the deceased was absent and when she asked, the Havildar told her that the deceased was wanted by the Inspector in-charge and if the deceased would not go to the police station, they would come and take him under handcuff. Again Havildar Behera babu came at about 4.30 p.m. and at that time also the deceased was absent and had been to his duty. When she informed her husband (deceased), her husband and P.W.1 talked together and decided to go to the Purighat police station. She further stated that again when the Havildar babu came, the deceased and P.W.1 along with the Havildar babu went to the police station and by then it was sun set time. Thus from the evidence of P.W.7, it appears that Havildar Behera babu had come for three times on the date of occurrence

to call the deceased and on the first two occasions, he could not meet the deceased but on the third occasion when he came, the deceased and P.W.1 accompanied him to the police station. It is elicited in the cross-examination that the said Havildar Behera babu used to come to the Basti of the deceased to pacify different dispute and to take miscreants to the police station. Therefore, the identity of Havildar Behera babu by P.W.7 cannot be doubted. In the cross-examination, she stated that on the date of occurrence, the deceased returned home at about 5 p.m. from duty. Except giving suggestion to P.W.7 that Havildar Behera babu had not come to call the deceased and that the deceased had not accompanied him to the police station, nothing further has been brought out in the cross-examination to discard this part of evidence. P.W.7 has denied the defence suggestion. Law is well settled that the suggestion made by the defence does not constitute any evidence when the same is denied. Suggestions put are not evidence at all against the accused and on the basis of such suggestion, no inference can be drawn against an accused that he admitted the fact suggested in the cross-examination. A suggestion thrown to a prosecution witness under cross-examination by the defence counsel cannot be used as an implied admission so as to dispense with the proof of prosecution case.

P.W.20 Biswanath Naik has stated that on the date of occurrence which was the lunar eclipse day, during day time at about noon, he saw Havildar Behera Babu had come to their Basti to search for the deceased and P.W.1. He further stated that when the Havildar approached P.W.13 to show him their houses, P.W.13 did not like to show their houses and at that time the deceased as well as P.W.1 was not present in their respective houses. He further stated that in the evening hours at about 6.30 to 7.00 p.m., he saw the deceased and P.W.1 going towards police station. Except putting suggestion that Havildar Behera Babu had not come to the Basti and searching for the houses of the deceased and P.W.1, nothing has been elicited in the cross-examination to disbelieve the same on this particular aspect.

Thus, a combined reading of evidence of P.W.1, P.W.7, P.W.18 and P.W.20, it appears that Havildar Behera Babu had come to their Basti and in the absence of P.W.1 and the deceased, informed their respective wives to tell their husbands to go to the police station. However, the evidence of P.W.7 and P.W.18 that Havildar Behera Babu took P.W.1 and the deceased with him to the police station is not corroborated by P.W.1 and even P.W.20 has not seen Havildar Behera Babu accompanying P.W.1 and the deceased while they were going towards police station.

P.W.13 Sura Naik who is the informant in Lalbag/Purighat P.S. Case No.269 of 1985 stated that he had not seen any police officer or Havildar or constable in his village on 04.05.1985. He was declared hostile and his previous statement before police was confronted to him by the Public Prosecutor and the same was proved through the I.O. (P.W.39) that he stated to have seen Havildar Behera Babu along with the brother of the deceased on 04.05.1985 at about noon and that Havildar asking him to show the houses of the deceased and P.W.1 but he told the Havildar that he was not pulling on well with them and asked to tell to the brother of the deceased to show the houses. Therefore, even though P.W.13 has made a statement before police regarding approach of Havildar Behera Babu to him to meet the deceased as well as P.W.1 on the date of occurrence but during trial, he resiled from his previous statement.

P.W.21 Harasamani Dei stated to have seen the deceased in the company of P.W.1 and a Havildar on the river embankment road on the date of occurrence going towards Purighat police station. In the cross-examination, she stated that she had come to Tala Telenga Bazar to take rice from a shop on credit but she could not say the name of the shop keeper. She further admitted that there were many grocery shops in Rajabagicha area where the rice was available. She stated that there is a short cut road from her house to that shop where she had gone to bring rice and another road through river embankment. The purpose for which the witness was passing on the river embankment road on that day appears to be doubtful and therefore, it is not believable that she was on the river embankment road in the evening hours to see the deceased and P.W.1 in the company of a Havildar. Thus the evidence of P.W.21 has to be discarded.

P.W.8 Brahmananda Behera on the other hand stated that he had not gone to Harijan Basti on 04.05.1985 and nobody sent him to call any person of that Basti and on that day, he had not seen P.W.1 and the deceased. His previous statement made before the investigating officer was confronted to him by the Public Prosecutor after he was declared hostile that he stated in his 161 Cr.P.C. statement that on 04.05.1985 at about 11.00 a.m., he had been to call P.W.1 and the deceased being ordered by appellant Pravat Mohanty. The said previous statement of P.W.8 has been proved through the investigating officer.

Mr. Devashis Panda, learned counsel contended that since no command certificate has been proved by the prosecution to show that P.W.8

was sent to the Basti of the deceased on the date of occurrence to call the deceased and P.W.1, the oral evidence adduced by the prosecution in that respect cannot be accepted. As per Rule 90 of Orissa Police Rules, whenever a Subordinate police officer is deputed on any duty, a command certificate in P.M. Form No.9 is given to him, who has to carry it with him and produce it on his return before the officer in-charge. Obviously by proving the command certificate, the prosecution case regarding visit of P.W.8 to the Basti of the deceased and P.W.1 on the date of occurrence to call them would have been strengthened but its absence cannot a ground to discard the oral evidence on that score provided the same is clinching and trustworthy. It cannot be lost sight of the fact that the defence plea of the appellants was that neither the deceased nor P.W.1 was called to the police station through any Havildar but they came on their own to lodge a report in connection with the assault on the deceased on the river embankment. The possibility of sending P.W.8 to the Basti of the deceased and P.W.1 to call them to the police station without issuing any command certificate cannot be ruled out inasmuch as it is hardly expected from persons of social and educational background like the deceased and P.W.1 to demand perusal of command certificate before going to the police station.

Analysing the evidence adduced by the prosecution, even though P.W.8 has not supported the prosecution case and no command certificate has been proved by the prosecution, but in view of the evidence adduced by P.Ws.1, 7, 18 and 20 as already discussed, I am of the humble view that on the date of occurrence, P.W.8 had been to the Basti of the deceased and P.W.1 to call them to the police station and in their absence, he also informed about the purpose of his visit to their respective wives. However, the evidence adduced by P.W.7 and P.W.18 that Havildar Behera Babu took the deceased and P.W.1 with him to Purighat police station is not acceptable.

B. Leaving of Basti and arrival time of the deceased and P.W.1 at Purighat police station:

It is the prosecution case that the deceased and P.W.1 left their Basti at about 4.30 p.m. and reached at Purighat police station in the evening hours on 04.05.1985. However, it is the defence plea that both of them came to police station at about 9.50 p.m. to lodge a report in connection with the assault on the deceased that took place on the river embankment at about 9.00 p.m.

On this point, the relevant prosecution witnesses are P.W.1, P.W.7, P.W.20 and P.W.21. Since I have already discarded the evidence of P.W.21, the evidence of other three witnesses is to be discussed.

In the first information report, P.W.1 has mentioned that after he returned home at about 4.30 p.m. and heard from his wife that he had been called to Purighat police station, decision was taken by him and the deceased to go to the police station. It is further mentioned that he and the deceased went to Purighat police station at about 7.00 p.m. In his evidence, P.W.1 stated that he and the deceased decided to go to Purighat police station at about 4.00 or 4.30 p.m. and again the deceased came and called him to go to Purighat police station at 4.30 p.m. and after taking some tiffin in the house of the deceased, they proceeded to Purighat police station and by the time they reached at the police station, it was already evening. In the cross-examination, he stated that they left the house of the deceased at 4.30 p.m. to go to police station and by the time they reached, the light was on. In the first information report, there is no mention about taking of tiffin in the house of the deceased by both of them before proceeding to the police station. It has been confronted to this witness in the cross-examination that he had not stated in his F.I.R. or in his 161 Cr.P.C. statement that at about 4.30 p.m., again the deceased called him to go to the police station and taking tiffin in his house, they went to the police station. The I.O. (P.W.39) has stated that P.W.1 did not state before him that he and the deceased went to police station at 4.30 p.m. rather he said that they went at about 7.30 p.m. It has been suggested to P.W.1 by the defence that they had never come to the police station during the evening hours on 04.05.1985. The discrepancies which are appearing in the evidence of P.W.1 vis-à-vis the F.I.R. and his previous statement recorded under section 161 Cr.P.C. relating to leaving the Basti and arrival at the police station has its own significance in the factual scenario. After arrival in the house at about 4.30 p.m., P.W.1 seems to have been informed by his wife that he had been called to Purighat police station and since the deceased was also called to the police station, both of them decided to go to the police station which obviously must have been after 4.30 p.m. They took the tiffin in the house of the deceased which must have taken sometime and then they proceeded to the police station. Therefore, the evidence of P.W.1 that they left the house of the deceased at 4.30 p.m. to go to the police station cannot be accepted. The distance between the Basti of P.W.1 and Purighat police station is only one kilometer and it is rightly contended by the learned counsel for the appellants that had P.W.1 and the

deceased started at 4.30 p.m., it would not have taken so much of time to reach at the police station at about 7.30 p.m. Though in the F.I.R., it is mentioned that they went to Purighat police station at about 7.00 p.m. and in his statement before police, he stated that they went to police station at about 7.30 p.m. but during trial he stated that they left the house of the deceased to go to police station at 4.30 p.m. Even though P.W.1 deposed in the Court almost a year after the occurrence, but the discrepancies relating to the leaving time of Basti as stated by him at different stage is very difficult to be digested. Why the leaving time of Basti was stated in a different manner? Whether it is an attempt by the prosecution to nullify the defence plea that the assault on the deceased took place on the river embankment at about 9.00 p.m. for which the deceased came to police station at about 9.50 p.m.? This aspect is to be discussed at appropriate stage while considering the defence plea and the F.I.R. stated to have been lodged by the deceased.

P.W.7 Malati Bewa, the widow of the deceased stated that her husband returned home after 4.30 p.m. and then he and P.W.1 talked together and decided to go to the police station. In the cross-examination, she stated that the deceased returned home at about 5.00 p.m. She further stated that P.W.1 went to attend the call of nature to the river and after he returned, she gave them tea, puri and halwa as it was a lunar eclipse day and then the deceased and P.W.1 went to the police station and by that time, it was sunset time. Thus, from the evidence of P.W.7, it appears that after taking tiffin, both P.W.1 and the deceased left their Basti at sunset time.

P.W.20 Biswanath Naik has stated that on the day of lunar eclipse in the evening at about 6.30 or 7.00 p.m., he had seen the deceased and P.W.1 going towards the police station. Nothing has been brought out in the cross-examination to raise any doubt on this aspect.

It was summer season and the sunset time in Cuttack on 04.05.1985 as per google was 6.02 p.m. In view of the evidence of P.W.1, P.W.7 and P.W.20, it appears that both the deceased and P.W.1 left their Basti after sunset and the time mentioned in the F.I.R. that they went to Purighat police station at about 7.00 p.m. appears to be correct.

Now, coming to the arrival time at Purighat police station, apart from the evidence of P.W.1, the evidence of P.W.9, P.W.11 and P.W.12 are relevant. P.W.1 stated that there was a cabin in front of the police station and

the deceased asked him to sit there so that he could go to the police station to study the situation and accordingly, he sat there and the deceased went up to the gate of the police station and returned and told him that the appellant Pravat Mohanty had not come and they have to wait till his arrival. P.W.1 stated in the chief examination that by the time they reached at Purighat police station, it was already evening. In the cross-examination, he stated that by the time he reached at the police station, there was already light. He further stated in the cross-examination that at about 7.30 p.m., they entered the police station. Therefore, according to P.W.1, their arrival time in the police station was at about 7.30 p.m.

P.W.9 was the constable attached to Purighat police station and he stated that on 04.05.1989 from 8.00 p.m. to 10.00 p.m. when he was on duty, he had seen the appellant Pratap Kumar Choudhury in the police station but not the appellant Pravat Mohanty. He further stated that just before 10.00 p.m., he had seen the deceased and P.W.1 coming to the police station and giving an application to the appellant Choudhury. This witness was declared hostile by the prosecution and cross examined as he did not support the prosecution case relating to the assault on the deceased inside the police station.

P.W.11 is an independent witness and he stated that at about 9.30 p.m. on 04.05.1985 he came to Purighat police station in a case matter and after fifteen minutes of waiting, appellant Choudhury babu came and he also found two HADIS standing there. This witness has been declared hostile by the prosecution as he did not support the prosecution case relating to the assault on the deceased inside the police station.

P.W.12 is an independent witness who stated that on 04.05.1985 at about 10.00 p.m., he had come to Purighat police station and sat on the verandah. At that time, appellant Choudhury babu came and started going through a newspaper sitting in his room. After some time, two persons came and approached Choudhury babu. This witness has also been declared hostile by the prosecution as he did not support the prosecution case relating to the assault on the deceased inside the police station.

The statements of P.W.11 and P.W.12 were recorded by Magistrate under section 164 of Cr.P.C. in which also they had stated about the assault on the deceased inside Purighat police station by the appellants. Thus P.W.11

and P.W.12 have not only resiled from their previous statements made before the I.O. but also before Magistrate.

After considering the evidence of P.W.9, P.W.11 and P.W.12 with due caution and care, I find that as a result of the cross-examination and contradiction, the witnesses stand thoroughly discredited and completely shaken and their testimony relating to the arrival time of the deceased and P.W.1 at Purighat police station around 10 p.m. is very difficult to be acted upon and as a matter of prudence, such evidence has to be discarded in toto. (**Ref: Sat Paul -Vrs.- Delhi Administration: (1976) 1 Supreme Court Cases 727**).

Since after discarding the evidence of P.W.9, P.W.11 and P.W.12, the only evidence remains regarding arrival time of the deceased and P.W.1 at Purighat police station is that of P.W.1 from whose evidence, the arrival time appears to be at about 7.30 p.m., at this stage it is important to discuss the evidence of P.W.1 who is the star witness of the prosecution and the conviction of the appellants seems to be based mainly on his evidence.

C. Whether statement of P.W.15 was concocted for calling P.W.1 and the deceased to the police station:

The prosecution case is that even though in the F.I.R. lodged by P.W.13 in Purighat/Lalbag P.S. Case No.269/1985, there was nothing against either P.W.1 or the deceased but all the same, they were called to the police station with an ulterior motive. I have already held that P.W.8 was sent on the date of occurrence to call P.W.1 and the deceased. It is not in dispute that there is nothing in the F.I.R. (Ext.20) lodged by P.W.13 against P.W.1 and the deceased. Appellant P.K. Choudhury has mentioned in the case diary of Purighat/Lalbag P.S. Case No.269/1985 that he examined Para Dei (P.W.15) in connection with the said case and she implicated the deceased in connection with that incident. P.W.15 in her evidence clearly denied having any knowledge about any such incident that took place on the previous day of lunar eclipse of the year 1985 or giving any statement to any police officer. The learned trial Court has held that such a statement of P.W.15 falsifies the recording of her statement by appellant P.K. Choudhury in Purighat/Lalbag P.S. Case No.269/1985.

Law is well settled that even though the name of a person does not find place in the first information report as an accused but during course of

investigation, materials come against such person, nothing prevents the investigating officer to arraign him as an accused and also interrogating him to ascertain the truth. I am of the humble view that merely because P.W.15 denied to have made any statement before appellant P.K. Choudhury, her evidence cannot be accepted as gospel truth. Whether she was examined or not and whether her statement has been concocted was the subject matter of the trial in Purighat/Lalbag P.S. Case No.269/1985.

Therefore, the finding of the learned trial Court that the evidence of P.W.15 falsifies her alleged statement in the case diary of Purighat/Lalbag P.S. Case No.269/1985 is not acceptable. However, it is evident that both P.W.1 and the deceased were called to Purighat police station through P.W.8 for which they came there and they were also shown to have been arrested in Purighat/Lalbag P.S. Case No.269/1985.

D. <u>Whether evidence of P.W.1 can be acted upon:</u>

I have already discussed the evidence of P.W.1 prior to his arrival at Purighat police station in the first two headings from which it appears that there are some discrepancies in his evidence relating to leaving time of his Basti but his arrival time at Purighat police station at about 7.30 p.m. has almost remained unshaken. Now, let me discuss about what he stated to have happened after he entered inside the police station with the deceased.

Since other eye witnesses to the occurrence like P.Ws.9, 11, 12 and 13 have not supported the prosecution case relating to the assault on the deceased and resiled from their previous statements, it is required to assess the evidence of solitary eye witness (P.W.1) relating to the assault by the appellants on him as well as the deceased carefully and also keeping in view the medical evidence.

P.W.1 stated that when he entered inside the police station with the deceased, the appellants abused them in filthy language as the son of the deceased approached Legal Aid office complaining against appellant P.K. Choudhury. Appellant P.K. Choudhury kicked both P.W.1 and the deceased and then assaulted the deceased with a lathi from his head to feet and then he assaulted P.W.1 by the same lathi on his left hand, left leg and left side cheek. Due to such assault by appellant P.K. Choudhury, the deceased sustained severe bleeding and swelling injuries all over his body and he himself also sustained swelling injury on his left fore arm. He further stated that the

appellant Choudhury came with a constable and the constable was holding a bottle of liquor. The deceased was forced to open his mouth and the appellant P.K. Choudhury poured liquor into his mouth and P.W.1 was also forced to open his mouth and some liquor was inserted in his mouth. The appellant P.K. Choudhury told P.W.1 that he was the Chamcha of the deceased as he was a witness for deceased's wife and son in the Legal Aid case. The appellant P.K. Choudhury also gave a slap on the left cheek of P.W.1. Again the appellant P.K. Choudhury assaulted the deceased by means of the lathi which he was holding. Out of fear, the deceased wanted to pass stool and urine and went to the verandah by crawling. P.W.1 heard the cry of the deceased "MARIGALI MARIGALI, MOTE AU BADANA". Then P.W.1 was forced to go to that place and he saw that the deceased had passed urine and stool. The appellant Pravat Mohanty asked P.W.1 to lift the deceased. When P.W.1 told that the deceased was about to die and it would not be possible on his part to lift him, the appellant Pravat Mohanty gave three to four kick blows on the buttock of P.W.1. With much difficulty, P.W.1 took the deceased to the side of a well inside the compound of the police station. One constable gave water and he washed the deceased. The appellant Pravat Mohanty gave some blows with a long lathi to the deceased after his washing. Then the appellant Pravat Mohanty brought some bread through one constable and told P.W.1 to give it to the deceased. P.W.1 told that the deceased was not in a position to take any food. At this, P.W.1 was given a kick on his buttock by appellant Pravat Mohanty. P.W.1 gave the bread to the deceased which he could not eat. The deceased was also assaulted by the appellant Pravat Mohanty by means of lathi on his shoulder and other joints of his body. While P.W.1 was taking the deceased to the verandah of the police station, his condition became serious. Appellant Pravat Mohanty asked the driver to bring the jeep and then the deceased was taken to the jeep and at that time, he was in a dying condition. The police officials told P.W.1 that they were taking the deceased to the hospital. He further stated that when he wanted to go with them as he had also sustained some swelling injuries on account of assault; he was not allowed to go and detained in the police station under handcuff. At about midnight, the deceased was taken to the hospital in the police jeep by appellant Pravat Mohanty and a constable. In the morning, again he saw the appellant Pravat Mohanty in the police station. Being asked by appellant Pravat Mohanty, the handcuff of P.W.1 was opened and he was set free. He further stated that at that time, a sweeper came to the police station for sweeping and the appellant Pravat Mohanty asked the sweeper to clean the spot which was stained with blood, stool, urine and vomiting

substances and accordingly, the sweeper washed it. While he was sitting there, the wife of the deceased came with another female and challenged in the police station in front of the appellant Pravat Mohanty that they killed her husband and she would die. He heard about the death of the deceased and was shocked. While he was in the police station, two police officers came one after another and took him in a jeep to Lalbag police station and asked him about the death of the deceased. He narrated the entire incident from beginning to end. One of the police officers reduced the oral account into writing at Lalbag police station which was read over and explained to P.W.1 and the same was treated as F.I.R. (Ext.1). P.W.1 further stated that he did not know the appellant Choudhury prior to the incident and that he identified him in a T.I. parade after the incident. He further stated that on the date of occurrence, the deceased had not lodged any sort of information at the police station nor any of them had sustained any injury before going to the police station on the date of occurrence.

Thus if evidence of P.W.1 given in the chief examination as enumerated above is assessed, it appears that he supported the prosecution case and implicated both the appellants in the assault on the deceased as well as on his assault. He further stated that due to such assault, the condition of the deceased became serious for which he was shifted to the hospital where he was declared dead.

Now, coming to his cross-examination, it has been elicited that since last four years, he was coming to the Court to look after his case and as a witness in other cases and occasionally, he was also coming to the police station along with the deceased to look after the cases of the Basti people at the time of litigation. He stated that the deceased was his agnatic relation and he called him as his brother. He admitted to have deposed in I.C.C. Case No.28/1985 which was filed by Sukanta Naik (P.W.34), the son of the deceased after taking Legal Aid advice. Thus, P.W.1 is not only related to the deceased but also deposed in the complaint case filed by the son of the deceased against appellant Choudhury and another and he also appears to be accustomed with the Court proceedings and therefore, though his evidence cannot be discarded merely on the ground that he is either partisan or interested being a relative to the deceased, but his evidence requires scrutiny with more care and caution, so that neither the guilty escapes nor the innocent is wrongly convicted. If on such careful scrutiny, his evidence is found to be reliable and probable, then it can be acted upon. If it is found to be

improbable or suspicious, it ought to be rejected. Law is well settled that in order to act upon the evidence of a solitary witness, the evidence must be clear, cogent, trustworthy and aboveboard.

P.W.1 stated that the assault on him as well as on the deceased was over by 10.30 p.m. to 11.00 p.m. Though he stated that four to five constables were present inside the police station during that period but only two of them i.e. P.W.8 and P.W.9 were examined but they did not support the prosecution case. He further stated that one Mishra Babu and one Panda Babu were also present in the police station. According to the I.O. (P.W.39), on 04.05.1985 A.S.I. of police namely Prafulla Mishra was in charge of the Station Diary of Purighat police station and on 05.05.1985 at 8 a.m. Chandrasekhar Panda took charge of the Station Diary and he examined both of them, but none of them have been examined during trial. P.W.1 further stated that one outsider of Bangalisahi was present during the assault and the said witness was examined as P.W.11 but he also did not support the prosecution case. He further stated that police officers were present at the police station when they entered inside at 7.30 p.m. and they had seen their arrival but none of them have been examined during trial to say about the arrival of P.W.1 and the deceased at 7.30 p.m.

In the F.I.R., P.W.1 stated that he was assaulted only by a police officer having mustache with a lathi who gave two blows on his hand and also a kick. Nothing has been stated therein about any assault made to him by appellant Pravat Mohanty. In the chief examination, he not only stated that appellant P.K. Choudhury kicked him and then gave four lathi blows on his left hand, left leg and left side cheek and slapped on his cheek but also stated that appellant Pravat Mohanty gave three to four kick blows on his buttock at one stage and also at a subsequent stage, he gave another kick on his buttock. Of course, in the 161 Cr.P.C. statement, P.W.1 stated about kick blows given to him by appellant Pravat Mohanty. Therefore, even though the implication of appellant Pravat Mohanty in his assault was not there in the first information report but it was stated in his previous statement before the I.O. and also during trial. P.W.1 was medically examined on police requisition by the doctor (P.W.10), who noticed one swelling on the left wrist joint and one abrasion on the left leg and both the injuries have been opined to be simple in nature. Thus, in the ocular testimony of P.W.1, it appears that he has exaggerated the number of blows given to him by lathi by appellant P.K. Choudhury and also the number of kicks given to him by appellant Pravat

Mohanty in comparison to his previous statement but these exaggeration in the number of lathi blows or kicks cannot be a factor to disbelieve the participation of the appellants in the assault of P.W.1.

Similarly so far as the assault on the deceased is concerned, the ocular testimony of P.W.1 indicates that, apart from the kick blows given to him by the appellants at different stages, he was assaulted by appellant P.K. Choudhury with a lathi from his head to feet for which he sustained severe bleeding and swelling injuries all over his body and again at another stage, appellant P.K. Choudhury assaulted him with the lathi which he was holding and after sometime, appellant Pravat Mohanty gave some blows with a long lathi to him and again appellant Pravat Mohanty assaulted him on his shoulder and other joints by a lathi.

At this stage, if the evidence of P.W.37, the doctor who conducted autopsy is taken into account, it appears that the deceased had sustained eleven external injuries, out of which the injuries nos. 1 to 9 were opined to be antemortem in nature. Those injuries were either abrasions or bruises except injury no.5 which is a lacerated wound below the left knee in front without involving the bone. The abrasions or bruises noticed were on lower part of right thigh, right leg below the right knee, medial aspect of right leg above the medial malleolus, left leg below the left knee, left buttock, left elbow joint on the posterior aspect, left thigh and on right hand from above the elbow to the dorsum of palm. Thus all the injuries except one on the right hand were below the waist line of the deceased.

The contradictions relating to the narration of events in the first information report as well as in the previous statement have been confronted to P.W.1 in the cross examination by the defence counsel and it has been proved through the I.O. (P.W.39) that he has not stated before him that two months before death of the deceased, there was a dispute between him and his brother named Biswanath (P.W.20) for the landed property and that P.W.20 reported the matter at the police station. He has also not stated before him that deceased cautioned him saying that if they would not go to the Purighat police station, the consequences would be bad. He has not stated that he and the deceased went to the police station at 4.30 p.m., rather he stated that they went at about 7.30 p.m. He has not stated before the I.O. that when they entered inside the police station, they saw the appellant Pravat Mohanty sitting on a chair in his office and that both the appellants told the

deceased "EEA SALA KASINATH TO EKA ASHICHU TO PUA KAHIN". He has not stated before the I.O. that the deceased replied to police that he had not gone to the Legal Aid office and that only his son and wife had gone there. He has not stated before the I.O. that appellant P.K. Choudhury gave kicks specifically to his knee and the knee of the deceased. Though he stated to the I.O. about the assault by the appellant P.K. Choudhury, he did not specifically state that the assault was on head to foot. He has not stated before the I.O. that the appellant P.K. Choudhury gave lathi blows on the left leg and left cheek of the deceased. Though he stated about lathi blows on his left hand but he did not state that the number of blows were four. Though he stated before the I.O. that the deceased sustained swelling in his hands and legs, he did not state that the swellings were throughout his body. He has not stated before the I.O. that appellant P.K. Choudhury came with a constable and that the latter was holding a bottle of liquor. He has also not stated that the appellants abused him saying that he was the CHAMACHA of the deceased as he was a witness for the wife and son of the deceased in the Legal Aid matter. He has not stated that the appellant P.K. Choudhury gave a slap on his cheek and gave a second phase beating by lathi to the deceased before taking him to verandah. Though he stated that the deceased was taken to the verandah after assault, he did not state that the deceased went to the verandah by crawling. He did not state that he was forced to go to the verandah and that the appellant Pravat Mohanty asked him to lift the deceased and that because the deceased was about to die it was not possible on his part to lift him. Though he stated to him about assault to him, he did not specifically state that it was through kicks on the buttock numbering three to four. He has not stated about assault by appellant Pravat Mohanty on his buttocks by kicks on the verandah. He has also not stated that the deceased was again assaulted by a long lathi after he washed the deceased at the well. Though he stated before the I.O. that the appellant Pravat Mohanty assaulted the deceased because he did not take bread, he did not specifically state that the assault was on the shoulder. He did not state that he was compelled to take the deceased to the verandah of the police station. He has not stated that the condition of the deceased was serious before he was taken to the verandah of the police station. He has not stated that the deceased was in dying condition specifically when he was taken in the jeep.

In view of the contradictions appearing in the evidence of the solitary eyewitness P.W.1 as pointed out above, the question arises whether he can be said to be a truthful witness and implicit reliance can be placed on his

evidence. In the case of **Jagdish** (supra), it is held that the sound and well established rule of law that conviction on the basis of a solitary eyewitness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances. The evidence of a solitary witness will therefore call for heightened scrutiny. In the case of **Kathi Odhabhai Bhimabhai** (supra), it is held that even if the presence of an injured witness cannot be doubted but if his evidence is in conflict with medical evidence, it is not safe to convict the accused on his sole testimony. In the case of **Lallu Manjhi** (supra), it is held that since the version of the incident given by the sole eyewitness who is also an interested witness on account of his relationship with the deceased and being inimically disposed against the accused persons is highly exaggerated and not fully corroborated by the medical evidence and the version of the incident as given in the Court is substantially in departure from the earlier version as contained and available in the first information report, no reliance can be placed on such testimony for the purpose of recording the conviction of the accused persons. In the case of **Govindaraju @ Govinda** (supra), it is held that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eyewitness then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. In the case of **Guman Singh** (supra), it is held that if the testimonies of the witnesses would be treated to be falling in the third genus i.e. neither wholly reliable nor wholly unreliable, the Court has to treat the evidence with circumspection and look for corroboration in material particulars by reliable evidence/testimony, direct or circumstantial. In the case of **Rai Sandeep** (supra), it is held that what would be more relevant in the case of a 'sterling witness' is the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. There should not be any variation in the version of such a witness. To be more precise, the version of such a witness on the core spectrum of the crime should remain intact. The Court can accept the version of such a witness without any corroboration, basing on which the guilty can be punished. The other attendant materials,

namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charges alleged.

The Court is always concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. A witness in a criminal case can be categorized under three headings i.e. **(i)** wholly reliable **(ii)** wholly unreliable **(iii)** neither wholly reliable nor wholly unreliable. In case the Court finds a witness to be under the first category i.e. wholly reliable, the Court can act upon it even without seeking for any corroboration. If the witness comes under the second category i.e. wholly unreliable, the Court has to discard his evidence in toto. If the Court finds a witness to be under the third category i.e. neither wholly reliable nor wholly unreliable then the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. It is the duty of the Court to make an attempt to separate grain from the chaff, the truth from the falsehood where it is possible to do so. However, where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the Court would have to reconstruct an absolutely new case then it would not be proper and justify doing so. While considering the discrepancies in the evidence of the witness, the Court has to see whether there are material discrepancies or minor ones. Minor discrepancies in the evidence of the witness do not corrode his credibility. However, material discrepancies affect the truthfulness of a witness and it would not be safe to place reliance on the testimony of such a witness.

The discrepancies in the evidence of P.W.1 mainly relates to the manner of assault by the appellants to the deceased as well as to him, the number of blows and the parts of the body where both of them were assaulted and it seems that even in some respect of such assault, P.W.1 has made certain exaggeration during trial than what he mentioned in the F.I.R. as well as stated in his statement recorded under section 161 of Cr.P.C. The learned trial Court has also held that there are some discrepancies between the evidence of P.W.1 and the averments made in the F.I.R. and those discrepancies were brought to the notice of P.W.1 during his cross-examination, but the Court found that in spite of such discrepancies, on the whole, the basic and broad feature of what happened inside the police station

have not been changed. The learned trial Court has also held that the occurrence took place in May 1985 and P.W.1 was examined in Court about a year thereafter and since he is not an educated person, the contradictions are bound to occur. The learned trial Court ultimately held that the evidence of P.W.1 should not be discarded on the ground that there were some differences between his testimony and his averments in the F.I.R. It seems that the learned trial Court has not taken into account the discrepancies between the evidence of P.W.1 vis-a-vis his statement before police recorded under section 161 of Cr.P.C. and it has only focused on the discrepancies of the evidence of P.W.1 with reference to the first information report.

It cannot be lost sight of the fact that after the death of the deceased came to notice, there was commotion in the Harijan Basti and among the sweepers of Cuttack Municipality and P.W.16 Biswanath Pandit who was the President of Cuttack Mehentara Sangh and President of Cuttack Municipal Employees' Union immediately brought the matter to the notice of Superintendent of Police and District Magistrate, Cuttack as the deceased was a Jamadar of Cuttack Municipality and a member of the Union. The Deputy Superintendent of Police, City arrived in Purighat Police Station on 05.05.1985 in the morning at about 10.30 a.m. followed by the D.I.G. of Police (Central Range), under whose direction, the Deputy Superintendent of Police took the informant (P.W.1) from Purighat police station to Lalbag police station. At the same time, it is the prosecution case that the Director General of Police passed an order in his residential office on 05.05.1985 directing P.W.39 to investigate into all the three cases. As per the evidence of the I.O. (P.W.39), the first information report was scribed in the hands of one A.S.I. of police named Mr. Jena in Lalbag police station and at that time City D.S.P. Umesh Mohapatra and other officers of Lalbag police station were present. In view of the background, when the F.I.R. was scribed in presence of City D.S.P. and has also been signed by him and it carries a vivid description of the events chronologically, even though the F.I.R. is not supposed to be an encyclopaedia of the entire events and cannot contain the minute details of the events but in the peculiar facts and circumstances, if any material aspect is not mentioned in the F.I.R. or stated in the 161 Cr.P.C. statement but stated for the first time in Court in an exaggerated manner for which contradictions have been proved, then certainly such contradictions cannot be just ignored on the ground that the witness deposed in Court about a year after the occurrence. The contentions raised by the learned counsel for the appellants that P.W.1 has made exaggerations while deposing in Court in

some material aspect that took place during course of occurrence which he has not mentioned in the first information report as well as in his statement recorded under section 161 Cr.P.C., has some force but the primary question is whether the entire evidence of P.W.1 is to be discarded on account of such exaggerations?

From the contradictions proved, it appears that so far as the assault that took place inside Purighat police station is concerned, P.W.1 has not stated in his previous statement before the I.O. about appellant P.K. Choudhury giving kicks specifically to his knee and the knee of the deceased and the assault by appellant P.K. Choudhury to the deceased by a lathi on the head and on his (P.W.1) left leg and left cheek by same lathi and giving four blows to him. He has also not stated in his previous statement about the deceased sustaining swellings all over his body and appellant P.K. Choudhury giving a slap on his (P.W.1) cheek and also giving a second phase of beating by lathi to the deceased. He has also not stated in his previous statement about appellant Pravat Mohanty giving three to four kicks on his (P.W.1) buttock and assaulting the deceased again by a long lathi and that the assault was on the shoulder of the deceased.

In the case of **Harbeer Singh** (supra), it is held that the explanation to section 162 Cr.P.C. provides that an omission to state a fact or circumstance in the statement recorded by a police officer under section 161 Cr.P.C., may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. Thus, while it is true that every improvement is not fatal to the prosecution case, in cases where an improvement creates a serious doubt about the truthfulness or credibility of a witness, the defence may take advantage of the same.

Though the prosecution case is that M.O.IV is the bamboo lathi and M.O.VII is the wooden batten with which the deceased as well as P.W.1 were assaulted but it is not understood as to why those weapons were not shown to P.W.1 for identification and to be marked as M.Os. at that stage when he deposed in Court since he is the only witness who stated about the assault inside the police station. Whether the prosecution had doubt that P.W.1 would not have supported the case of prosecution that M.O.IV and M.O.VII were the weapons of offence? The bamboo lathi which has been marked as M.O.IV was examined by the Scientific Officer (P.W.2) on the date of inspection at Purighat police station during midnight on 05.05.1985 and he noticed bloodstain on top portion of it

and he marked the lathi as Ext.D. When the said lathi was produced along with other articles by the investigating officer, according to P.W.2, those were not under sealed cover. The articles were sent to the Director, S.F.S.L., Rasulgarh, Bhubaneswar on the prayer of the investigating officer through the learned S.D.J.M., Cuttack and on examination, it was found that there was human blood stain on the lathi. The other weapon of offence i.e. wooden batten (M.O.VII) was neither produced before P.W.2 nor sent to S.F.S.L. though it was seized on 05.05.1985 at 11.45 p.m. by the investigating officer at Purighat police station along with M.O.IV vide Ext.13 which was prior to the arrival of Scientific Officer.

In my humble view, it was the duty of the Public Prosecutor to show the weapons of offence M.O.IV and M.O.VII to P.W.1 for identification which would have strengthened the case of prosecution as he was the only witness to the assault.

Even though the learned trial Court has not taken into account the discrepancies between the evidence of P.W.1 vis-a-vis his previous statement before police and considered only with reference to the first information report but after considering the contradictions closely and carefully in the evidence of P.W.1 with reference to the first information report as well as his previous statement before police, I am of the humble view that the entire evidence of P.W.1 cannot be discarded for such contradictions.

D-1. <u>Discussion on lodging of first information report:</u>

A number of comments were made on the lodging of the first information report (Ext.1). While discussing the evidence of the informant, it is felt necessary to have a discussion on the same. It is contended that prior to lodging of the F.I.R. (Ext.1), information was given by P.W.1 to the police officials about the commission of cognizable offence and such information was the real first information report and not Ext.1, which was lodged at Lalbag police station at a later stage. It is further contended that Ext.1 has been scribed by one police officer in the presence of D.S.P., City, Cuttack and other police officials but the scribe of F.I.R. was not examined. According to the learned counsel for the appellants, Ext.1 is hit by section 162 of Cr.P.C. It is further contended that the lodging of the F.I.R. on 05.05.1985 at 11.00 a.m. is a doubtful feature, as according to the informant (P.W.1), the writing of the F.I.R. was completed on that day at about 4.00

p.m. It is further contended that since the inquest was held by the Executive Magistrate and the dead body was sent for post mortem examination in connection with Purighat/Lalbag P.S. Case No.272/1985 and not in connection with Purighat/Lalbag P.S. Case No.273/1985 even though those events took place after 11.00 a.m., therefore, the registration of Purighat/Lalbag P.S. Case No.273/1985 at 11.00 a.m. is a doubtful feature. It is further argued that if the F.I.R. was registered at 11.00 a.m. on 05.05.1985 and despatched from the police station on that day itself as was shown in the formal F.I.R. which was a Sunday, being a sensational matter, it should have been placed before the learned S.D.J.M., Cuttack on that very day at his residential office but it was placed before the learned S.D.J.M. on 06.05.1985 which creates doubt that the F.I.R. was ante timed and it was never despatched on 05.05.1985 from the police station as shown in the formal F.I.R.

P.W.1 stated that on the following day of occurrence, in the morning, one police babu came in a car to Purighat police station and took him inside a room and remained with him for about ten minutes and asked him about the incident and he narrated about the incident including the assault. He further stated that after the departure of the said police officer, another police babu came in an Ambassador car and took him to the very same room and asked him about the incident, however again P.W.1 stated that the said police babu did not ask him anything but took him in his car to Lalbag police station.

Section 154 of Cr.P.C. states that every information relating to the commission of cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant; and every such information, whether given in writing or reduced to writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. An information given under sub-section (1) of section 154 of Cr.P.C. which is commonly known as ‘first information report’ is a very important document. It is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation. The informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station diary by the police officer or such other cognizable

offences as may come to his notice during the investigation, will be statements falling under section 162 of Cr.P.C. Thus there cannot be any dispute that any statement recorded during the investigation is covered by section 162 of Cr.P.C. No such information/statement can be treated as an F.I.R. and entered in the station diary again, as it would in effect be a second F.I.R. and the same cannot be in conformity with the scheme of the Code of Criminal Procedure.

Though P.W.1 stated to have narrated about the incident including the assault to one police officer who came to Purighat police station, but that officer was not the officer in charge of a police station, nor was the narration of events reduced to writing. The narration of events made by P.W.1 was not even entered in the Station Diary of Purighat police station. The accusation was against the Inspector in-charge of Purighat police station and a Senior S.I. of the said police station. At the time of occurrence, Purighat police station was not notified by the Government as an independent police station and the first information reports received in Purighat Police Station were registered in Lalbag Police Station. Therefore, no fault can be found in bringing P.W.1 to Lalbag Police Station for lodging the first information report.

It appears from the evidence of P.W.39 that after P.W.1 was taken to Lalbag Police Station, he gave an oral report which was reduced to writing by one A.S.I. of Police named Mr. Jena and certificate about reading over and explaining was also made by Mr. Jena and it was also signed by Mr. Umesh Mohapatra, D.S.P., City, Cuttack and treated as F.I.R. (Ext.1). P.W.1 has also stated that after he was taken to Lalbag police station in a jeep, he narrated the entire incident from beginning to end and one police officer reduced his saying into writing and the contents of the writing were read over and explained to him and he gave his signature. P.W.1 also proved the F.I.R. and his signature on it. Of course, the scribe Mr. Jena has not signed or endorsed anything in Ext.1 and he has also not been examined during trial and Mr. Umesh Mohapatra in whose presence Ext.1 was lodged has also not been examined during trial but non-examination of the scribe of the first information report during trial cannot be a ground to doubt that the lodging of F.I.R. is a suspicious feature or it is fatal to the prosecution and it can at best be treated as mere irregularity which can be cured if it is otherwise proved. In view of the above discussion, I am of the humble view that no first information was lodged prior to lodging of Ext.1 which is the real F.I.R. and

it cannot be said to be a statement made during investigation to be hit by section 162 of Cr.P.C.

Of course, it is brought out in the cross-examination of the informant (P.W.1) that the writing of the F.I.R. was completed on that day at about 4.00 p.m., but the I.O. (P.W.39) stated that by the time he reached Lalbag police station at 10.30 a.m., the formal F.I.R. was in the process of being written and registration of the case was completed at 11 a.m. and he took up investigation at that time. The I.O. further stated that in between 11 a.m. to 12 noon, he opened the case diary and wrote the gist of the F.I.R. in it and that the examination of P.W.1 by him continued from 12 noon to 1 p.m. and then he came to Purighat police station and reached there at 1.15 p.m., made the spot visit, inspected the police jeep and sent requisition to the Director of State F.S.L., Rasulgarh for sending Scientific Officers for collection of physical evidence. Therefore, I am of the humble view that the F.I.R. (Ext.1) is correctly shown to have been registered on 05.05.1985 at 11 a.m. and it is not ante timed as after registration of F.I.R., P.W.39 has started investigation and did various things as enumerated above. The statement of P.W.1 that writing of the F.I.R. was completed at about 4.00 p.m. is a misstatement. Of course, the prosecution could have called for the station diary of Lalbag police station and proved the same to show what was the actual time of lodging of the F.I.R. in Purighat/Lalbag P.S. Case No.273/1985 by P.W.1 but since the defence is raising a point regarding ante timing of the F.I.R., nothing prevented the defence to make a prayer before the Court in that respect. Therefore, I am of the humble view that for the non-proving of the station diary of Lalbag police station, the timing of lodging of the F.I.R. (Ext.1) cannot be doubted.

It is not in dispute that the inquest over the dead body was conducted by the Executive Magistrate as well as by appellant P.K. Choudhury on 05.05.1985 in connection with Purighat/Lalbag P.S. Case No.272/1985 and inquest reports Ext.15 and Ext.16 were prepared respectively. The time of preparation of Ext.16 was in between 8.35 a.m. to 9 a.m. which was much prior to the registration of Ext.1, whereas Ext.15 was prepared at 11.17 a.m. which was just after registration of Ext.1. Since Purighat/Lalbag P.S. Case No.272/1985 was also in connection with the assault on the deceased, though a different version was presented therein relating to such assault and in that case also offence under section 302 I.P.C. was added by the learned S.D.J.M., Cuttack on the prayer of P.W.38 , I am of the humble view that merely

because inquest over the dead body was conducted by the Executive Magistrate and the dead body was also sent for post mortem examination in connection with Purighat/Lalbag P.S. Case No.272/1985, it would be an extremely farfetched conclusion to hold that by that time Ext.1 was not in existence for which Purighat/Lalbag P.S. Case No.273/1985 could not be mentioned in inquest report Ext.15.

The learned counsel for the appellants raised contentions that the presence of Mr. Umesh Mohapatra, D.S.P., City, Cuttack at Lalbag police station at the time of lodging of F.I.R. (Ext.1) at 11 a.m. is a doubtful feature as there are evidence on record that at that time, he was present at Purighat police station and made certain station diary entries and he was also at S.C.B. Medical College & Hospital where inquest and post mortem over the dead body were conducted. It was argued that a person cannot remain present at three different places at one time which is an additional feature to show that Ext.1 was lodged at a later stage and not at 11 a.m. and the City D.S.P. signed on it but it was ante timed.

In my humble view, this contention has no force. P.W.39, the I.O. specifically stated that Ext.1 was scribed in presence of City D.S.P. who also signed on it. Ex.1 shows it was signed by City D.S.P. at two portions. P.W.39 admits that S.D. Entry No.182 dated 05.05.1985 of Purighat police station was made in the hands of City D.S.P. and such entry was made at 10.30 a.m. and in the end of the entry below his signature, the time 10.45 a.m. has been written. P.W.39 further states that City D.S.P. Sri Mohapatra was present in Purighat P.S. on 05.05.1985 between 10.30 a.m. to 10.45 a.m. Of course, P.W.34, the son of the deceased stated that he saw the Collector, S.P. and City D.S.P. at S.C.B.M.C. Hospital at about 11 a.m. but it cannot be said that he was checking his watch all the time to remember at what time he saw them exactly. It appears from the evidence on record that the distance between Purighat and Lalbag police station is just one and half k.m. and according to P.W.39, it ordinarily takes five minutes to cover the distance in a jeep. Therefore, in view of the distance between Purighat P.S. to Lalbag P.S. and from Lalbag P.S. to S.C.B.M.C. Hospital, it cannot be said that the duties performed by City D.S.P. Sri Umesh Mohapatra one after the other at three different places was an impossible task. This cannot be the reason to doubt that F.I.R. (Ext.1) was not lodged at 11 a.m.

Similarly, delay in placement of F.I.R. (Ext.1) before Magistrate in this case cannot be said to be so unreasonable that it would be factor to doubt

about timing of its lodging. The F.I.R. was lodged on 05.05.1985 at 11 a.m. which was a Sunday and it was shown to have been dispatched from the police station on the very day, however, it was placed before the learned S.D.J.M., Cuttack on the next day i.e. 06.05.1985 who signed it. Rule 148(a) of Orissa Police Rules states that the original of the first information report shall be sent without delay to the S.D.J.M. having jurisdiction and the copies of such report shall be sent to the Superintendent, Circle Inspector and S.D.P.O., if there be any. Therefore, the first information report should reach the Magistrate immediately and without undue delay. However, mere delay in sending the first information report to the Magistrate cannot be a ground to throw away the prosecution case if the evidence adduced in the case is found to be credible and unimpeachable.

In the case of **Arjun Marik -Vrs.- State of Bihar, (1994)2 Supreme Court Reporter 265** , the Hon'ble Court held as follows:

> "...The forwarding of the occurrence report is indispensable and absolute and it has to be to forwarded with earliest despatch which intention is implicit with the use of the word 'forthwith' occurring in Section 157 Cr.P.C., which means promptly and without any undue delay. The purpose and object is very obvious which is spelt out from the combined reading of Sections 157 and 159 Cr.P.C. It has the dual purpose, firstly to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation and secondly to enable the Magistrate concerned to have a watch in the progress of the investigation."

In the case of **Motilal** (supra), it is held that there is a purpose behind the enactment of section 157 of the Code of Criminal Procedure. The statutory requirement that the report has to be sent forthwith itself shows the urgency attached to the sending of the report. In a given case, it is open to the prosecution to indicate reasons for the delayed dispatch or delayed receipt. This has to be established by evidence.

It is common knowledge that on Sunday in the residential office of the S.D.J.M. or Magistrate in-charge, apart from the cases of forwarding of accused persons, only exceptional urgent matters are placed on being moved. After the F.I.R. is dispatched from the police station, as per practice, it first comes to the office of Court Sub-Inspector (in short 'C.S.I. Office') where it is entered in G.R. Case register [i.e. Form No. (R) 2 as per G.R.C.O. (Criminal) Vol.II] serially with date and G.R. Case number is allotted to the said F.I.R. and then the C.S.I. places the F.I.R. before the S.D.J.M. or

concerned J.M.F.C. who after perusing the same puts his signature and date on each page of the F.I.R., on the first order sheet of the case record and also in the G.R. Case register. After G.R. Case number is allotted to an F.I.R., it should be placed immediately placed before the concerned Magistrate for perusal and to make necessary endorsements, but sometimes it becomes not possible to place the F.I.R. before the Magistrate on the same day for some genuine reasons. If the defence pleads that the F.I.R. was not actually dispatched from the police station on the day as it was shown in the formal F.I.R. for which it could not be placed before the Magistrate on the date of its forwarding, then the first checkpoint is when it was received and registered in the C.S.I. Office and the defence can call for the said register in accordance with law during trial to prove it, otherwise the vague contentions in that respect should not be accepted.

In view of the aforesaid discussion, the comments made by the learned counsel for the appellants on the lodging of the first information report (Ext.1) are not acceptable.

E. <u>Whether defence plea is acceptable:</u>

The defence plea of the appellants was that on 04.05.1985 the deceased Kasinath Nayak came to Purighat police station at about 9.50 p.m. to lodge a first information report regarding assault on him on Kathajori river embankment at about 9 p.m. by some unknown persons and that he had sustained injuries on account of such assault. P.W.1 accompanied the deceased to lodge the report and on the F.I.R. of the deceased, Purighat/Lalbag P.S. Case No.272/1985 was registered by appellant Pravat Mohanty, who directed appellant P.K. Choudhury to investigate the case and accordingly the later took up investigation and maintained case diary.

In order to substantiate its plea, apart from the oral evidence, the defence relied upon the F.I.R. lodged by the deceased in Purighat/Lalbag P.S. Case No.272/1985, the case diary maintained in the said case by appellant P.K. Choudhury marked as Ext.63, the station diary entries dated 04.05.1985 of Purighat police station marked as Exts.C, D, E, E/1, F, F/1.

Before going to discuss about the documentary evidence, it is felt necessary to examine the oral evidence related to such plea. P.W.1 specifically stated in the chief examination that on the date of occurrence, the deceased had not lodged any sort of information at the police station and they

had not sustained any sort of injury before going to the police station on the date of occurrence. He further stated that on the date of incident, there was no other incident regarding the assault on the deceased by his opponents on the Kathajori river embankment near Rajabagicha School. P.W.1 was questioned by the learned defence counsel on the lodging of the first information report by the deceased but P.W.1 denied that he along with the deceased had been to Purighat police station on 04.05.1985 to lodge any first information report relating to the assault on the deceased on the river embankment at about 9.00 p.m. on that day and he also denied to have made any statement before police in connection with that case and he also specifically denied that the deceased came to the police station sustaining injuries.

P.W.7, the wife of the deceased was also asked about the incident stated to have taken place on the Kathajori river embankment in front of Rajabagicha High School in the cross-examination by the learned defence counsel but she denied that the deceased sustained severe injuries at about 9.00 p.m. on 04.05.1985 on account of any such incident and that the deceased had been to the police station to lodge information in connection with that incident.

P.W.11 stated to have seen the deceased as well as P.W.1 in Purighat police station at about 9.30 p.m. but he stated not to have seen any sort of injury either on the person of the deceased or on the person of P.W.1. P.W.13 also stated to have visited Purighat police station on 04.05.1985 past 10.00 p.m. and remained there for five minutes but he stated not to have seen any sort of injury on the deceased and P.W.1. These two witnesses have completely resiled from their previous statements made before the I.O. and the Magistrate under section 164 Cr.P.C. and therefore, the learned trial Court has not rightly placed any reliance on their evidence.

P.W.33 Bhaghyadhar Bal whose house was adjacent to Rajabagicha High School stated that on the lunar eclipse day of year 1985, he had not seen any disturbance taking place near Rajabagicha High School or heard any hullah though he was present in his house all through. In view of the distance of his house from main Kathajori road, the learned trial Court rightly has not placed any reliance on his testimony.

Thus, not a single witness examined on behalf of the prosecution has stated anything in support of the defence plea relating to any incident on the Kathajori river embankment.

The learned counsel for the appellants contended that since the deceased sustained injuries mainly below the waistline and he was wearing dhoti and half shirt, it might have missed the notice of others. It is somewhat difficult to comprehend this argument. If the deceased came to the police station with the type of bleeding injuries as noticed by the doctor conducting post mortem examination and he had passed stool, urine on his dresses and was vomiting and not even in a position to walk properly, it could not have missed the notice of others including P.W.1 and in such a condition, the deceased would not have been allowed to enter into various rooms of police station to make the floor dirty.

Coming to the documentary evidence, the first information report stated to have been lodged by the deceased carries a signature 'Kasinath Nayak' on the bottom portion which has been marked as Ext.A during the cross-examination of P.W.31. The said F.I.R. is shown to have been received on 04.05.1985 at 10.00 p.m. at Purighat police station and it was sent to Lalbag police station where it was registered under the signature of Inspector in charge of Lalbag police station on the same day at 10.30 p.m. and it is specifically mentioned therein that appellant P.K. Choudhury had already taken up investigation. The signature of the I.I.C. of Lalbag police station has been marked as Ext.A/1. There is no material as to who scribed the F.I.R. which was in Odia language stated to have been presented by the deceased. P.W.39 stated that he compared the standard writings of all the employees of Purighat police station with the disputed F.I.R. but the writings did not tally and therefore, he could not know as to who scribed the Odia portion of the disputed F.I.R. in Purighat/Lalbag case no.272/85. P.W.34, the son of the deceased specifically stated that the signature Ext.A did not belong to his father and that usually his father wrote his name by using 'Talabyasa'. P.W.31, the Senior Clerk in the Health Office of Cuttack Municipality though identified Ext.A to be the signature of the deceased when confronted to him by the learned defence counsel in the cross-examination but it is not understood as to how he was so confident about it particularly when in other signatures of the deceased proved on the official documents, 'Talabyasa' have been used whereas in Ext.A, 'Dantasa' has been used. He was not present when Ext.A was put on the F.I.R. and he was examined in Court one year and four months after the occurrence. Though the defence has cleverly elicited about Ext.A on the last but one question of the cross-examination of P.W.31 and thereafter the prosecution has not put any question on this aspect by way of re-examination but it is difficult to accept Ext.A to be the signature

of the deceased solely on the testimony of P.W.31. The handwriting expert (P.W.27) after examining the admitted handwritings of the deceased and the disputed signature Ext.A, opined that for want of sufficient basis, it was not possible to say as to whether the person who wrote the admitted signatures and writings marked as K/1 to K/11 also wrote the disputed signature which has been marked by him as X-1. He further stated that the disputed signature marked X-1 revealed certain amount of freedom of stroke and some amount of resemblance in inherent characteristic when compared with the admitted signatures and writings marked K/1 to K/11. Thus the evidence of P.W.27 is no way helpful either to the prosecution or to the defence to arrive at a conclusion whether the Odia signature 'Kasinath Nayak' appearing on the F.I.R. of Purighat/Lalbag P.S. Case No.272/1985 is that of the deceased or not. The learned trial Court held that the handwriting expert's opinion is confusing as he stated to have found some amount of resemblance in inherent characteristic with the admitted writing and simultaneously said that sufficient characteristic and similarities could not be found. The learned trial Court accepted the statement of P.W.34 to hold that the disputed signature reading 'Kasinath Nayak' in the F.I.R. relating to Purighat/Lalbag P.S. Case No.272/1985 was not in the hands of the deceased.

P.W.39 who took charge of investigation of Purighat/Lalbag P.S. Case No.272/1985 stated that the case diary in the said case was opened by appellant P.K. Choudhury and first five sheets of the case diary were written in the handwriting of the said appellant. He further stated that though the date of seizure in Ext.23/3 was shown to have been prepared on 04.04.1985 but the appellant P.K. Choudhury put his signature and below it, he had put the date as 05.05.1985. He further stated that the witnesses shown to have been examined by appellant P.K. Choudhury in Purighat/Lalbag P.S. case No.272/1985 were re-examined but they did not support their alleged previous statements made before the appellant and some of them even denied to have been examined by him.

Now the crucial question comes for consideration is whether Purighat/Lalbag P.S. Case No.272/1985 is an out and out false case and the F.I.R. of the said case carries an imaginary story and the so-called signature of the deceased vide Ext.A is a forged one. As already discussed, there is lack of oral evidence that such an occurrence at all took place on the date, time and place as pleaded by the defence. There is no evidence as to who scribed the F.I.R. and P.W.1 who accompanied the deceased from Basti to Purighat

police station has denied about any such incident of assault on the deceased being taken place on the Kathajodi river embankment as well as any F.I.R. lodged by the deceased in connection with his assault and no other witness stated about it. Final report was submitted in that case by P.W.39 indicating it to be a false case and thus there is nothing to support the defence plea. The learned trial Court has vividly dealt with entire defence plea very carefully and cautiously and came to hold that Purighat/Lalbag P.S. Case No.272/1985 is a false case and the alleged investigation by appellant Pratap Kumar Choudhury was just a paper transaction. Law is well settled that the Court may accept the fact proved through expert's evidence when it has satisfied itself on its own observation that it is safe to accept the opinion of the expert. After closely examining the admitted signatures of the deceased on the documents i.e. in Exts.5 to 5/5, 6, 7, 8 and comparing those signatures minutely with disputed signature Ext.A, I am of the humble view that Ext.A does not tally with signatures of the deceased on official documents.

The learned counsel for the appellants argued that since the F.I.R. in Purighat/Lalbag P.S. Case No.272/1985 reached Lalbag police station at 10.30 p.m. on 04.05.1985 and I.I.C., Lalbag police station has put his signature, it cannot be said that the signature Ext.A is a forged one or that the narration of events in that F.I.R. is a fabricated version. It was further argued that I.I.C., Lalbag police station should have been examined by prosecution to clarify the position. This contention is not acceptable as merely because the F.I.R. reached Lalbag police station at 10.30 p.m. on 04.05.1985, it cannot be said the narration of events therein are correct. According to P.W.38, Ext.A/1 is the endorsement and signature of Mr. Mahakud, S.I. of Lalbag police station. The said Mr. Mahakud has mentioned himself as I.I.C., Lalbag P.S. below his signature and date in Ext.A/1. Neither the F.I.R. forwarded to Lalbag police station was written in the presence of said Mr. Mahakud nor it is the defence plea that the deceased had put his signature in presence of Mr. Mahakud. Even if such F.I.R. reached at Lalbag police station at 10.30 p.m. on 04.05.1985, the point for consideration is whether any such occurrence as narrated in the said F.I.R. had at all taken place and whether the deceased lodged the F.I.R. by putting his signature as appearing on the F.I.R.

The learned counsel for the appellants submitted that Purighat/Lalbag P.S. Case No.272/1985 was not investigated properly and final report was submitted. It was argued that in the case diary of the said case, appellant P.K.

Choudhury has mentioned the presence of one Biswanath Bardhan during his spot visit on 04.05.1985 but the said witness was not cited as a charge sheet witness. In my humble view, the spot visit by the appellant in the late night itself appears to be a doubtful feature inasmuch as who would have identified the alleged spot of assault to the appellant in the deep night when neither the deceased nor P.W.1 accompanied him. It further appears as if in that night, the witness Biswanath Bardhan was waiting for the arrival of the appellant to give his statement on the river embankment. The possibility of making such entries relating to spot visit and examination of witness to make out a plea of alibi from 10.15 p.m. onwards from the police station cannot be ruled out.

According to the learned counsel for the appellants, if the said witness Biswanath Bardhan on examination would have denied about any occurrence that took place on the river embankment as per defence plea, that would have dislodged the entire defence case and therefore, non-citing of such an important witness in the charge sheet indicates that the investigation was conducted in an unfair manner with malafide intention. The fact remains that final report was submitted in Purighat/Lalbag P.S. Case No.272/1985 vide Ext.64 indicating the case to be false. Reasons have been assigned therein as to why the case was a false one. No one has challenged such report. P.W.39 has also clarified as to why he submitted final report in that case. In the case in hand, it is not required to be adjudicated whether final report was submitted rightly or in an unfair manner. P.W.39 stated that he examined Biswanath Bardhan on 19.06.1985 but not cited him as charge sheet witness. If according to the defence, Biswanath Bardhan was such an important witness who could have thrown light about the alleged incident taking place on Kathajori river embankment on 04.05.1985 at 9 p.m., nothing prevented the defence to make a prayer before the learned trial Court to summon such a witness at appropriate stage for examination as a defence witness.

The case diary of Purighat/Lalbag P.S. Case No.272/1985 maintained by appellant P.K. Choudhury vide Ext.63 indicates that injury requisition in respect of the deceased for his examination in the casualty of S.C.B. Medical College & Hospital was prepared prior to 10.15 p.m. when he left for spot visit. The Station Diary of Purighat police station dated 04.05.1985 at serial no.164 at 11 p.m. indicates about receipt of injury report of Kasinath Naik (deceased) from appellant P.K. Choudhury, who was the I.O. of the case. In the left hand side of the said S.D. entry, it is mentioned that the Havildar was out with injured. When the deceased was present in Purighat police station all

through from the time of his arrival till he was taken in a police jeep after midnight to Casualty Department and was declared dead there by the doctor (P.W.14) at 3.15 a.m., the preparation of his injury requisition prior to 10.15 p.m. by appellant P.K. Choudhury and also receipt of injury report at 11 p.m. are highly suspicious features. Similarly if as per the case diary (Ext.63) prepared by the appellant P.K. Choudhury, he left Purighat police station at 10.15 p.m. on 04.05.1985 and returned at 12 midnight how could he be remained present at 11.00 p.m. at the police station to hand over the injury report as mentioned in the station Diary.

Of course, it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case. It is sufficient for the accused to prove the defence on the touchstone of preponderance of probability. The defence can succeed in throwing reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version. Once the defence gives reasonable and probable explanation, it is for the prosecution to prove affirmatively that the explanation is false.

The written report stated to have been presented by the deceased was received at 10.00 p.m. at Purighat police station and the endorsement of appellant Pravat Mohanty treating the same as F.I.R. and directing appellant P.K. Choudhury to take up investigation have been mentioned in it and the hand writings have been proved by P.W.39. Even though this F.I.R. stated to have reached at 10.30 p.m. at Lalbag police station and Purighat/Lalbag P.S. Case No.272/1985 was registered but while sending the F.I.R. in Purighat/Lalbag P.S. Case No.273/1985 to the S.D.J.M., Cuttack on 05.05.1985, the F.I.R. stated to have been lodged by the deceased on 04.05.1985 was not sent to Magistrate for which it was placed before the learned S.D.J.M. on 07.05.1985 which was two days after the date of lodging of F.I.R.

Now, let me discuss about the two seizure lists prepared by appellant P.K. Choudhury in connection with Purighat/Lalbag P.S. Case No.272/1985 which were marked as Ext.23/3 and Ext.42. Ext.23/3 indicates seizure of one half shirt and one napkin on production of deceased at 10.05 p.m. at Purighat police station. The witness to the seizure namely Maheswar Nayak who was examined as P.W.17 did not support the seizure. P.W.17 stated that four to five days of the death of the deceased, appellant P.K. Choudhury called him

and took his signature vide Ext.23 on a written paper and that he had not gone through that paper and was not aware that it was a seizure list. In my humble view, such a statement of P.W.17 is not acceptable as appellant P.K. Choudhury was placed under orders of suspension on 05.05.1985 and he stopped investigation of Purighat/Lalbag P.S. Case No.272/1985 at 3 p.m. on that day and P.W.38 took over charge of investigation of that case on 06.05.1985. It is not understood as to why the half shirt and napkin under seizure list Ext.23/3 were not seized in the presence of P.W.1 who accompanied the deceased to the police station. Though the date and hour of seizure was mentioned in Ext.23/3 as 04.05.1985 at 10.05 p.m. on the top but appellant Pratap Kumar Choudhury has put the date as 05.05.1985 below his signature in the said seizure list. Moreover, when the case was registered at 10.30 p.m. at Lalbag police station as Purighat/Lalbag P.S. Case No.272 of 1985, it is not understood as to wherefrom the appellant P.K. Choudhury got the P.S. Case number to mention it on the seizure list prepared at 10.05 p.m. In the case diary, appellant P.K. Choudhury has inserted this seizure aspect in between the gist of the F.I.R. and examination of the deceased in small letters. The reply given by the appellant P.K. Choudhury in his accused statement in question no.46 on the seizure list Ext.23/3 is highly unsatisfactory as he stated that the seizure started at 10.00 p.m. and it was completed at 12.00 p.m. and therefore, he put his date as 05.05.1985. Appellant P.K. Choudhury seems to have left the police station for spot visit at 10.15 p.m. as per the case diary prepared by him and closed the diary at 12.00 midnight. Therefore, the explanation given by the appellant that the seizure of a half shift and a napkin continued for two hours cannot be accepted by any stretch of imagination. It seems that the wearing apparels of the deceased like dhoti, ganji and deunria and steel ring which were marked as M.Os.I, II, III and VI were produced by P.W.8 after post mortem examination before the I.O. and accordingly, those were seized under seizure list Ext.11. The shirt and napkin seized by the appellant under seizure list Ext.23/3 were also sent for chemical examination being marked as ‘K’ and ‘L’ and the C.E. report marked as Ext.60 indicates that the blood stain were detected in those two exhibits.. The half shirt and the napkin were not shown to P.W.1 to prove whether those were of the deceased or not, however the wife of the deceased being examined as P.W.7 identified the shirt (M.O.VIII) to be that of her husband and further stated that the deceased had put on that shirt while going to the police station. In my view, the articles seized under Ext.23/3 can be said to be of the deceased though there are some irregular features in the preparation of seizure list as already discussed.

Coming to the other seizure list prepared by appellant P.K. Choudhury i.e. Ext.42, it appears that on 05.05.1985 at 7.30 a.m., some soil containing the vomiting substance of the deceased was seized in front of the Casualty Department. P.W.36 Trinath Nayak is a witness to the said seizure list but he stated that he did not notice any vomited substance in the soil. P.W.35 Bulu Nayak stated that appellant P.K. Choudhury asked him to collect some wet sand lying in front of the casualty verandah which was collected by him and seized but he did not notice any sign of vomiting. The earth with vomiting substance was also sent for chemical analysis being marked as 'M' and the chemical examiner did not find any vomiting substance in it as per the C.E. report Ext.60. The seizure list Ext.42 seems to have been prepared to show that the deceased was alive when he arrived at Casualty Department and there he vomited. However, P.W.30 who was the attendant of the Casualty Department and was on night duty on 04/05.05.1985 stated that police brought the deceased to Casualty at 3.00 a.m. and he informed the doctor and the deceased was taken to the bed in the Casualty Department and the doctor on examining him, declared him dead. He specifically stated that he had not seen the deceased vomiting. In his cross-examination, he has stated that he had not seen any saliva coming either from the nose or mouth of the deceased. P.W.14 is the doctor who was in-charge of Casualty stated that he received one Kasinath Naik dead at 3.15 a.m. on 05.05.1985. Therefore, the contents of this seizure list are false and preparation of such a document makes the conduct of the appellant P.K. Choudhury more suspicious.

As per the case diary prepared by appellant Pratap Kumar Choudhury in Purighat/Lalbag P.S. Case No.272/1985, he left Purighat police station at 10.15 p.m. on 04.05.1985 for investigation of the case and returned at 12 midnight. The station diary entries nos.163 and 166 dated 04.05.1985 of Purighat police station also indicate about the same. Within fifteen minutes of his stay at Purighat police station from 10 p.m. to 10.15 p.m., appellant P.K. Choudhury seems to have opened the case diary in that case, mentioned the gist of the F.I.R. stated to have been presented by the deceased, seized some wearing apparels of the deceased under a seizure list, examined the deceased, issued injury requisition for examination of the deceased and also examined P.W.1 and recorded his statement. The learned trial Court rightly held that within such a short span of fifteen minutes, it was not possible on the part of appellant Pratap Kumar Choudhury to do so many things including arresting the deceased and P.W.1 in connection with Purighat/Lalbag P.S. Case

No.269/85 where they were not even named as accused in the F.I.R. The case diary seems to have been so prepared for the purpose of taking plea of alibi if contingency so arises and to show that he had not participated in the assault on the deceased and P.W.1 that the prosecution put forth to have taken place after 10.15 p.m.

It is contended that since appellant P.K. Choudhury was placed under orders of suspension on 05.05.1985 for which he stopped investigation of Purighat/Lalbag P.S. Case No.272/1985 and he was present in S.C.B. Medical College from early morning of 05.05.1985 till 12.30 p.m., there was no scope on his part to make false entries as alleged by the prosecution. As already indicated, most of the entries in the case diary of the said case including the preparation of one seizure list were prior to his leaving the police station at midnight. Another irregular feature was noticed in the preparation of the inquest report (Ext.16) by him in minimizing the injuries on the deceased. The appellant maintained the case diary till 3 p.m. on 05.05.1985. Therefore, the contentions are not acceptable.

In view of the foregoing discussions, the defence plea that any occurrence of assault on the deceased took place on the Kathajori river embankment on 04.05.1985 at about 9.00 p.m. in which the deceased sustained injuries and came to lodge the first information report to Purighat police station and accordingly, the F.I.R. was registered and that as per the direction of appellant Pravat Mohanty, appellant P.K. Choudhury took up investigation of the case and maintained case diary vide Ext.63 mentioning all correct state of affairs is not acceptable. I am of the considered view that the deceased had not presented any F.I.R. on 04.05.1985 at 10 p.m. at Purighat police station and a false F.I.R. is shown to have been presented by him which carries the forged signature of the deceased vide Ext.A.

F. <u>Lacunas in investigation:</u>

The learned counsel for the appellants pointed out certain lacunas in the investigation which is now required to be discussed. It is contended that the evidence of P.W.39 that he received oral communication in the residential office of the D.G. of Police at about 9.00 a.m. on 05.05.1985 in which he was directed to investigate three cases i.e. Purighat/Lalbag P.S. Case Nos.269/1985, 272/1985 and 273/1985 is unbelievable as by that time the F.I.R. in Purighat/Lalbag P.S. Case No.273/1985 was not registered and it

was only registered according to the prosecution on that day at 11.00 a.m. It is further argued that when the office order vide Ext.66 was issued on 06.05.1985 posting P.W.39 in Purighat police station as Addl. I.I.C. as well as directing him to be the investigating officer of all the three cases, how could and under what authority he investigated Purighat/Lalbag P.S. Case No.273/1985 on 05.05.1985 after the registration of the first information report. It is further argued that though direction was issued to P.W.39 to take up investigation of Purighat/Lalbag P.S. Case Nos.269/1985 and 272/1985 simultaneously along with Purighat/Lalbag P.S. Case No.273/1985 but he took charge of investigation of those two cases only on 26.05.1985. It is further argued that many important witnesses who could have substantiated the defence case were not deliberately examined and even if some of them were examined but they were not shown as charge sheet witnesses. It is further argued that P.W.39 did not submit charge sheet against some of the F.I.R. named accused persons in Lalbag/Purighat P.S. Case no.269 of 1985 whereas he submitted charge sheet against some who were not even named in the first information report. All these aspects, according to the learned counsel for the appellants indicate about the lapses in the investigation made by P.W.39 for which the appellants are entitled to benefit of doubt.

In the case of **State of W.B. -Vrs.- Mir Mohammad Omar and Ors. reported in (2000)8 Supreme Court Cases 382**, the Hon'ble Supreme Court observed as follows:

> "41.....Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit the accused in criminal cases. In our perception, it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation....."

P.W.39 stated that on 05.05.1985, he was ordered to take charge of investigation in Purighat/Lalbag P.S. Case Nos.269/2985, 272/1985 and 273/1985 and accordingly, he proceeded to Lalbag police station where he found P.W.1 was lodging the F.I.R. before City D.S.P. who registered Purighat/Lalbag P.S. case No.273/1985. He further stated that he was so directed to take charge of investigation by the Director General of Police. In the cross-examination, he stated that the order was communicated to him by

the D.G.-cum-I.G. himself. He further stated that he received oral communication of the Director General of Police directing him to be the investigating officer on 05.05.1989 which was a Sunday and the written communication was received on 06.05.1985. According to P.W.39, he received oral communication in the residential office of D.G. of Police at about 9.00 a.m. in the morning. He further stated that he was posted in Purighat police station by the D.G. -cum- I.G. and the said order was passed simultaneously with the order directing him to be the I.O. Ext.66 is the copy of the order of D.G. of police, Orissa, Cuttack communicated to P.W.39. In the cross-examination, it has been elicited that the residential office of D.G of Police did not remain close on Sunday. The I.O. fairly admitted that he had not mentioned in the case diary that he received oral intimation from D.G. of police.

It appears that when the death news of the deceased on account of his assault in Purighat police station spreaded, P.W.16 approached the Superintendent of Police and District Magistrate and talked with D.I.G. of Crime Branch and taking into account the situation precipitated by consequential commotion, the D.G. of police orally directed P.W.39 to take up investigation on 05.05.1985 but the written order was communicated to P.W.39 on 06.05.1985. The said written order dated 06.05.1985 has been marked as Ext.66. It is not the case of the defence that P.W.39 was not competent to investigate the cases. If the residential office of the D.G. of police was open on 05.05.1985 where P.W.39 received the oral direction from the D.G. of Police, it sounds absurd that he would have insisted the D.G. of police to pass a written order for proceeding to Purighat police station to take up investigation particularly when sensitiveness of the matter required immediate action otherwise there would have been growing public resentment. Therefore, no fault can be found with P.W.39 in obeying the oral order of his superior authority and coming to Lalbag police station to investigate the cases. It appears from the evidence of P.W.1 that while he was in Purighat police station, two police officers came in car one after another in the morning and the first police officer interrogated him for ten minutes about the incident and the second officer took him in his car to Lalbag police station for lodging the first information report. The station diary entry no.182 dated 05.05.1985 of Purighat police station made at 10.30 a.m. by City D.S.P. also corroborates the evidence of P.W.1. At Lalbag police station, steps were taken to reduce the oral account of P.W.1 into writing. Of course, there is some confusion relating to timing of the oral order

passed by D.G. of police to P.W.39 to take up investigation of the cases, but that would not be factor to view the lodging of F.I.R. by P.W.1 and taking over investigation by P.W.39 in a suspicious manner. In a sensational case like this, it was the utmost duty of a responsible and prudent investigating officer not only to take up the investigation as per the order of the superior authority but also to take all consequential steps as quick as possible so that the evidence should not disappear particularly when it had come to light that by that time another version of the occurrence relating to the injuries sustained by the deceased was presented on the so-called F.I.R. of the deceased and the appellant P.K. Choudhury was carrying out investigation of the said case as per the direction appellant Pravat Mohanty.

The evidence of P.W.39 clearly indicates that in a non-stop way, he carried out investigation by examining witnesses, making spot visit, conducting seizure of articles, sending information to Scientific Officers to visit the spot, going through the station diary entries of Purighat police station and also remaining present with the scientific team during their spot visit in the midnight. All these things performed by P.W.39 on a single day i.e. on 05.05.1985 would have got delayed had he waited for the written order which he received on the next day i.e. 06.05.1985. Therefore, there was no illegality on the part of P.W.39 to investigate the matter on the oral direction of the D.G. of Police before receipt of Ext.66.

Coming to non-examination/non-citation of some witnesses in the charge sheet, it is the settled law that investigation is in the absolute domain of the investigating agency. Whom the investigating officer would examine during course of investigation and whom he would cite as charge sheet witnesses depends completely on him, of course the investigation is to be done in an impartial and fair manner to ascertain the truth. Merely because some of the witnesses who might have supported the defence case were not examined during course of investigation nor cited as charge sheet witnesses, that itself would not be a factor to reject the prosecution case. If the defence felt that any material witnesses were left out from the list of charge sheet witnesses, even though their statements were on record or any particular witness should have been examined to throw light on certain aspects, the defence could have filed appropriate application to summon such witnesses assigning reasons for their examination. The trial Court on being satisfied that the examination of any such witnesses mentioned in the application of the defence counsel was necessary for arriving at truth and for just decision

of the case, would have allowed such petition and permitted such witnesses to be examined as 'defence witnesses'. Even the Court has got power to examine any witness as 'Court witness' for the ends of justice. The defence has not taken any step to examine a single witness as defence witness though it has proved certain documents. Therefore, I am of the humble view that non-examination/non-citation of some witnesses in the charge sheet cannot be a factor to hold that the investigation was perfunctory.

The next contention was raised that Purighat/Lalbag P.S. Case No.269/1985 was not investigated properly for which accused persons named in the F.I.R. were not charge sheeted whereas others whose name do not find place in the F.I.R. have been charge sheeted. The first information report in Purighat/Lalbag P.S. No.269/1985 was registered against seven accused persons and charge sheet was submitted against five persons and three sons of the deceased though specifically named in the F.I.R. were not charge sheeted. There is no mandate in law for the investigating officer to file charge sheet against all the F.I.R. named accused persons. After proper investigation, if the I.O. finds that there is no sufficient material against some of the accused persons relating to their involvement in the alleged incident, he is not bound to submit charge sheet against them merely because the informant named them as accused in the F.I.R. Even an informant can be charge sheeted as accused in the same case, if clinching materials come against him in course of investigation. If P.W.13, who was the informant in P.S. Case No.269/1985 was not satisfied with the submission of charge sheet only against five persons, various options were available with him including filing of a complaint petition which he had not done. Therefore, it cannot be said that P.W.39 conducted perfunctory investigation.

It is correct that even though P.W.39 was directed to take up investigation of all the three cases, he took over charge of P.S. Case Nos. 269/1985 and 272/1985 only on 26.05.1985 but after taking over investigation, he filed final report in P.S. Case No.272/1985 vide Ext.64 and charge sheet in P.S. Case No.269/1985. There is no evidence that the conclusion arrived at by P.W.39 either in P.S. Case No. 269/1985 or P.S. Case No.272/1985 were challenged either by the informant or any aggrieved persons in any Court. P.W.39 specifically stated that he has explained the reason for delay in taking over investigation of Purighat/Lalbag P.S. Case No.273/1985 in the case diary of Purighat/Lalbag P.S Case No.272/1985. Therefore, there is nothing on record to s how that P.W. 39 deliberately

delayed in taking over investigation of Purighat/Lalbag P.S. Case Nos.269/1985 and 272/1985.

Thus the contentions raised by the learned counsel for the appellants relating to certain lacunas in the investigation are not acceptable.

G. Non-examination of independent witnesses and police staff regarding the occurrence inside Purighat police station:

It is contended by the learned counsel that materials on record indicate that one Gadadhar Swain and Aswini Kumar Mohapatra who were the outsiders were present at some point of time during the course of the occurrence in Purighat police station but they have not been examined. Similarly the jeep driver Sk. Firoj, Diary in-charge A.S.I. Prafulla Mishra, constables N.C. Samal, Prafulla Samanta, Sentry constables Gopabandhu Sadangi and Ananda Nayak as well as A.S.I. of Police C.S. Panda were present at some point of time in police station during the occurrence but they have not been examined.

Some of the official witnesses like P.W.8, P.W.9 present in Purighat police station at the relevant point of time were examined but they did not support the prosecution case. Some of the outsiders like P.W.12 and P.W.13 who also stated about the occurrence in their previous statements were examined but they also did not support the prosecution case. There was serious allegation against A.S.I. of police Prafulla Mishra that he entered certain incorrect facts in the station diary of Purighat police station to show genuineness of Purighat/Lalbag P.S. Case No.272/1985.

Law is well settled that withholding of material witnesses who could have unfolded the genesis of the incident or essential part of the prosecution case would be a factor for the Court to draw adverse inference against the prosecution but where the overwhelming evidence is already available on record and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of other witnesses may not be material. It has come on record of the evidence of P.W.39 that during his investigation, he did not receive cooperation from the police staff of Purighat police station and Lalbag police station, though he has not mentioned about any obstruction to his investigation in the case diary. He has also stated that he had no personal hostility with the officers and staff of Purighat police station. In my humble view, it is not at all necessary to

examine all the persons as pointed out by the learned counsel for the appellants. Section 134 of the Evidence Act provides that no particular number of witnesses is required for proof of any fact. It is not the number of the witnesses but the quality of evidence which is required to be taken note of by the Court for arriving at a conclusion whether the prosecution case is to be accepted or rejected. Though the selection of the witnesses to prove an essential part of the prosecution case should be fair but the defence cannot compel the prosecution to examine any particular witness. At best, the Court can draw adverse inference against the prosecution for withholding material witnesses. Therefore, I am of the view that non-examination of some witnesses as pointed out by the learned counsel for the appellants cannot be a factor to discard the prosecution case.

H. Non-examination of Executive Magistrate to prove inquest report (Ext.15):

According to the prosecution case, the Executive Magistrate N.K. Das prepared the inquest report (Ext.15) over the dead body on 05.05.1985 at 11.17 a.m. in the mortuary of S.C.B.M.C. Hospital, in which more number of injuries on the person of the deceased were reflected than the inquest report (Ext.16) prepared by appellant P.K. Choudhury on the same day in between 8.35 a.m. to 9.00 a.m.

Though the learned trial Court has observed that the appellant P.K. Choudhury had minimized the actual injuries sustained by the deceased but the Executive Magistrate who prepared the inquest report has not been examined during trial. The inquest report (Ext.15) was proved first by P.W.8 Brahmananda Behera and then by P.W.16 Biswanath Pandit, who is a witness to the inquest report and he stated about the arrival of the Executive Magistrate for conducting the inquest and preparing the report in the presence of Inspector of Police, Mangalabag police station as well as appellant P.K. Choudhury. He further stated that Ranendra Pratap Swain, Chittaranjan Mohanty and Krushna Chandra Patra were present at the time of inquest and they also signed in the inquest report. He further stated that inquest continued for about one and half hours and everything was noted by the Executive Magistrate and the inquest was held in their presence. P.W.39 also said that Ext.15 is the inquest report in respect of the dead body of the deceased prepared by the Executive Magistrate. He has denied the suggestion of the defence that he was not acquainted the handwriting and signature of N.K.

Das and that the inquest report Ext.15 has been manufactured under the signature of so-called Executive Magistrate N.K. Das.

On comparison of the two inquest reports i.e. Ext.15 and Ext.16, it appears that Ext.15 has mentioned the injuries in a detailed manner and those injuries tallied with the post mortem report. Some of the injuries mentioned in Ext.15 as well as the post mortem report do not find place in Ext.16. It is mentioned in Ext.16 that swelling was noticed on palm of the right hand and one finger of the right hand and thumb of left hand and below the knee portion of both the legs, the injuries were also noticed. Comparing P.W.16 with the post mortem report, I am of the view that the learned trial Court rightly held that while preparing inquest report vide Ext.16, appellant P.K. Choudhury has minimized the injuries. In view of section 174 of Cr.P.C. and also column no.5 of the inquest report which indicates that apparent injuries or marks on the body are to be noted down, the conduct of appellant P.K. Choudhury in not mentioning some of the injuries shows his malafide conduct in preparing the inquest report himself without taking the help any Executive Magistrate.

In view of the foregoing discussions, non-examination of the Executive Magistrate cannot a factor not to take into account the inquest report Ext.15 as an authentic document.

I. <u>Whether T.I. Parade of appellant P.K. Choudhury was necessary:</u>

It is contended by the learned counsel for the appellants that appellant P.K. Choudhury was a known person to P.W.1 and P.W.1 deposed against him in I.C.C. Case No.28 of 1985 filed by P.W.34 Sukanta Nayak, the son of the deceased. Therefore, not naming the said appellant in the F.I.R. or in the previous statement of P.W.1 casts doubt about his participation in the occurrence. It is further contended that there was no need to conduct T.I. Parade.

It is not in dispute that in the first information report as well as in the 161 Cr.P.C. statement, P.W.1 has not named appellant P.K. Choudhury, however he stated that a person having moustache along with appellant Pravat Mohanty assaulted them. P.W.1 identified both the appellants in the dock and also named appellant P.K. Choudhury as ‘Choudhury Babu’. He stated that he did not know appellant Choudhury Babu prior to the incident and that he had identified him in a T.I. Parade after the incident. In the cross-

examination, P.W.1 stated that he deposed in I.C.C. Case No.28 of 1985 which was filed by P.W.34 and in that case, he was examined under section 202 Cr.P.C. two to three months prior to the date of occurrence. The deposition copy of P.W.1 in the said complaint case has not been proved. The certified copy of the order sheet in I.C.C. Case No.28 of 1985 has been marked as Ext.41. The order dated 29.03.1986 is the order taking cognizance and issuance of process against the appellant P.K. Choudhury and one P.K. Jaisingh, S.I. of Police. The learned Magistrate has passed a detailed order where the evidence of the witnesses has been discussed. In 202 Cr.P.C. enquiry, the informant (P.W.1) was examined as P.W.2 but there is nothing to show that he named appellant P.K. Choudhury, though he stated that Police Babu assaulted the complainant with a lathi which broke and when the mother of the complainant came and protested, she was pushed and assaulted by another stick and that the complainant became senseless. Therefore, from the order sheet, it is not clear whether P.W.1 knew the name of appellant P.K. Choudhury. Even in Court, he only used the surname of the appellant P.K. Choudhury.

Therefore, merely because P.W.1 has not named appellant P.K. Choudhury in the F.I.R. as well as in the 161 Cr.P.C. statement but stated about the participation of one person having moustache and identified him in the test identification parade, it cannot be a factor to doubt that appellant P.K. Choudhury was not the person who was having moustache and present in the police station at the relevant point of time. In fact, appellant P.K. Choudhury himself admits about his presence in the police station when P.W.1 and the deceased arrived. Since in the prosecution evidence, it appears that there were other police officers in Purighat police station having moustache and the petitioner was not aware about the full name of the appellant P.K. Choudhury, therefore, it cannot be said that an illegality has been committed by P.W.39 in making a prayer before the Magistrate to hold test identification parade of appellant P.K. Choudhury. Moreover, no infirmity has been pointed out in the test identification parade conducted by P.W.24 Niranjan Das, the learned J.M.F.C., Cuttack who proved the T.I. parade report Ext. 24.

J. <u>Whether post mortem report finding negatives ocular testimony of P.W.1:</u>

It is contended by the learned counsel for the appellants that P.W.1 stated that after taking some tiffin in the house of the deceased, they

proceeded to Purighat police station and P.W.7, the wife of the deceased stated that she gave raw tea and puri and halua to P.W.1 and the deceased as that was a lunar eclipse day and then they proceeded to the police station along with Havildar. It is further stated that after taking tiffin in his house, the deceased had not taken any other food prior to his death. Though the deceased was offered bread in Purighat police station but he did not take it. However, the doctor (P.W.37) conducting post mortem examination found undigested food i.e. rice and vegetables in the oropharynx and larynx and mouth also contained semi-digested food like rice, vegetables residue inside it. Similarly though P.W.1 stated that appellant P.K. Choudhury forcibly poured liquor in his mouth as well as in the mouth of the deceased but the query made to the doctor (P.W.37) has been answered in Ext.51 which indicates that no poison including alcohol was detected in the stomach and other viscera of the deceased. It is further contended that though P.W.1 stated that appellant P.K. Choudhury assaulted the deceased with a lathi from head to feet but no injury was noticed on the head of the deceased and therefore, the post mortem report negatives the evidence of P.W.1.

Though there is evidence that in the afternoon, taking puri, halua and raw tea, the deceased left his house for the police station but there is no evidence that prior to that he had not taken any rice or vegetables. Therefore, it cannot be ruled out that the deceased had not taken rice and vegetables at all on the date of occurrence. No question at all were asked to P.W.7, the wife of the deceased as to whether she had given the deceased rice and vegetables at all on the date of occurrence or not. The contention of the learned counsel for the appellants that the deceased came to police station after taking dinner and in the dinner he had taken rice and vegetables which were found from his stomach during post mortem examination is a hypothetical argument. Law is well settled that medical evidence is only an evidence of opinion and is hardly decisive. The doctor has not clarified as to what was the extent of undigested food in the stomach of the deceased. The process of digestion depends upon the digestive power of an individual and varies from an individual to an individual. It also depends upon the type and amount of food taken. The period of digestion is different for different types of food **(Ref.: Maniram -Vrs.- State of Rajasthan, A.I.R. 1993 S.C. 2453)**. In **Taylor's Principles and Practice of Medical Jurisprudence** (11^{th} Ed.), it is observed that the rate of digestion varies in different persons and according to the functional efficiency of gastric mucosa; that the gastric process does not cease at once after death and can continue after death also. In **Modi's**

Medical Jurisprudence (25th Edition), it is observed that the rate of emptying of stomach varies in a healthy person depending upon consistency of food, motility of stomach, osmotic pressure of stomach contents, quality of food in duodenum, surroundings where food was taken, emotional factors and residual variations and it varies from 2.5 to 6 hours. Meals containing carbohydrates generally leave the stomach early while that containing protein leaves later. Fatty food delays emptying time and liquids leave the stomach immediately.

Though an argument was advanced that since puri and halua were not found in the stomach of the deceased, it falsifies that the deceased took such food items, in my humble view, as there is no evidence about the quantity of such food items taken by the deceased while leaving his house and when it is the prosecution case that death of the deceased took place after midnight, therefore, the complete digestion of such food items cannot be ruled out.

Similarly though P.W.1 stated that appellant P.K. Choudhury poured liquor in the mouth of the deceased, there is no evidence that what were the quantity of such liquor and whether the deceased consumed the alcohol or not. Moreover, there is no evidence that what was poured into the mouth of the deceased was liquor inasmuch as no bottle of liquor was seized.

It is already discussed that so far as the assault on the head of the deceased with a lathi by appellant P.K. Choudhury appears to be an exaggerated version as it does not get corroboration from the post mortem report.

Therefore, the contention of the learned counsel for the appellants that the post mortem report findings completely negatives the evidence of P.W.1 is not acceptable.

K. Finding of blood stain on the floor of police station by Scientific Officer:

It is contended by the learned counsel for the appellants that when P.W.3, the sweeper of Purighat police station washed the floor of the police station in the morning as usual on the next day of occurrence, how the Scientific Officer (P.W.2) who visited the police station during the midnight on 05.05.1989 could notice bloodstain on the floor.

P.W.3 has not supported the prosecution case and he resiled from his previous statement made before the I.O. to the effect that he had seen vomiting substance and bloodstain inside the police station and washed it with water. The Scientific Officer (P.W.2) not only noticed bloodstain on different articles produced by the investigating officer and in Thana Jeep (which was not washed by P.W.3) but also collected bloodstain earth from the cemented floor of the rooms of the police station. The samples so collected by P.W.2 from the floor of the police station were marked as Exts. E, F and G and on chemical analysis, bloodstains were detected in it as per C.E. report Ext.60 and it was also found to be human blood though the blood group could not be detected.

It is common knowledge that if there is extensive bloodstain on the cemented floor which had remained for few hours, it cannot be cleanly removed by simply washing the floor with water. Application of detergent mixture and treatment with hydrogen peroxide can make clean removal of the bloodstain from the cemented floor. There is no evidence of P.W.3 applying detergent mixture or treating the floor by using hydrogen peroxide. Therefore, there is nothing to doubt about noticing bloodstain by the Scientific Officer on the cemented floor of the police station even after washing.

11. After carefully dealing with various contentions raised by the learned counsel for the respective parties, I am of the view that those part of evidence of P.W.1 which is consistent with his version in the first information report, his previous statement before the investigating officer and other surrounding circumstances and gets support from medical evidence can be safely acted upon after adopting the separation of grain from the chaff theory.

It has already been held that the defence plea relating to the assault on the deceased on Kathajori river embankment on 04.05.1985 at about 9.00 p.m. by some unknown persons is not acceptable. Similarly, it has already been held that the deceased had not sustained any injury on his person when he arrived at Purighat police station along with P.W.1 on 04.05.1985 at about 7.30 p.m. The ante mortem injuries noticed on the person of the deceased as per post mortem report were caused to the deceased in Purighat police station during his stay from 7.30 p.m. till past midnight on 04/05.05.1985 and the evidence of the Scientific Officer and chemical examination report also corroborate that the spot of assault was the police station and not any river embankment and the appellants were the authors of those injuries.

12. Now, the question comes for consideration is whether the conviction of the appellants under various offences as was held by the learned trial Court is sustainable.

Section 304 Part-II/34 of the Indian Penal Code:

The charge was framed under section 304/34 of the Indian Penal Code, however, the learned trial Court found both the appellants guilty under section 304 Part-II read with section 34 of the Indian Penal Code.

The learned trial Court has observed that there was nexus between the death of the deceased and the act of the appellants in subjecting him to long detention throughout the night and in mercilessly beating him and that the appellants did it in furtherance of their common intention. It was further held that the facts of the case disclosed that there might not be an intention to cause such bodily injury as was likely to cause death but the facts disclosed that the appellants knew that their act would be likely to cause death.

The evidence of the doctor (P.W.37) who conducted autopsy indicate that the deceased had sustained eleven external injuries, out of which the injuries nos. 1 to 9 were opined to be ante mortem in nature. The opinion on injuries nos.10 and 11 were kept reserved, however in Ext.51, the doctor opined that those two injuries were not ante mortem injuries and those could be due to post mortem hypostasis stimulating injuries which was evident from histopathological study. Except injury no.5 which is a lacerated wound below the left knee in front without involving the bone, the other ante mortem injuries were either abrasions or bruises. The abrasions or bruises noticed were on lower part of right thigh, right leg below the right knee, medial aspect of right leg above the medial malleolus, left leg below the left knee, left buttock, left elbow joint on the posterior aspect, left thigh and on right hand from above the elbow to the dorsum of palm. Thus all the injuries except one on the right hand were below the waist line of the deceased.

The doctor found undigested and regurgitated vomitus (rice and vegetable residues) present in the oropharynx and larynx blocking the air passage. Trachea showed oedema of the walls and food particles inside it. Mouth contained semi digested food matters like rice, vegetable residues inside it. The doctor also noticed that the heart weight was 550 grams enlarged with deposit of fat over the heart. The left ventricle was thicken, bicuspid vulve admitted three fingers. Bicuspid and aortic vulves were

thicken with nodules at its margin which was attached to the chordae tendineae. Heart chambers were found containing blood clots which were thicken fat appearance. The ascending aorta, carotid arteries, abdominal aorta showed atheromatous plaque which were marked at the junctions. There was obstruction of the left coronary artery. The muscle of left ventricle was contested and showed areas of hyperemia.

The doctor opined that all the injuries sustained by the deceased were simple in nature and not fatal in ordinary course of nature. According to him, death was proximately due to asphyxia resulting from chocking brought about by regurgitated stomach contents which aspirated into respiratory passage. The doctor found evidence of atherosclerotic changes in the aorta, vessels of neck and brain coronaries with blocking of left coronary artery. Hypertrophic enlargement of heart with dilatation of mitral vulvular opening and thickening mitral and aortic cusps was found. He noticed marked congestion associated with massive edema of both lungs and also massive cerebral edema with congestion of cerebral vessels. According to the doctor, these features could have contributed to the cause of death of the deceased. In his report Ext.51, the doctor opined that the immediate cause of death was asphyxia due to the obstruction of the windpipe by the regurgitated food materials, which is otherwise known as choking. He further opined that the deceased was having previous heart trouble owing to high blood pressure associated with obesity (fattiness). The signs observed at post mortem examination were suggestive of the fact that the 'choking' could have precipitated by the failing heart. He further opined that none of the injuries or all the injuries taken together could not have been directly fatal in ordinary course of nature. However, he opined that long detention associated with the injuries as mentioned in the post mortem report could have precipitated in failure of the already diseased heart resulting in death as a matter of consequence. The doctor opined in his report Ext.45 that anxiety, excitement, fear, emotional tension, physical and mental stress can precipitate the failure of the heart which was already diseased to the extent as described in the post mortem report. He further opined in that report that long detention associated with multiple injuries can induce physical and emotional stress.

In the cross-examination, the doctor has clarified that the weight of the heart of the deceased was abnormal and it was a diseased one and diseased heart can accelerate heart attack and sudden death. He further stated that all the external injuries were superficial in nature and the superficial

external injuries by themselves are not fatal and cannot precipitate death. The doctor opined that injuries nos. 1 to 9 except injury no.6 (which was a Grazed abrasion 1/2" X 1/2" on the left buttock) can be caused by M.O.IV and M.O.VII. Grazed abrasion is caused by relative movement or rubbing of skin against a rough surface.

In order to sustain conviction either under section 304 Part I or 304 Part II of the Indian Penal Code, the prosecution is first required to prove it to be a case of culpable homicide and then such culpable homicide does not amount to murder. Culpable homicide is murder, if it comes within any of the four clauses as enumerated under section 300 of the Indian Penal Code. Culpable homicide is not murder, if it comes within any of the five exceptions as enumerated under section 300 of the Indian Penal Code. In order to be called a case as murder, it needs to be culpable homicide in the first place. All murders are culpable homicides, but the vice versa may not true in all cases. 'Culpable homicide' is defined under section 299 of the Indian Penal Code. According to section 299, whoever causes death by doing an act **(i)** with the intention of causing death, or **(ii)** with the intention of causing such bodily injury as is likely to cause death, or **(iii)** with the knowledge that he is likely by such act to cause death, commits the offence of 'culpable homicide'. The Explanation 1 to section 299 which is important in the case in hand states that a person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death. Illustration (b) given under section 300 of the Indian Penal Code after four clauses defining in which case culpable homicide is murder, is very important. It states, inter alia, that if A, not knowing that Z was labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

In the case of **Sellappan -Vrs.- State of Tamil Nadu reported in (2007)15 Supreme Court Cases 327**, it is held as follows:-

> "13. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that

such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

12. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words 'sufficient in the ordinary course of nature to cause death' have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words 'bodily injury....sufficient in the ordinary course of nature to cause death' mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature."

While analysing section 304 of the Indian Penal Code, the Hon'ble Supreme Court in the case of **Mahadev Prasad Kaushik -Vrs.- State of U.P. reported in (2008)14 Supreme Court Cases 479** held as follows:-

"20....A plain reading of the above section makes it clear that it is in two parts. The first part of the section is generally referred to as Section 304 Part I, whereas the second part as Section 304 Part II. The first part applies where the accused causes bodily injury to the victim with intention to cause death; or with intention to cause such bodily injury as is likely to cause death. Part II, on the other hand, comes into play when death is caused by doing an act with knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

xx xx xx xx

22. Before section 304 can be invoked, the following ingredients must be satisfied:

(i) the death of the person must have been caused;

(ii) such death must have been caused by the act of the accused by causing bodily injury;

(iii) there must be an intention on the part of the accused

(a) to cause death; or

(b) to cause such bodily injury which is likely to cause death (Part I); or

(iv) there must be knowledge on the part of the accused that the bodily injury is such that it is likely to cause death (Part II).

In view of the evidence of P.W.1 and other surrounding circumstances and corroborating medical evidence, I am of the considered view that the prosecution has successfully proved that the appellants were responsible for causing the external ante mortem injuries as noticed on the deceased. In the case in hand, there is no evidence that the appellants had any knowledge that the deceased was labouring under any disease and that weight of his heart was abnormal and it was a diseased one and that he had serious lungs problem. The external injuries were superficial in nature and not fatal in ordinary course of nature. None of the injuries either individually or collectively were fatal in ordinary course of nature. All the injuries were on the non-vital parts of the body and those were mainly abrasions or bruises. The finding of the learned trial Court that it was a case of long detention of the deceased throughout the night is factually incorrect as the deceased was not detained throughout the night but taken to hospital past midnight. The detention was stated to be on account of his involvement in a case instituted at the instance of P.W.13 where he was shown to be arrested. The nature of injuries sustained by the deceased does not indicate it to be a case of merciless beating as observed by the learned trial Court. Of course, the deceased could have been taken to the hospital earlier without waiting for his health condition getting worse.

In view of the aforesaid discussions, I am of the humble view that the conviction of the appellants under section 304 Part II/34 of the Indian Penal Code is not sustainable in the eye of law, which is accordingly set aside and instead the appellants are found guilty of offence under section 324/34 of the Indian Penal Code.

Section 323/34 of the Indian Penal Code:

The charge under section 323/34 of the Indian Penal Code was framed against the appellants for voluntarily causing hurt to P.W.1. As already discussed, P.W.1 exaggerated the number of blows given to him by lathi by appellant P.K. Choudhury but right from the F.I.R., P.W.1 has stated about two lathi blows given to him on his hand by the said appellant. Similarly P.W.1 exaggerated the number of kicks given to him by appellant Pravat

Mohanty during his evidence in Court in comparison to his previous statement. The doctor (P.W.10) noticed one swelling on the left wrist joint and one abrasion on the left leg of P.W.1 and both the injuries have been opined to be simple in nature. These exaggerations in the number of lathi blows or kicks cannot be a factor to disbelieve the participation of the appellants in the assault of P.W.1.

Therefore, in my humble view, the learned trial Court rightly convicted the appellants under section 323/34 of the Indian Penal code.

Section 342/34 of the Indian Penal Code:

The charge under section 342/34 of the Indian Penal Code was framed against the appellants for wrongfully confining the deceased and P.W.1 at Purighat police station. According to the prosecution case, the deceased and P.W.1 were not arrested in connection with Purighat/Lalbag P.S. Case No.269/1985 but wrongfully detained. The learned trial Court held that the deceased and P.W.1 were not arrested and connected parts of case diary in Purighat/Lalbag P.S. Case No.269/1985 were fabricated to falsely show that they were arrested. It is not in dispute that in the case diary of Purighat/Lalbag P.S. Case No.269/85 dated 04.05.1985, appellant P.K. Choudhury (who was the I.O. of that case) has reflected about arrest of the deceased and P.W.1. The said entry was proved by P.W.38 and it is marked as Ext.52. The learned trial Court doubted the participation of the deceased and P.W.1 in the said case as their names were not reflected in the F.I.R. of the said case by P.W.13, who was the informant of that case.

In my view, since the learned trial Court was not trying Purighat/Lalbag P.S. Case No.269/1985, therefore, such observation was not justified. A person can be made as an accused and arrested in connection with a case, even if his name does not finds place in the F.I.R. but during course of investigation, materials come against him. Since Para Dei (P.W.15) examined during investigation of the said case and stated to have implicated the deceased and P.W.1 in her statement recorded in that case by appellant P.K. Choudhury, stated during her evidence in the case in hand not to have given any statement in connection with Purighat/Lalbag P.S. Case no.269/1985, the learned trial Court observed that such a statement is shown to have falsely recorded. I have already held that the finding of the learned trial Court that P.W.15 falsifies her alleged statement in the case diary of Purighat/Lalbag P.S. Case No.269/1985 is not acceptable. A witness may resile from his

previous statement during trial of the case and may say that he was not examined by police, in the event of which the prosecution can take step in consonance with 154 of the Evidence Act and the evidenciary value of such statement is to adjudicated in accordance with law. The learned trial Court held that appellant P.K. Choudhury should have allowed the deceased to go on bail or P.R. bond in that case. There is no justification for such observation. One of the offences in Purighat/Lalbag P.S. Case No.269/1985 was under section 452 of the Indian Penal Code which carries maximum punishment upto seven years and also imposition of fine and it is a non-bailable offence. Whether appellant P.K. Choudhury exercised his discretion improperly in not releasing the deceased on bail in Purighat/Lalbag P.S. Case No.269/1985 after his arrest was definitely not the subject matter of adjudication before the learned trial Court. Merely because the time and place of arrest of the deceased and P.W.1 was not shown in Ext.52, is not a ground to disbelieve their arrest. The appellant in the accused statement has stated that such omission in Ext.52 in not reflecting the time and place of arrest might be a mistake. I am of the humble view that on 04.05.1985 the deceased and P.W.1 were arrested by appellant P.K. Choudhury in connection with Purighat/Lalbag P.S. Case No.269/1985 in Purighat police station and both of them were detained there and as such it cannot be said to be a case of wrongful confinement of the deceased and P.W.1 at Purighat police station without their arrest.

Therefore, the conviction of the appellants under section 342/34 of the Indian Penal Code is hereby set aside.

Section 471/34 of the Indian Penal Code:

The charge under section 471/34 of the Indian Penal Code was framed against the appellants for fraudulently or dishonestly using the document purporting to be first information report registered as Purighat/Lalbag P.S. Case No.272/1985 and seizure lists which they knew or had reason to believe as forged documents.

While discussing this charge in para 78 of the judgment, the learned trial Court held that C.D. in Purighat/Lalbag P.S. Case No. 269/1985 was fabricated so far as it related to the alleged arrest of the deceased and P.W.1 and that the appellant P.K. Choudhury, the I.O. of that case committed forgery and appellant Pravat Mohanty is also responsible for it. This observation is contrary to the charge framed for this offence which was specific relating to Purighat/Lalbag P.S. Case No.272/1985 and therefore, the

learned trial Court was not justified in considering the case records of Purighat/Lalbag P.S. Case No. 269/1985 in connection with this charge.

It was further held by the learned trial Court that the so-called F.I.R., seizure lists and the connected case diaries including examination of witnesses, inquest etc. in Purighat/Lalbag P.S. Case No.272/1985 were also forged and that the appellants used such forged documents as genuine documents, though to their knowledge the same were forged and that they did so in furtherance of their common intention to falsely explain wrongful detention of the deceased and P.W.1 and to explain the injuries in their bodies. The finding on the basis of considering the case diaries including examination of witnesses, inquest etc. in Purighat/Lalbag P.S. Case No.272/1985 was not justified as the charge was specific relating to the first information report and seizure lists.

The essential ingredients of offence under section 471 of the Indian Penal Code are: **(i)** fraudulent or dishonest use of document as genuine, and **(ii)** knowledge or reasonable belief on the part of person using the document that it is a forged one. Thus if a document although not genuine, and a person knowing it not to be genuine or having reasons to believe that it is not a genuine but a forged document, uses it and that also fraudulently or dishonestly then it comes within the mischief of section 471 of the Indian Penal Code. 'Fraudulently' as per section 25 of the Indian Penal Code means to do a thing with intent to defraud but not otherwise. It is not necessary that the 'use' should be in a particular manner. If it is known to be not a genuine document and it is used, it is sufficient. It is fairly settled that the meaning of the term "use" mentioned in the section is not restricted to the filling of such documents as evidence in a Court. It is sufficient that it is used in order that it may ultimately appear in evidence or used dishonestly or fraudulently. The nature of user is not material. Whether the accused knew or had reason to believe the document in question to be a forged has to be adjudicated on the basis of materials and the finding recorded in that regard is essentially factual.

I have already held the appellants prepared a false first information report which carries the forged signature of the deceased vide Ext.A and used it as genuine one by registering as Purighat/Lalbag P.S. Case No.272/1985 on 04.05.1985 at 10 p.m. Appellant Pravat Mohanty registered it and as per his direction, appellant P.K. Choudhury shown to have investigated the case. I

have also held that there are some irregular features in the preparation of seizure list Ext.23/3 and the contents of seizure list Ext.42 are false.

Therefore, in my humble view, the learned trial Court rightly convicted the appellants under section 471/34 of the Indian Penal Code.

13. In the result, the impugned judgment and order of conviction of both the appellants for the offences under sections 304 Part-II/34 and 342/34 of the Indian Penal code are hereby set aside, however their conviction under sections 323/34 and 471/34 of the Indian Penal Code are upheld. Both the appellants are also convicted under section 324/34 of the Indian Penal Code.

Now, it is to be carefully examined taking into consideration the facts and circumstances of the case as to what sentence is required to be imposed upon the appellants. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the offence is committed. The quantum of sentence imposed should not shock the common man. It should reflect the public abhorrence of the crime. The Court has a duty to protect and promote public interest and build up public confidence in efficacy of rule of law.

The appellant Pravat Mohanty is now aged about 76 years and appellant P.K. Choudhury is now aged about 75 years. The occurrence in question took place thirty five years back and the appellants must have suffered immense mental agony and pain facing criminal proceeding for a considerable period. Keeping all the aforesaid factors in view, I sentence both the appellants to undergo simple imprisonment for one month for the offence under section 323/34 of the Indian Penal Code and simple imprisonment for three months for the offence under section 471/34 of the Indian Penal Code. Both the appellants are also sentenced to simple imprisonment for one year for the offence under section 324/34 of the Indian Penal Code. All the substantive sentences shall run concurrently. The appellants are on bail. Their bail bonds shall stand cancelled and they are directed to surrender before the learned trial Court within two weeks from today for undergoing the remaining period of sentence.

14. Custodial violence on a person which may sometimes lead to his death is abhorrent and not acceptable in a civilized society and it is a crime

against humanity and a clear violation of a person's rights under Article 21 of the Constitution of India. Police excesses and maltreatment of detainees, under trial prisoners or suspects tarnishes the image of any civilised nation. Stern measures are required to be taken to check the malady against those police officials who consider themselves to be above the law and bring disrepute to their department, otherwise the foundations of the criminal justice delivery system would be shaken and common man may lose faith in the judiciary. Act of custodial violence reflects tragic state of affairs indicating the apparent disdain of the State to the life and liberty of individuals, particularly those in custody and relief could be moulded by granting compensation to the next of kin of the deceased. The Hon'ble Supreme Court, in the case of **Nilabati Behera (Smt.) @ Lalita Behera - Vrs.- State of Orissa and others reported in 1993 (2) Supreme Court cases 746** proceeded to take view that even convicts, prisoners and undertrials cannot be denuded of their fundamental rights under Article 21 of the Constitution of India and once an incumbent is taken into custody and there are injuries on his body, then State will have to explain, as to how he sustained the injuries, and compensation can be awarded under public law remedy.

Keeping in mind the age and earning capability of the deceased as he was serving as Jamadar in Cuttack Municipality, I am of the considered opinion that in the ends of justice, it would be just and proper to grant compensation, amounting to Rs.3,00,000/-(rupees three lakhs) in favour of the legal representative(s) of the deceased. Accordingly, I direct the State Government to pay Rs.3,00,000/-(rupees three lakhs) in favour of the legal representative(s) of the deceased within a period of one month from the date of this judgment.

15. Accordingly, the criminal appeals are partly allowed. Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with this case, I would like to record my deep appreciation for the valuable assistance rendered by the learned counsel for the appellants and learned counsel for the State in taking up the hearing of these thirty two year old criminal appeals adopting the mode of virtual hearing.

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2020 (III) ILR - CUT- 770

S. K. SAHOO, J.

CRLA NO. 175 OF 1990

Sk. ABU DAUD .....Appellant

.V.

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 308 – Offence under – Punishment for attempt to commit culpable homicide – Satisfaction of ingredients to attract the penal provision – Held, there must be an act with such intention or knowledge and under such circumstances that if one by that act causes death, then would be guilty of culpable homicide not amounting to murder. (Para 10)

For Appellant : Mr. V. Narasingh (Amicus Curiae)

For Respondent : Mr. Deepak Ranjan Parida, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 26.11.2020

S. K. SAHOO, J.

The appellant Sk. Abu Daud faced trial in the Court of learned Addl. Sessions Judge, Jajpur in S.T. No. 131/27 of 1989 for the offence punishable under section 308 of the Indian Penal Code on the accusation that on 20.03.1988 at about 6.00 a.m., he drove the truck speedily while his father Sk. Abdul Rouf (P.W.1) and elder brother Sk. Abu Zahur (P.W.2) were climbing on the footrest of the truck and in that process, he had the intention or knowledge that by that act, he would cause the death of P.W.1.

The learned trial Court vide impugned judgment and order dated 20.06.1990 found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for two years.

2. The prosecution case, as per the F.I.R. (Ext.1) lodged by Sk. Abdul Rouf (P.W.1) is that he had three sons, namely, Sk. Abu Zahur (P.W.2), Sk. Abu Daud (appellant) and Sk. Abu Barik. The eldest son i.e. P.W.2 was doing a job but since the appellant Sk. Abu Daud was an unemployed person, P.W.1 availed some loan from the bank and adding the loan amount with his personal savings money, he purchased a Standard Mini Truck bearing registration no.OAC 9154 in the name of the appellant. The appellant was driving the vehicle and making repayment of the loan installment dues in

time, but three months prior to the date of occurrence, the appellant being misguided by his in-laws' family members, did not pay any installment dues rather quarreled with his own family members over that issue and taking cash of Rs.25,000/-(twenty five thousand) from the box of the informant, he left the house with his children on 08.02.1988. P.W.1 took the assistance of some gentlemen, who went to Cuttack and persuaded the appellant to refund the cash of the informant. Though assurance was given by the brother-in-law of the appellant to settle the dispute, but the appellant did not refund the money. On 20.03.1988 the appellant was in the native village and at about 6 a.m., P.W.1 asked the appellant to stay back in the house so that the dispute could be sorted out by way of discussion to which the appellant did not agree. The appellant started the truck but both P.W.1 as well as P.W.2 tried to resist him holding the doors of the driver's cabin of the truck from both the sides and asked the appellant not to take away the truck. In spite of such resistance, the appellant tried to take the truck speedily without listening to them and also gave a push to his father (P.W.1), who was on the footrest of the truck adjacent to driver's cabin as a result of which P.W.1 fell down on the ground and P.W.2, who was on the other side holding the cabin door standing on the footrest also fell down on the ground, as a result of which both P.W.1 and P.W.2 sustained some injuries on different parts of their bodies.

3. The F.I.R. was presented before the A.S.I. of Police, Baruan outpost, which was sent to the officer in charge, Jajpur police station for registration and accordingly, Jajpur P.S. Case No.49 of 1988 was registered on 22.03.1988 against the appellant under sections 307, 325 and 323 of the Indian Penal Code. P.W.8 Sisir Kumar Rout attached to Baruan Police Station as A.S.I. of Police took up investigation of the case, examined the informant and other witnesses, sent the injured persons for medical examination, visited the spot, arrested the appellant on 22.03.1988, received injury reports along with the opinion and on completion of investigation, he submitted chargesheet against the appellant on 16.12.1988 under section 308 of the Indian Penal Code.

4. In order to prove its case, the prosecution examined eight witnesses.

P.W.1 Sk. Abdul Rouf is the father of the appellant and he is the informant in the case and himself an injured.

P.W.2 Sk. Abu Zahur is the elder brother of the appellant and he is also another injured in the case.

P.W.3 Lokman Khan is a co-villager of the appellant and he is an eye witness to the occurrence.

P.W.4 Sk. Khalil also stated to have seen a part of the occurrence.

P.W.5 Sk. Mamtaj Ali stated about the disclosure made by P.W.1 that the appellant had taken away cash of Rs.25,000/-(twenty five thousand) from the house.

P.W.6 Biraja Kinkar Naik stated about the gentlemen assembled to decide the dispute between P.W.1 and the appellant and also the disclosure made by P.W.1 before him that the appellant had removed his cash.

P.W.7 Dr. Sadhu Charan Satpathy examined P.W.1 as well as P.W.2 on police requisition and noticed injuries on their person and he proved his reports Ext.2 and Ext.3.

P.W.8 Sisir Kumar Rout is the Investigating Officer of the case.

The prosecution exhibited six documents. Ext.1 is the F.I.R., Ext.2 is the injury report of Sk. Abu Zahur, Ext.3 is the injury report of Sk. Abdul Rouf, Ext.4 is the true copy of original of the medical opinion report, Ext.5 is the true copy of original of medical opinion report, Ext.6 is the receipt.

5. The defence plea of the appellant is that the truck was purchased under hire purchase agreement availing loan from Cuttack Gramya Bank, Ramchandrapur Branch and for that the appellant had deposited some cash. He was having a driving licence and he was driving the truck and since the informant asked him to transfer the truck in the name of P.W.2, he objected to it for which there was dissention between them. He further stated that on the date of occurrence when he tried to leave the village with the truck, the informant (P.W.1) kept the boulder underneath the rear tyre of the truck and in spite of that he tried to take the vehicle, but his father (P.W.1) and the elder brother (P.W.2) boarded on the footrest of the truck from both the sides of the driver's cabin and tried to prevent him and tried to take away the vehicle from his possession and P.W.2 also gave fist blows to him at the instigation of P.W.1. When P.W.2 tried to catch hold the neck of the appellant with both the hands, he enhanced the speed of the truck for which both P.W.1 and P.W.2 jumped from the vehicle and in that process they might have sustained some injuries. The further defence plea is that when the appellant presented a

report in the Haripur outpost, the same was not accepted for which he filed a complaint petition.

Two witnesses were examined on behalf of the defence. D.W.1 is Dr. Sadhu Charan Satpathy, the Medical Officer, Haripurhat Addl. P.H.C. stated to have treated the appellant on 20.03.1988 at 7.30 a.m. and noticed number of injuries on his person. D.W.2 is the appellant himself.

The defence exhibited five documents. Ext.A is the writing of P.W.8, Ext.B is the O.P.D. register No.34340 dated 20.03.1988 of Addl. PHC, Haripurhat, Ext.C is the current accounts sheet of Canara Bank, Ext.D is the application and Ext.E is the complaint petition in I.C.C. No.194 of 1988.

6. The learned trial Court has been pleased to hold that P.Ws.1, 2, 3 and 4 have corroborated each other in material particulars and their evidence conclusively made the Court to believe that the appellant gave the push to P.W.1 from the running vehicle. The learned trial Court further held that the appellant had no occasion to exercise the right of private defence either to his person or to the property i.e. the truck. The learned trial Court further held that giving push to P.W.1 and consequential falling of P.W.2 from the running vehicle for enhancing the speed of the vehicle by the appellant pointedly indicate that the appellant intended to do away with P.Ws.1 and 2 to go away from the village at any cost.

7. Mr. V. Narasingh, learned Amicus Curiae contended that in the factual scenario, when the injuries sustained by the appellant have not been explained by the prosecution and looking at the conduct of P.Ws.1 and 2, it cannot be said that the ingredients of the offence under section 308 of the Indian Penal Code are made out. Mr. Deepak Ranjan Parida, learned Addl. Standing Counsel on the other hand supported the impugned judgment.

7. The evidence of P.W.1 is that he and P.W.2 persuaded the appellant not to go away with the vehicle and when the appellant stepped on to the vehicle, he (P.W.1) boarded the footrest from the right side and P.W.2 boarded the footrest from the left side of the vehicle. He further stated that the appellant put the vehicle to start and in spite of his objection, he drove the vehicle. The appellant enhanced the speed of the vehicle and gave a push to him (P.W.1), as a result of which he fell down on the laterite stones lying at the spot and sustained injuries on the head, chest and also fracture on the left hand. P.W.2 also fell down on the other side of the truck on the road and he

was shifted to the hospital for treatment. In the cross-examination, P.W.1 admits that he was a guarantor of the loan transaction relating to purchase of the truck. Though P.W.1 claimed that he purchased the vehicle for the appellant availing loan from the bank, but no documentary evidence has been proved in that respect to show that he had financed for purchasing the vehicle, on the other hand the document (Ext.C) proved by the defence shows that the appellant spent money at the time of purchase of the truck.

P.W.1 has stated in cross-examination that initially he tried to stop the vehicle and requested the appellant in that respect, however, he further stated that he could not say how he fell down on the ground. This statement of P.W.1 falsifies that on account of push given by the appellant, he fell on the ground. P.W.1 admits that on the village road, boulders were spread over which morum were there. It has been confronted to P.W.1 and proved through I.O. that he has not stated that the appellant pushed him with intention to kill. Similarly, P.W.2 stated that he stepped on the footrest from one side of the vehicle and his father from the other side and they asked the appellant to stop the vehicle, but he enhanced the speed of the vehicle and gave a push to P.W.1, for which P.W.1 fell down from the vehicle and he also fell down on a stony surface for which he sustained injuries. Both P.W.1 and P.W.2 have stated that by the time of occurrence, no outsider had come to the place of occurrence. In that view of the matter, the evidence of P.W.3 and P.W.4 who stated to have seen the occurrence in question is not acceptable.

The doctor (P.W.7) noticed four injuries on the person of P.W.2 and one of the injury which is on the right side chest, was opined to be grievous in nature. Similarly according to the doctor, P.W.1 had sustained four injuries, out of which injury no.4, which was on the left forearm was opined to be grievous in nature. The doctor further stated that if a man falls on account of the vibration of the motion of the truck, injuries noticed on P.Ws.1 and 2 are possible.

On a cumulative assessment of the evidence on record, it appears that on the date of occurrence both the P.W.1 and P.W.2 climbed over the footrest of the truck from both the sides of the driver's cabin of the truck when the appellant tried to take away the vehicle. Since the appellant did not stop the vehicle, both P.W.1 and P.W.2 fell down on the ground and sustained injuries. It appears that the appellant had sustained some injuries and he was

examined immediately after the occurrence by D.W.1 at Haripurhat Additional P.H.C. who noticed multiple injuries over his body. The injuries sustained by the appellant have not been explained by the prosecution. It is the specific case of the appellant that while he was trying to take the vehicle, he was assaulted by P.W.2 by fist blows on the instigation of P.W.1.

Now question comes up for consideration whether in the factual scenario, the ingredients of the offence under section 308 of the Indian Penal Code are attracted or not. Section 308 of I.P.C. prescribes punishment for attempt to commit culpable homicide. The said section requires that there must be an act with such intention or knowledge and under such circumstances that if one by that act caused death, then he would be guilty of culpable homicide not amounting to murder. In other words, it is the attempt to commit culpable homicide which is punishable under the said section. 'Culpable homicide' has been defined under section 299 of I.P.C. and culpable homicide is not murder if it comes within any of the five exceptions provided under section 300 of I.P.C. 'Culpable homicide' will be attracted only when death is caused by doing the act, (i) with the intention of causing death; (ii) with the intention of causing such bodily injury as is likely to cause death; or (iii) with the knowledge that he is likely by such act to cause death. When there is no attempt by the offender to act with the intention of causing death of someone, or no attempt to act with the intention of causing such bodily injury as is likely to cause death of someone, or no attempt in acting in a manner to show the knowledge of the offender by such act to cause death, the basic ingredients of section 308 of I.P.C. would be missing.

In this case, from the evidence of the doctor (D.W.1) as well as the defence plea and the defence evidence adduced, it appears that the appellant has sustained multiple injuries over his body which probablises that there was assault on the appellant at the time of occurrence. There was scuffle between the parties relating to transfer of ownership of the truck in the name of P.W.2. It appears that on the date of occurrence, the appellant was assaulted while he was trying to take away the truck. Both P.W.1 and P.W.2 themselves climbed over the footrest from either side of the driver's cabin of the truck to obstruct the appellant from taking away the truck. If the appellant was assaulted and to save himself from further assault, he drove the vehicle speedily and in that process, both the P.W.1 and P.W.2 who were on the footrest adjacent to the driver's cabin fell down on the ground and received some injuries, it cannot be said that the appellant attempted to act with the intention of causing death

of P.Ws.1 and 2, or attempted to act with the intention of causing such bodily injuries as was likely to cause death of P.Ws.1 and 2, or attempted in acting in a manner having his knowledge that by such act, death would be caused to P.Ws.1 and 2. The incident appears to have occurred all on a sudden while the appellant wanted to take away the truck and P.Ws.1 and 2 protested. It may be argued that the appellant should not have driven the truck while P.Ws.1 and 2 were climbing on the footrest of the vehicle and it was a rash or negligent act on his part which endangered the lives of P.Ws.1 and 2 in driving the truck without waiting for the P.Ws.1 and 2 to get down from the footrest, but that itself would not be sufficient to hold the appellant guilty of the offence under section 308 of the Indian Penal Code.

11. In view of the foregoing discussions, I am of the humble view that the prosecution has failed to make out a case under the offence charged against the appellant. Accordingly, the appeal is allowed. The impugned judgment and order of conviction of the appellant under section 308 of the Indian Penal Code and the sentence passed thereunder is hereby set aside. The appellant is on bail by virtue of the order of this Court. He is discharged from the liability of his bail bond. The personal bond and the security bonds stand cancelled.

Before parting with the case, I would like to put on record my appreciation to Mr. V. Narasingh, the learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees which is fixed at Rs.5,000/-(rupees five thousand only).

Lower Court records with a copy of this judgment be sent to the learned trial Court forthwith for information.

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2020 (III) ILR - CUT- 776

K. R. MOHAPATRA, J.

W.P.(C) NO.11677 OF 2020

SARBESWAR LENKA ……..Petitioner

.V.

THE COLLECTOR, JAGATSINGHPUR & ORS. ……..Opp. Parties

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Sections 34 & 35 – Whether the 'Contiguous Chaka' land can be alienated/ transferred? – Ans. Yes. – Held, the land under the territory of master plan published as per the Odisha Town planning and improvement Trust Act, 1956 can be alienated and the provisions under the OCH & PFL Act shall not apply.

Case Laws Relied on and Referred to :-

1. 2019 (II) OLR 1029 : Nikunja Kishore Rajguru & Anr .Vs. Nityananda Barik & Ors.

For Petitioner : Mr.Smita Ranjan Pattanaik, S.K. Nayak, P.K. Mohanty, I. Khan, S. Mohanty, S. Mohakud & M. Kar.

For Opp. Parties : Mr. Swayambhu Mishra, Additional Standing Counsel (for O.P. No. 1)

Mr.Basudev & Mr. Bismaya Stalin, (for O.P. Nos.2 & 3)

For Opp. Party No.4: None

ORDER Heard and Order delivered on : 09.12.2020

K.R.MOHAPATRA, J.

This writ petition has been filed assailing the order dated 09.01.2020 (Annexure-4) passed by the Collector, Jagatsinghpur-opposite party No.1 in Consolidation Misc. Case No.10 of 2019, whereby he declared registered sale deed No.387 dated 09.03.2005 (Annexure-1) executed by Gouranga Samal-opposite party No.4 in favour of the present petitioner, as void.

2. Mr. Pattanaik, learned counsel for the petitioner submits that Consolidation Khata No.43 (Mutation Khata No.225/14) Chaka No.88, Chaka Plot No.169 to an extent of Ac.0.50 decimals of mouza- Nimadihi (for short, 'the case land') stood recorded in the name of opposite party Nos.2 to 4. By virtue of a registered partition deed No.2955 dated 05.11.1997 an area of Ac.0.17 decimals out of the case land fell to the share of opposite party No.4. Accordingly, he transferred the same in favour of the petitioner vide registered sale deed No.387 dated 09.03.2005 (Annexure-1) and delivered possession thereof in favour of the petitioner. After lapse of 14 years, the opposite party Nos. 2 and 3 filed a petition under Sections 34 and 35 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short, 'the OCH & PFL Act') before the Collector, Jagatsinghpur-opposite party No.1, which was registered as Consolidation Misc. Case No.10 of 2019 (Annexure-2). On being noticed, the petitioner and proforma opposite party no.5 filed their objection (Annexure-3), but the

Collector, Jagatsinghpur-opposite party No.1, without considering the objection in its proper perspective, passed the impugned order under Annexure-4. Hence, this writ petition has been filed with a prayer to set aside the impugned order under Annexure-4.

3. Mr. Pattanaik, learned counsel for the petitioner further submits that the land purchased by the petitioner comes under the Master Plan of Paradeep Development Authority. Thus, the rigours of Section 34 (1) and (2) of OCH & PFL Act are not applicable to the transfer in question in view of the provision under Sub-section 5 of Section 34 of OCH & PFL Act. Section 34(1), (2) and (5) of OCH & PFL Act read as follows:

> **"34. Prevention of fragmentation.** -(1) No *agricultural land in a locality shall be transferred or partitioned so as to create a fragment.*
>
> *(2) No fragment shall be transferred except to a land-owner of a contiguous Chaka:*
>
> *Provided that a fragment may be mortgaged or transferred in favour of the State Government, a Co-operative Society, a scheduled bank within the meaning of the Reserve Bank of India Act, 1934 (2 of 1934) or such other financial institution as may be notified by the State Government in that behalf as security for the loan advanced by such Government, Society, Bank or institution, as the case may be.*
>
> *xxx xxx xxx xxx*
>
> *(5) Nothing in Sub-sections (1) and (2) shall apply to-*
>
> *(a) any land which is covered under the approved Master Plain published under the Odisha Town Planning and Improvement Trust Act, 1956 or as the case may be approved development plan published under the Odisha Development Authorities Act, 1982; or*
>
> *(b) a transfer of any land for such public purposes, as may be specified, from time to time, by notification in this behalf, by the State Government."*

It is his submission that this legal aspect was not taken into consideration by the Collector, Jagatsinghpur-opposite party No.1, while considering the Consolidation Misc. Case No.10 of 2019 filed by opposite party Nos.2 and 3, which makes the impugned order under Annexure-4 vulnerable. Hence, he prays for setting aside the impugned order.

4. Mr. Stalin, learned counsel for the opposite party Nos. 2 and 3, on the other hand, vehemently objected to the submission of Mr. Pattanaik, learned counsel for the petitioner and submits that in view of the provision of Section 59 of OCH & PFL Act, the rigours of Section 34(1) and (2) of the said Act are applicable to the transfer in question in favour of the petitioner. Admittedly, the petitioner is not a contiguous Chaka owner and no

permission before transfer of the case land was obtained from the competent authority under OCH & PFL Act. Hence, the Collector, Jagatsinghpur-opposite party No.1 has committed no error in declaring the sale deed executed in favour of the petitioner to be void. He also relies upon paragraph-11 of the decision of this Court in the case of ***Nikunja Kishore Rajguru & Another -v- Nityananda Barik and others*****, reported in 2019 (II) OLR 1029**, which is reproduced hereunder:

> *"11. On a conspectus of the Statement of Objects and Reasons together with Section 2(e), Section 2(m) and 34(1) & 2 of the Act makes it abundantly clear that the object behind introduction of Section 34 to the Act is not to create a 'fragment of chaka' in contravention of Section 2(m). Section 2(m) though refers to a compact parcel of land, it cannot be equated with 'Chak' as defined under Section 2(e) of the Act. Thus, the word 'fragment' necessarily means a 'fragment of Chak' or 'a division of Chak', which is less than one acre in the district of Cuttack, Puri, Balasore and Ganjam and in Anandapur Sub-division Keonjhar district and less than two acres in rest of the areas of Odisha. Further, Section 34(2) provides that a fragment of the chaka can be sold to a contiguous land owner. A 'Chak' may be a compact parcel of land less than one acre/two acres. But, it cannot be inferred that wherever a 'Chak' is less than one acre/two acres depending upon the locality, where it situates, the compact parcel of land would be called a 'fragment'."*

5. Heard learned counsel for the parties; perused the impugned order and materials placed before this Court. It is the admitted case of the parties that the petitioner is not a contiguous Chaka owner before purchasing the case land. Further, no permission under Section 4(2) of OCH & PFL Act appears to have been taken before the alienation was made in favour of the petitioner. Mr. Stalin, learned counsel for the opposite party Nos. 2 and 3 also disputes the fact that the land in question was allotted to the share of the opposite party No.4 in the family partition. It is under this backdrop the case has to be decided.

> Section 59 of the Act reads as follows:
>
> *"**59. Act to override other laws**–Save as otherwise provided the provisions of this Act shall have effect notwithstanding anything to the contrary in any other law, custom, usage, agreement, decreed or order of Court."*

6. A reading of Section 59 makes it abundantly clear that the provisions of OCH & PFL Act shall have an overriding effect notwithstanding anything to the contrary in any other law, custom, usage, agreement, decree or order of Court. But, the provision opens with a saving Clause, which provides that the overriding effect is subject to the provisions made in OCH & PFL Act itself. Sub-section 5 of Section 34 of OCH & PFL Act clearly provides that the provisions of Sub-sections (1) and (2) of Section 34 are not applicable to the

land which is covered under the approved Master Plan published under the Odisha Town Planning and Improvement Trust Act, 1956 (for short, 'the Town Planning Act') or as the case may be approved development plan published under the Orissa Development Authorities Act, 1982 (for short, 'ODA Act').

6.1 It connotes that the land situated within the territorial jurisdiction of Master Plan published under the Town Planning Act or approved plan published under the ODA Act shall not attract the rigours of the provisions of Section 34 (1) and (2) of OCH & PFL Act. It is submitted by Mr. Pattanaik, learned counsel for the petitioner that the case land situates within the territorial jurisdiction of Paradeep Development Authority, which has been declared, as such pursuant to Government notification No.31172-H.U.D. dated 06.09.1989 issued by the Housing and Urban Development Department, Government of Odisha. This material aspect was not taken into consideration by the Collector, Jagatsinghpur-opposite party No.1 while adjudicating Consolidation Misc. Case No.10 of 2019 filed under Sections 34 and 35 of OCH & PFL Act.

7. In that view of the matter, the impugned order suffers from non-consideration of statutory provision of the OCH & PFL Act. Accordingly, the impugned order is set aside, the matter is remitted back to the Collector, Jagatsinghpuropposite party No.1 for *de novo* adjudication by giving opportunity of hearing to the parties concerned and by examining as to whether the case land situates within the territorial jurisdiction of the approved plan of Paradeep Development Authority and whether Sub-section (5) of Section 34 of OCH & PFL Act has any application to the case land. The Collector, Jagatsinghpur-opposite party No.1 shall act upon production of an authenticated copy of this order.

8. The writ petition is accordingly disposed of with the aforesaid observation and direction.

8.1 Interim order dated 27.05.2020 passed in I.A. No. 5258 of 2020 stands vacated.

8.2 Authenticated copy of this order downloaded from the website of this Court shall be treated at par with certified copy in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

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2020 (III) ILR - CUT- 781

S.K. PANIGRAHI, J.

CRLMC NO. 1060 OF 2020

KAMALAKANTA TRIPATHY @ BABULI .....Petitioner

.V.

STATE OF ODISHA & ORS. .....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 166-A – Letter of request (Letters Rogatory) – Meaning of – Held, Letters Rogatory are the letters of request sent by the court of one country to the court of another country for obtaining assistance in investigation or prosecution in criminal matter. (Para 17)

(B) LETTER ROGATORIES – Evidentiary value – Held, the documents sent in reply to a letter rogatory issued under section 166-A of the CR.P.C are "evidence collected during course of investigation" (Para 18)

Case Laws Relied on and Referred to :-

1. 631 F. 3d 266,282-288 (6th Cir.2010) : United States Vs. Warshak.
2. 359 F. 3d 1066 (9th Cir 2004) : Theofel Vs. Farey- Jones[s.]
3. 1993 Supp (4) SCC 260 : Union of India Vs. W.N. Chadha.
4. (2014) 4 SCC 626 : Dinubhai Boghabhai Solanki Vs. State of Gujarat.
5. (1992) 4 SCC 305 : Janata Dal Vs. H.S. Chowdhary.
6. (2013) 15 SCC 222 : CBI Vs. Ashok Kumar Aggarwal.
7. MANU/DE/0735/2020 : Paramjit Singh Gulati Vs. Directorate of Revenue Intelligence.
8. 2018 (64) ITR (Trib) 149 (Delhi): Ravina Associates Pvt. Ltd. Vs. Additional Commissioner of Income Tax.
9. 2016 Cri LJ 2410 : Ashok Kumar Aggarwal Vs. CBI and Ors.
10. [2011] 43 SOT 544 (Delhi) : Harsh W. Chadha Vs. DDIT.
11. (ILR 2017 (4) Kerala 607) : Oommen Vs. Union of India.
12. (2017 (9) SCC 641 : Parbatbhai Aahir and Ors. Vs. State of Gujarat and Ors.
13. 1992 Supp (1) SCC 335 : State of Haryana Vs. Bhajan Lal.
14. 182019 SCC Online SC 1587 : Google India Private Limited vs. Visakha Industries and Ors.
15. (1977) 4 SCC 451 : Kurukshetra University Vs. State of Haryan.
16. (2004) 4 SCC 129 : State of W.B. Vs. Sujit Kumar Rana.
17. (2011) 14 SCC 770 : State of Punjab Vs. Davinder Pal Singh Bhullar.
18. 1993 Supp (4) 260 : Union of India Vs. W.N. Chadha, Narender.
19. (2009) 6 SCC 65 : G. Goel Vs. State of Maharashtra.
20. (2004) 2 SCC 694 : Simon Vs. State of Karnataka.
21 : (2008) 11 SCC 352 : Mohd. Kalam Vs. State of Rajasthan.
22. (1999) 5 SCC 740 : Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs. State of A.P.

23. (2007) 12 SCC 93 : T. Vengama Naidu Vs. T. Dora Swamy Naidu & Ors.
24. 1990 (Supp) SCC 686 : Dhanalakshmi Vs. R. Prasanna Kumar & Ors.
25. 2020 SCC Online SC 111 : State of Madhya Pradesh Vs. Yogendra Singh Jodan and Anr.
26. (2020) 3 SCC 240 : Sushil Sethi and Another Vs. The State of Arunachal Pradesh &Ors.

For the Petitioner : Mr. Devashis Panda.
For the Opp.Party : Sk. Zafarulla, Addl Standing Counsel

JUDGMENT Date of Hearing:12.06.2020 : Date of Judgment: 21.07.2020

S.K. PANIGRAHI, J.

1. The petitioner in this Criminal Misc. Case preferred under Section 482 of the Criminal Procedure Code,1973 has challenged the Notice No.1373 dated 12.05.2020 issued by the Opp. Party No.2 in connection with Cyber Crime P.S. Case No. 0028 of 2017 corresponding to G.R. Case No. 1731/2017, wherein the petitioner was directed under Section 91 of the Cr.P.C to appear in person along with three seized Laptops on 12.06.2020 and with a further direction to produce those seized laptops, as they were, without any tampering. Resultantly, it is prayed by petitioner that the said impugned notice under Annexure-3 dated 12.5.2020 may be quashed and set aside.

2. The factual matrix of the case in hand is that one Madhusudan Padhy, IAS, Transport Commissioner, Odisha lodged a written report on 11.09.2017 before the I.G., Crime Branch, C.I.D. with a request to investigate into a possible "hacking" of his e-mail I.D mspadhi@gmail.com by an unknown miscreant. Accordingly, on the basis of his report, Cyber Crime P.S. Case No.28 dated 13.09.2017 was registered under Sections 465, 469 of the IPC read with Section 66 of the Information Technology Act, 2000 against an unknown person. Thereafter, a corresponding G.R. Case No.1731 of 2017 was registered in the Court of learned SDJM, Sadar, Cuttack.

3. The prosecution case, in short, is that the informant received information from one Ashok Nanda on 2.8.2017 which narrates that he received three emails from an unknown person namely one Prasanta Rath having email ID prasanta.rath007@gmail.com. He further stated that the above e-mails purportedly related to the account of the informant wherein the said Prasanta Rath had sent a threatening email i.e. *"you stop nuisance or we would go to Crime branch against you"*. On getting such email, the

informant enquired into the matter and found that some unknown miscreant had probably hacked into his email account and by creating forged electronic record and via a fictitious email ID i.e. prasanta.rath007@gmail.com for sending those incriminating e-mails. Accordingly, the informant requested for investigation into the matter by the police through its cyber cell.

4. After registration of the case, the Opp. Party No.2 was entrusted with the investigation and immediately registered the case on 13.09.2017 and on the very next day correspondence was made with Google Inc. USA vide letter No.3119/3120/3121/CID-CB seeking details and information regarding cobweb of those three e-mail IDs in question i.e. ashoknanda6@gmail.com, prasanta.rath007@gmail.com and mspadhi@gmail.com. Thereafter on 23.09.2017, the I.O received a reply from the legal investigation support team of Google Inc. USA and commenced investigation of the case. It is pertinent to mention here that in the reply of Google Inc., it was ascertained that the accused has prepared a forged electronic document by using a pseudonym i.e. Prasanta Rath. By using the said pseudonym, the accused had sent the incriminating emails to Ashok Nanda (who is said to be a school senior of the informant) to threaten the informant. Taking into account, the entirety of the facts and circumstances, prima facie, it was found that an offence under different provisions of the I.T Act, 2002 was committed. The Investigating Officer started investigation into the case and she came to know that the petitioner herein Kamalakanta Tripathy was, in fact, using the said email ID by masking his true identity while sending the offending emails to the said Ashok Nanda.

5. Having figured out the identity of the accused who was hiding behind an alias, the Opp. Party No.2 further dug into the issue in order to establish the culpability of the petitioner with the help of some trained agencies since the investigation of this nature involved a lot of technicalities. The investigation was initially initiated with an anonymous criminal with a masking identity but finally, *prima facie,* discovered a ghost living behind a shell in the form of the petitioner Kamalakanta Tripathy. A notice under Section 160 of Cr.P.C was issued on 24.02.2018 asking him to appear before the I.O. for interrogation and to produce certain documents. Accordingly, the petitioner appeared before the I.O. on 5.3.2018 and his statement was recorded on the next day and seizure was effected on 17.3.2018 in respect of three laptops wherefrom 3 emails were suspected to have been sent. After having effected the seizure on the same day i.e. on 17.3.2018, all the three

laptops were handed over to the custody /zimanama of the petitioner with an instruction to produce the same as and when required for the purpose of investigation.

6. The Investigating Officer on 22.03.2018 issued a letter to the BSNL, i.e. internet service provider (ISP) seeking a detailed report regarding the MAC ID No. of the seized "Router", which was seized from the house of the petitioner. It may be noted here that a media access control address (MAC address) is a unique identifier assigned to a network interface controller (NIC) for use as a network address in communications within a network segment. MAC addresses are primarily assigned by the device manufacturers which are often referred to as the "burned-in" address or physical address. These are indicative of the physical address/location of the device used. The records show that the investigation continued and during such investigation on 13.06.2018 a report was received from BSNL i.e. the service provider. The said report intimated that as per available Internet Protocol Detailed Report (IPDR) record of the router seized from the accused unskinned the MAC address and the seized "Router" belonged to said Kamalakanta Tripathy i.e. the accused petitioner herein. When the complicity of the accused was prima facie established, the Opp. Party No.2 herein issued a notice u/s. 41(A) of Cr.P.C to the petitioner on 14.08.2018 and was received by the petitioner on 16.08.2018.

7. It has been submitted that from the available materials and evidence collected thus far, prima facie involvement of accused has been established. In so far as the motive regarding the crime is concerned, the I.O. during her investigation came to know that there was previous dispute of the accused with the informant. While the informant helmed as Secretary to the Rural Development, Govt. of Odisha and held additional charge of OMFED certain irregularities had arisen in connection with the supply of Poly Roll where the petitioner was allegedly involved and some payment was punitively stopped by the informant. The said factum of long-standing dispute and online intimidation tactics adopted by the petitioner were unearthed during the investigation. Upon receipt of such a piece of information, the involvement of the accused petitioner was further reinforced and finally the Opp. Party no.2 issued a notice u/s 91 of the Cr.P.C on 12.5.2020 to produce those three laptops which were given in Zimanama so that investigation could be completed and chargesheet could be filed in time.

8. A bare perusal of the FIR demonstrates that Shri Ashok Nanda who was a senior to the informant during his school days informed him telephonically on 2.8.2017 stating that he had received three emails from one unknown person Prasanta Rath having email ID prasanta.rath007@gmail.com. He has further stated that the unknown miscreant has attached three emails by intruding into informant's account and threatened him. The informant, thereafter, requested to Ashok Nanda to forward those three emails to him so that he could look into the matter. The informant was shocked to see the contents of the three emails. The first email was received from his school seniors email ID i.e. ashoknanda6@gmail.com which related to the nomination as a visitor to Jharpada jail by the collector which was the subject matter of the email. The second email was received from email ID nanupany@gmail.com which related to a tender matter of the State. The third email related to supply of poor quality of calf feed under RKVY scheme by a private supplier to milk farmers of the State. The informant in his complaint has stated that the nature of all those documents which were forwarded/sent to the said Ashok Nanda said to be purely confidential government documents obtained illegally by the unknown miscreant which could directly or indirectly offends the data secrecy of the Government. Having gone through the content of the emails, the informant was sure of the fact that his email account had been hacked by some mischief mongers and apparently, they had access to his emails and data therein for a dilated time period. The informant has stated that he suspects that the unknown miscreants were hiding behind a veneer by creating a fake email ID i.e. prasanta.rath007@gmail.com to threaten the informant through his school senior Ashok Nanda.

9. Shri Devashis Panda, learned counsel for the Petitioner has submitted that petitioner has been falsely dragged into the present case despite the fact that there is no nexus with any of the allegations and he has been made a scapegoat in the entire investigation process at the behest of a Senior IAS officer of the state. The Criminal Justice system dictates that investigation cannot be perennial and should be completed as expeditiously as possible to avoid harassment to the accused. He further submits that for verification of IP addresses neither the I.O. nor the police anywhere in India or worldwide have the necessary facilities that are required to correspond with Google headquarters electronically and get the necessary information with respect the address of origin of the email which is the subject matter of the current investigation. He also contended that when the laptop originally seized by the

I.O., she should have taken out the contents of the hardware by means of external hard disk drives for the purpose of ascertaining the source of emails and for further investigation. This was not done but the production of laptops was being requisitioned belatedly only to prolong the investigation process. The prosecution has the power to seize the incriminating device or any material therefrom and it could have shortened the delayed investigation process but they chose not to do so.

10. Per Contra, Sk. Zafurulla, learned Additional Counsel for the State has submitted that investigation has been conducted diligently without any laches which is reflected in the case diary. After due investigation the involvement of the accused was detected and thereafter, a notice u/s of 91 of the Cr.P.C for production of the three laptops was issued to the Petitioner so that it could enable the I.O. to submit charge-sheet/final form at the earliest. The Investigation is on the verge of completion and Investigating Officer is going to submit the charge-sheet shortly but the Petitioner is using the instant petition as a trick to further prolong the submissions of charge sheet. The petitioner has filed this application challenging only a formal notice issued u/s.91, Cr.P.C for production of three laptops which have been returned back to the accused. Due to non-submission of those laptops which, in turn, emanates from a binding obligation to cooperate with the investigating agency, the accused is causing undue and probably an intentional delay in causing the submission of the charge-sheet. The submission of the three laptops before the Investigating Officer shall not cause any prejudice to him. The law is well settled that no Court shall take cognizance after the expiry of period of limitation provided under Section 468 of the Cr.P.C. In the instant case, on 13.09.2017 an FIR was registered under Sections 465, 469 of the IPC read with Section 66 of the Information Technology Act, 2002 in which prescribed maximum punishment is up to three years. Therefore, the Court can take cognizance within 3 years from the date of offence or when the accused was not known, the first day the identity of the offender was known i.e. 06.10.2017 on which date the report from BSNL was received regarding the involvement of the petitioner herein. It is with this understanding, it is submitted, that there is no delay in completion of the investigation. Since the investigation is still continuing and the charge-sheet is going to be filed within the stipulated period, therefore, the submission of the petitioner seeking quashment of the entire criminal proceeding on the ground of delay is not tenable.

11. Heard Ld. Counsel for the parties. The case diary in the instant case was called for and the same has been produced. The case in hand coincides with an exponential rise in cybercrime, a medium that this petitioner has, prima facie, exploited to hilt to the target with his own narratives. It is revealed from a perusal of the case diary that the response has been received from Google Inc. which has pointed out that they require all communication be sent from the end of official government email address backed by appropriate legal documentation seeking any kind of disclosure of user data. Further, it is revealed from the report of Google that by using the IP address "117.242.188.70" the accused had prepared a fake email ID in the name of the fictitious person i.e. Prasanta Rath and immediately used the same email ID to send the email in question to Ashok Nanda. Thus, from the proximity of time span between both the acts, it can be inferred that the objective with which the email ID was created was only to threaten the informant through his friend. It was further observed from the case diary that BSNL in its reply email dated 16.10.2017 provided the user details (IPDR) of the IP address which are as under:

User ID :kt2440281_ecdrid@bsnl.in

Name: Tripathy Kamalakanta

Phone No: 0671-2440281

Address: New Malgodown Road, Gandarpur, College Square, Cuttack, Orissa-753003

Start Time : Tue 01 Aug 2017 16:33:18

Stop Time : Wed 02 Aug 2017 12:43:11

MAC: 00:17:7c:48:dc:11

PORT: 9/4 vlan-id 3318;310 pppoe 9854

BNG: ctk-ras-bng-ctk-01

IP Address: 117.242.188.70

12. There is a further noting, as per the information report obtained from BSNL, that the particular IP address in question is in the name of the accused herein from which the three emails have been sent to the said Ashok Nanda from the fictitious email ID prasanta. rath007@gmail.com on 2.08.2017. It

also transpires from the case diary that correspondences with BSNL as well as Google Inc continued with an effort to obtaining requisite data and information. Due to the transnational dimension of the issue, the communication as has been received from Google Inc. states that in cases where a request is issued from non-US government, the said request should be made in accordance with the Mutual Legal Assistance Treaty (MLAT) and that such request must be protected by way of a treaty i.e. treaty between the government of United States and the government of the Republic of India. During the course of investigation, a router has been seized from the possession of the accused and its MAC ID has been noted. Three laptops of Apple (silver colour), Lenovo (black colour) and HP (silver colour) have been seized and later return them back to the accused on 17.03.2018 with an instruction to produce them as and when required. A detailed reply with regard to the IPDR Report has been obtained on 13.06.2018 which indicates that the seized router was being used to hack the email ID of the informant and also to create a fake email ID to entrap the informant. It is also revealed that the motive behind such an act is arguably more profound since the informant was officiating as the Secretary, Rural Development Department, Government of Odisha, with an additional charge of OMFED, he had ordered to stop the payment of the accused due to some irregularity. The said action of the informant has led to dissonance in the mind of the accused which motivated him to adopt illegal means to wreak vengeance on the informant. It has further come to the fore from the statement recorded under Section 161 of the Cr. P.C dated 13.09.2017 of one Suresh Chandra Attia who was working a Dy. General Manager, Finance OMFED, that the accused used to run a firm called M/s Kamala Agency and during the financial year 2015 – 2016 he had supplied Poly Roll to the said OMFED. However, it was observed by the management of OMFED that the said goods were being supplied at a higher rate by the accused's firm. The informant who was then helmed as Managing Director of the OMFED had stopped payments of approximately Rs. 6 crores which was due to the accused herein. The documents which have been mischievously sent from the fictitious email ID are essentially internal documents for the use of senior functionaries of the State Government and deal with policy issues which have a large-scale administrative, social and financial ramification on the decision-making process of government servants involved.

13. The details of those documents are not being gone into here as they contain sensitive information with regard to certain tenders. It shocks the

conscience of the court and one shudders at the thought as to how calamitous technology can be in the hands of such reprobates who can sabotage the e-mail accounts of government functionaries and use the information derived therefrom to arm twist and blackmail them. This court takes a very serious view of the matter though accuracy, corroboration, and neutrality of the evidence collected are likely to be pipped through a detailed trial process.

14. The digital age has transformed many aspects of our life experience, but the most obvious yet very much neglected feature of our electronic governance, has led to a variety of unprecedented and ugly outcomes like the present one. In the Internet Crime Report for 2019, Internet Crime Complaint Centre, Federal Bureau of Investigation (USA), India stood third among top 20 countries in the world (excluding USA) that are victims of internet crimes. Alarmingly, the Indian Computer Emergency Response Team (CERT-In), Ministry of Electronics & Information Technology Government of India has handled about 2,08,456 incidents in the year 20181 alone. Further, as per the National Crime Records Bureau, Ministry of Home Affairs2 the number of cases of cybercrimes increased from 12317 in 2016 to 27248 in 2018. During 2018, 55.2% of cyber-crime cases registered were for the motive of fraud (15,051 out of 27,248 cases) followed by sexual exploitation with 7.5% (2,030 cases) and causing disrepute with 4.4% (1,212 cases)[3]. Out of the total number of cases in 2018, 843 cases were registered in Odisha. Appositely, the Interpol elucidate the issue of cyber crime as under:

> *"…Words and phrases that scarcely existed a decade ago are now part of our everyday language, as criminals use new technologies to commit cyberattacks against governments, businesses and individuals. These crimes know no borders, either physical or virtual, cause serious harm and pose very real threats to victims worldwide.*
>
> *Cybercrime is progressing at an incredibly fast pace, with new trends constantly emerging. Cybercriminals are becoming more agile, exploiting new technologies with lightning speed, tailoring their attacks using new methods, and cooperating with each other in ways we have not seen before.*
>
> *Complex criminal networks operate across the world, coordinating intricate attacks in a matter of minutes.*
>
> *Police must therefore keep pace with new technologies, to understand the possibilities they create for criminals and how they can be used as tools for fighting cybercrime."*

One cannot be oblivious of the challenges thrown by this new age menace, which are seen to be increasing day by day. Needless to say, the new methods and techniques adopted by such criminals pose a grave challenge to the

1. Annual Report of 2018, **2**. Crimes in India 2018- Statistics Vol 1 **3**. Crimes in India 2018- Statistics Vol 2

investigating agencies as they are intricate both technically and legally. The inherent differences between the technical and legal systems of different nations, would make investigation into such crimes, having cross border implications, more complex. However, the challenges thrown in this regard cannot be used to the advantage of a criminal to escape the long arm of the law. Keeping the above in mind, I may now proceed to examine the present case.

15. On the whole, after having extensively gone through the case records it is trite to prima facie believe that the Investigating Officer has conducted the investigation thus far diligently and to the best of her ability. However, at this stage a major impediment that has cropped up featuring heavily on the role of Google Inc. which is protected under the laws of United States. In its response to the query sent to it by the investigating officer, it has stated that the information requested relates to services offered by Google Inc., a company incorporated in the US and governed by the US laws. Absent a statutory exemption, Google Inc., is precluded under the US laws from providing the contents of a subscriber's communication by the Electronic Communication Privacy Act, **18 U.S.C. g 2702(a)** as construed and enunciated by the US Circuit Court of Appeals for the Sixth Circuit in the cases of ***United States V. Warshak***[4], and by the US Circuit Court of Appeals for the Ninth Circuit in ***Theofel v. Farey- Jones***[5]. It is thus clear, that the only option available to the investigating officer to secure the evidence available with Google Inc. is to seek refuge in the remedies available under Indian law especially through "**Letters Rogatory".**

16. The term '**Letters Rogatory'** is derived from the Latin term rogātōrius (requesting for evidence). Letters Rogatory are the letters of request sent by the court of one country to the court of another country for obtaining assistance in investigation or prosecution in a criminal matter. The assistance sought under Letters Rogatories is for service of documents and taking of evidence. Letters Rogatory may be made to any country on the basis of Bilateral Treaty/Agreement, Multilateral Treaty/Agreement or International Convention or on the basis of assurance of reciprocity and *comity of courts*. India has thus far entered in Mutual Legal Assistance Treaty with about 42 countries till date. Google Inc. (as incorporated under the laws of the United States) as evident from its responses seems to be suggesting

4. 631 F. 3d 266,282-288 (6th Cir.2010), **5**. 359 F. 3d 1066 (9th Cir 2004)

that it can only supply the requisite data only through the mechanism provided under the Treaty. India has signed such a treaty with the United States of America since October 17, 2001[6]. The treaty *inter alia* provides assistance will be provided by either of the contracting nations in securing evidence upon the prescribed procedure being followed.

17. Section 166-A of the Cr P.C provides for issuance of a Letter of request by a competent authority from outside the country. If during the course of an investigation into an offence a competent investigating officer believes that evidence may be available in a foreign country, the competent Criminal Court may issue a letter of request to a Court or an authority in that country competent to deal with such request. Such request may also be for the purpose of examining orally any person supposed to be acquainted with the facts and circumstances of the case and also may require such person to produce any piece of evidence which may be in his possession pertaining to the case. It is further provided that every such statement recorded or document or thing received thereunder shall be deemed to be the evidence collected during the course of investigation. Section 105-K of the Cr.P.C. provides that such a request may be made in the manner as provided for by the Central Govt. Pursuant to the aforesaid enabling provision, the Central Govt. has framed comprehensive guidelines called the Guidelines on Mutual Legal Assistance in Criminal Matters dated 4.12.2019 which outlines detailed procedure to be followed after invoking the aforesaid provisions.

18. The Supreme Court of India has from time to time dealt with the issuance of such "*Letter Rogatories*" as was done in the case of ***Union of India v. W.N. Chadha***[7] wherein it was held that "Letter Rogatory' is a formal communication in writing sent by a Court in which action is pending to a foreign Court or Judge requesting the testimony of a witness residing within the jurisdiction of that foreign Court may be formally taken thereon under its direction and transmitted to the issuing Court making such request for use in a pending legal contest or action. It has also been held, that at the investigative stage, the accused had no right to contest the issuance of the letter rogatory and need not be heard before issuance of the same. The same

[6]Treaty on Mutual Legal Assistance in Criminal Matters signed at New Delhi October 17, 2001; transmitted by the President of the United States of America to the Senate April 8, 2002 (Treaty Doc. 107-3, 107th Congress, 2d Session); reported favorably by the Senate Committee on Foreign Relations October 8, 2002 (Senate Executive Report No. 107-15, 107th Congress, 2d Session); Advice and consent to ratification by the Senate November 15, 2002; Ratified by the President January 29, 2003; Ratified by India July 1, 2005; Ratifications exchanged at New Delhi October 3, 2005; entered into force October 3, 2005.

7. 1993 Supp (4) SCC 260

view was upheld in ***Dinubhai Boghabhai Solanki v. State of Gujarat***[8]. Further in the case of ***Janata Dal v. H.S. Chowdhary***[9] the question arose as to whether the Investigating Agency (CBI in that case) needed to convince the Court that the allegations against the accused were satisfactorily established before requesting a letter rogatory. The Supreme Court did not find merit in the argument and ordered that the issuance of the letter rogatory was to remain unaffected and was to be proceeded with in accordance to law. In the case of ***CBI v. Ashok Kumar Aggarwal***[10] the Hon'ble Apex Court held that the documents sent in reply to a letter rogatory issued under Section 166 A of the Cr.P.C are "evidence collected during course of investigation".

19. Indian courts have from time to time, depending on the facts of the case, supported the move to issue such requests both for the purposes of collecting evidence as well as for conducting investigation which have been aptly reiterated in cases like ***Paramjit Singh Gulati vs. Directorate of Revenue Intelligence***[11] ***Ravina Associates Pvt. Ltd. vs. Additional Commissioner of Income Tax***[12] ***Ashok Kumar Aggarwal vs. CBI and Ors.***[13] ***Harsh W. Chadha vs. DDIT***[14] ***Oommen vs. Union of India***[15]

20. The FIR in the instant has been lodged under Section 465 of the IPC which provides for the punishment of forgery, Section 469 of the IPC provides that whoever commits forgery with an intention or knowledge that such a forged document or electronic record is likely harm the reputation of a person shall be punishable with a maximum term of 3 years and fine. Section 66 of Information Technology Act, 2002 states that when a person dishonestly or fraudulently does any of the acts referred to in Section 43 of the Act shall be punishable with a term of 3 years and fine. Section 43 of the said Act provides for a host of offences which have been made punishable including when any person without permission of the owner of a computer or computer network accesses such computer or computer network and downloads, copies or extracts any data or information from such computer or computer network shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected. Such an offence in common parlance is referred to as "hacking".

21. "Hacking" in a layman's understanding simply means gaining unauthorized access to a computer or a computer network. When a person

8. (2014) 4 SCC 626, **9**. (1992) 4 SCC 305, **10**. (2013) 15 SCC 222, **11**. MANU/DE/0735/2020, **12.** 2018 (64) ITR (Trib) 149 (Delhi), **13.** 2016 Cri LJ 2410 **14.** [2011] 43 SOT 544 (Delhi), **15.** (ILR 2017 (4) Kerala 607)

destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means with intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person, he is said to have committed an offence of hacking under Section 66 of the Act. The person, who commits an offence of hacking is called "hacker". However, over time, such knowledge of electronic intrusion has been weaponized by wanton elements to wreak vengeance or blackmail hapless victims. Plainly put, within the legal confines, hacking, means willful and malicious computer trespassing and make a critical impact on the network security. The culpability of hacking depends on the presence of *mens rea* or the object with which the act was carried out for it to be punishable under Section 66 of the IT Act.

22. The investigation thus far has been able to establish that the IPDR report obtained from the internet service provider (ISP) i.e. has indicated that the IP Address: used was "117.242.188.70". The said IP address is a static address which remains constant and never in a state of flux. The MAC ID of the router has also been obtained. It is thus clear that the router seized from the accused has been used from the aforesaid IP address which in turn matches with report of Google that the said IP address i.e. "117.242.188.70". The said IP address has been fraudulently used to create the fake email ID which has been used to send the confidential documents as well as to mail the informant's friend. Thus, from a conjoint reading of the above facts, prima facie, imply that the accused herein has hacked into the email account of the informant. In this context, a through trial is very much required to testify the prima facie view of the case in hand.

23. In the facts and circumstances of the case, considering that the email account of a Senior IAS Officer of the State has been hacked so as to illegally obtain sensitive and confidential documents, the Investigating Officer may do well to follow the procedure referred to hereinabove so as to obtain further evidence as may be required by seeking issuance of a letter rogatory from the competent court to aid in its investigation.

24. In so far as the question of using the inherent powers of this court to quash vexatious proceedings or proceedings which are used to abuse the process of court are concerned. The Hon'ble Apex Court over the years has more or less crystallized as to when such powers may or may not be used. In the case of ***Parbatbhai Aahir and Ors. vs. State of Gujarat and Ors***[16]**,** it has been held that in forming an opinion whether a criminal proceeding or

16. (2017 (9) SCC 641

complaint should be quashed in exercise of its jurisdiction under Section 482 of the Cr.P.C., High Court must evaluate whether the ends of justice would justify the exercise of the inherent power. In the case of ***State of Haryana vs. Bhajan Lal***[17] the Hon'ble Supreme Court has extensively dealt with the scope of the powers under Section 482 of the Cr.P.C. to quash a proceeding holding that it should not be used mechanically or routinely, but with care and caution, only when a compelling case for quashing is made out. The said judgment has also laid down an indicative guidelines for this purpose. The Hon'ble Supreme Court recently in the case of ***Google India Private Limited vs. Visakha Industries and Ors***[18] reiterated the guidelines laid down in Bhajan Lal's Case (supra). The position that the inherent power of the High Court can be exercised under Section 482 Cr.P.C only in respect of a proceeding pending before an inferior criminal court is well settled as held in the cases of ***Kurukshetra University v. State of Haryan***[19] ***State of W.B.*** **v.** ***Sujit Kumar Rana***[20] and ***State of Punjab*** **v.** ***Davinder Pal Singh Bhullar*** [21] . But merely because a FIR is sent to the Magistrate it cannot be said that a case is pending before the Magistrate. A case can be said to be pending before the Court only if the Court, aftertaking cognizance of the offence on a police report issues process to the accused. Then only the accused can be said to have been proceeded against. Strictly speaking, at this stage only the accused gets the right to challenge the proceedings before the court and possibly to ask for the relief of quashing the proceedings including, the charge-sheet, under Section 482 of the Cr.P.C., any of the grounds available to him. This view of the matter is in tune with the law laid down by the Hon'ble Supreme Court in ***Union of India v. W.N. Chadha***, ***Narender*** [22] ***G. Goel*** **v.** ***State of Maharashtra*** [23], ***Simon*** **v.** ***State of Karnataka***[24] , ***Mohd. Kalam*** **v.** ***State of Rajasthan*** [25] etc. holding that the accused have no right to interfere with the investigation by the police. In ***Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj*** **v.** ***State of A.P.***[26] it has also been held that the accused does not have any right to question "further investigation" conducted under Section 173(8) Cr.P.C. Thus, until the matter reaches the Court and a stage has reached when it could be said that the case is pending before the Court, there cannot be any plea of abuse of the process of Court or a right to challenge the FIR under Section 482 Cr.P.C. The main factor to be considered while exercising its inherent powers under Section 482 Cr.P.C is to ascertain as to whether the complaint has been taken

17. 1992 Supp (1) SCC 335, **18**. 2019 SCC Online SC 1587, **19**. (1977) 4 SCC 451, **20.** (2004) 4 SCC 129
21. (2011) 14 SCC 770, **22**. 1993 Supp (4) 260, **23.** (2009) 6 SCC 65, **24.** (2004) 2 SCC 694, **25**. (2008) 11 SCC 352
26. (1999) 5 SCC 740

at its face value discloses the commission of an offence or not, this view is strewn through a series of judgments as in the case of ***T. Vengama Naidu v. T. Dora Swamy Naidu & Ors***[27] ***, Dhanalakshmi v. R. Prasanna Kumar & Ors***[28] ***, State of Madhya Pradesh v. Yogendra Singh Jodan and Anr***[29]***, Sushil Sethi and Another v. The State of Arunachal Pradesh &Ors.***[30]. In the instant case, the facts and evidence on record clearly point towards the involvement of the Petitioner in the alleged offence. Hence, he is not entitled to any such indulgence as prayed for in the instant case at this stage.

25. Further, in the instant case, the contention of the accused Petitioner is that delay in investigation has been caused due to the prosecution, cannot be lent any credence due to the fact that Section 468 (2)(c) of the Cr.P.C. mandates that the period of limitation shall be three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years, the same also draws support from a conjoint reading of Section 468 (3), Section 473 and Section 173 of the Code. Thus, from the facts and evidence borne out from the records of the case, it is crystal clear that the investigation has been carried out diligently and it is well within time. In fact, no undue delay has been caused by the prosecution, rather the delay has been caused by the accused petitioner who has evaded the process of law by causing non-production of the laptops before the I.O. for further investigation.

26. Considering the aforesaid discussion, submissions made and taking into account a holistic view of the facts and circumstances of the case at hand, this Court is not inclined to entertain the instant petition. Accordingly, the present petition u/s 482 of the Cr.P.C. filed on behalf of the accused/petitioner stands rejected. The petitioner has also preferred I.A. No. 655 of 2020 wherein a prayer has been made to stay the operation of the Notice No.1586 dated 10.6.2020 and an I.A. No.636 of 2020 with the prayer to ascertain and produce the status report of the investigation in relation to the present petition. Since the instant petition has been dismissed, therefore, these I.As. do not survive and accordingly stand dismissed.

27. (2007) 12 SCC 93, **28**. 1990 (Supp) SCC 686, **29**. 2020 SCC Online SC 111 **30**. (2020) 3 SCC 240

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2020 (III) ILR - CUT- 796

MISS SAVITRI RATHO, J.

TRP (C) NO.142 OF 2018

PRABHATI PATTNAIK .....Petitioner

.V.

ADITYA KUMAR PATTNAIK .....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – Transfer of civil proceeding – Matter examined in the light of the direction of the apex court in the judgment of Krishna Veni Nagam Vrs. Harish Nagam reported in (2017) 4 SCC 150 – Order of transfer passed and the evidence of witnesses who are unable to appear can be taken in video conferencing mode.

Case Laws Relied on and Referred to :-

1. AIR 2002 SC 396 : Sumita Singh Vs. Kumar Sanjay & Anr.
2. (2017) 4 SCC 150 : Krishna Veni Nagam Vs Harish Nagam.

For the Petitioner : Mr. Jayanananda Panda.

For the Opp. Party : M/s. B.S.Rayaguru,A.K.Senapati K.C.Sahoo & P.R.Swain.

ORDER Date of Order : 12.11.2020

MISS SAVITRI RATHO, J.

This matter is taken up through Video Conferencing mode due to COVID-19 Pandemic.

Heard Mr.J.N.Panda, learned counsel for the petitioner-wife and Mr.B.S.Rayaguru, learned counsel for the opp. party-husband.

Though this case has been listed along with TRP (C) No. 3 of 2018 filed on behalf of the present petitioner- wife-Smt. Prabhati Pattnaik, on account of non appearance of learned counsel for the opp party –husband-Aditya Kumar Pattnaik in that case , the same is adjourned on the request of Mr B. S Rayaguru, learned counsel who is appearing for the Opp party-husband in the present TRP(C).

In this petition, the petitioner-wife has prayed for a direction to transfer the Civil Proceeding No.54 of 2017 pending before the Court of learned Judge, Family Court, Bhawanipatna to the Court of learned Judge, Family Court, Berhampur.

Mr. Panda, learned counsel for the petitioner-wife states that the petitioner is working as Asst. Scientific Officer, RFSL, Berhampur and being a lady it would be very difficult on her part to attend the court at Bhawanipatna in the district of Kalahandi which is 350 K.Ms away from Berhampur where she is now residing. He further submits that in the case of ***Sumita Singh v. Kumar Sanjay and another reported in AIR 2002 SC 396***, the Hon'ble Apex Court has held that the wife's convenience must be looked into while considering the application for transfer of a case.

Mr B.S. Rayaguru, learned counsel for the opp party-husband although not disputing the factual aspects, submits that inconvenience will be caused to the opp –party husband if the application for transfer is allowed and to mitigate this inconvenience, the transferee court may be directed to dispose of the proceeding within a stipulated period.

In the case of ***Sumita Singh v. Kumar Sanjay and another reported in AIR 2002 SC 396***, while turning down the husband's objection that he was unemployed while the wife being educated and well to do, can travel to Bihar from Delhi, has held that it being the husband's suit against the wife, the wife's convenience must be looked into while considering the application for transfer of the case.

At this juncture , it would be apposite to refer to the decision of the Hon'ble Apex Court in the case of ***Krishna Veni Nagam vs Harish Nagam reported in (2017) 4 SCC 150***. The directions contained in paragraph 18 of the said judgment are especially relevant in today's situation in view of the disruption caused by the Covid-19 pandemic.

While allowing the application of the wife for transfer of the proceedings under section -13 of the Hindu Marriage Act from the Court of the Family Judge, Jabalpur to the Court of the Family Judge, Hyderabad, the Hon'ble Apex court had taken notice of the fact that the Apex court is flooded with petitions for transfer and having regard to the convenience of the wife, transfer is normally allowed but in the process the litigants have to travel to the Supreme Court and spend on litigation and whether the same could be avoided. After taking note of the suggestions of learned Amicus Curiae and the learned Additional Solicitor General, it was observed as follows:

.... "13. We have considered the above suggestions. In this respect, we may also refer to the doctrine of forum non conveniens which can be applied in matrimonial proceedings for advance inginterest of justice. Under the said doctrine, the court exercises its inherent jurisdiction to stay proceedings at a forum which is considered not to be convenient and there is any other forum which is considered to be more convenient for the interes to fall the parties at the ends of justice. In Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd. : (2003) 4SCC 341 this Court observed:(SCCpp.356-57,para19)

"19 in Spiliada Maritime case (1986)3 All ER 843 ; the House of Lords laid down the following principle: (*All ER p.844a*)

'The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice...'

The criteria to determine which was a more appropriate forum, for the purpose of ordering stay of the suit, the court would look for that forum with which the action had the most real and substantial connection in terms of convenience or expense, availability of witness, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court, it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate, the court would normally grant a stay unless there were circumstances militating against a stay. It was noted that as the dispute concerning the contract in which the proper law was English law, it meant that England was the appropriate forum in which the case would be more suitable tried."

Though these observations have been made in the context of granting anti-suit injunction, the principle can be followed in regulating the exercise of jurisdiction of the court where proceedings are instituted. In a civil proceeding, the plaintiff is the dominus litis but if more than one court has jurisdiction, court can determine which is the convenient forum and lay down conditions in the interest of justice subject to which its jurisdiction may be availed. (Kusum Ignots & Alloys Ltd vs Union of India: (2004)6SCC254 para 30)

14. One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of video conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country video conferencing is now available. In any case, wherever such facility is available, it ought to be fully

utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video conferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on video conferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by videoconferencing. (State of Maharashtra vs Praful B.Desai; (2003) 4 SCC 601 ;Kalyan Chandra Sarkar v Rajesh Ranjan (2005) 3 SCC 284; Budhadev Karmaskar vs State of W.B;(@011) 10 SCC 283 ; maltesh Gudda vs State 2011) 15 SCC 330 .)

15. The other difficulty faced by the parties living beyond the local jurisdiction of the court is ignorance about availability of suitable legal services. The Legal Aid Committee of every district ought to make available selected panel of advocates whose discipline and quality can be suitably regulated and who are ready to provide legal aid at a specified fee. Such panels ought to be notified on the websites of the District Legal Services Authorities/ State Legal Services Authorities/National Legal Services Authority. This may enhance access to justice consistent with Article-39-A of the Constitution.

16. The advancement of technology ought to be utilized also for service on parties or receiving communication from the parties. Every District Court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a District Court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manger/information officer in every District Court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the High Courts.

17. We, are thus of the view that it is necessary to issue certain directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place a way from their ordinary residence on the ground that if proceedings are not transferred it will result in denial of justice.

18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safe guards may be sent along with the summons. The safeguards can be:

(i) *Availability of video conferencing facility.*

(ii) *Availability of legal aid service.*

(iii) *Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.*

(iv) *Email address/ phone number, if any, at which litigant from outstation may communicate.*

Considering the averments made and the facts and circumstances of the case, the TRP (C) is allowed. Accordingly, Civil Proceeding No.54 of 2017 pending before the Court of learned Judge, Family Court, Bhawanipatna is transferred to the Court of learned Judge, Family Court, Berhampur.

It is also directed that after transfer of the record, the learned Judge, Family Court, Berhampur shall do well to dispose of the aforesaid Civil Proceeding as expeditiously as possible, preferably, within a period of six months from the date of appearance of both the parties in the case. Records shall be sent by the learned Judge, Family Court, Bhawanipatna where the proceedings are pending, to the transferee court as soon as possible. If the parties seek mediation, the transferee court should explore the possibility of an amicable settlement through mediation even if that exercise has already been done by the original Court.

Taking a cue from the decision of the Hon'ble Apex Court in **Krishna Veni Nigam vs Harish Nagam** (supra), it is directed that it will be open to the transferee court to conduct the proceedings or record evidence of the witnesses who are unable to appear in court, by way of videoconferencing.

The TRP (C) is accordingly disposed of.

As restrictions are continuing due to COVID-19 pandemic, learned counsel for the petitioner may utilize the soft copy of this order available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587 dated 25.03.2020.

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